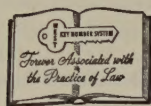


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thing was wrong with the boy he would be responsible for everything that happened to him," held for jury, nor would proof of statement several hours later denying liability justify taking from jury right to weigh such statements.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Eugene L. Gonzales, a minor, by Maria Gonzales, his guardian ad litem, against Kenneth M. Davis. From a judgment of nonsuit, plaintiff appeals. Reversed.

Robert P. Troy, of San Francisco, for appellant.

Jesse H. Steinhart, John J. Goldberg, and Hadsell, Sweet & Ingalls, all of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment entered after an order granting a motion for nonsuit in an action wherein the plaintiff, a minor of the age of five years, acting through his guardian ad litem, sues the defendant for the recovery of damages for injuries suffered by said plaintiff by being struck by the defendant's automobile operated by himself at the intersection of Taylor and Pacific streets in the city of San Francisco. The plaintiff alleges that his injuries were received on the 28th day of December, 1921, at said place and in the following manner: "That at said time and place while said plaintiff was walking across Pacific street at the point of its intersection with Taylor street said defendant carelessly, negligently and recklessly ran said automobile without warning signal or notice of any kind against and upon said plaintiff with great force and violence while said automobile was caused by said defendant to run and operate at a high and unlawful rate of speed, to wit, at the rate of about 35 miles per hour, whereby and wherewith said defendant knocked said plaintiff down upon the roadway of said Pacific street," and thereby caused him to sustain the detailed injuries complained of. The answer of the defendant does not deny that he was operating his said automobile upon said streets and at the intersection thereof at said time, but denies that he was doing so negligently, carelessly, or recklessly, or that while so operating his automobile he ran the same without warning, signal, or notice against or upon the plaintiff with great or any force or violence. He denies that he was operating his automobile in other than a careful and prudent manner, and denies that he was operating the same at any rate of speed in excess of 15 miles per hour. For want of information he denies that the plaintiff sustained the specific injuries complained of or that he has been damaged in any sum whatever. In a sepa-

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GONZALES v. DAVIS. (S. F. 10779.)

(Supreme Court of California. Oct. 3, 1925.)

1. Trial §165—On motion for nonsuit, evidence considered most favorably to plaintiff.

On motion for nonsuit, trial court must assume truth of all evidence educed in support of plaintiff's case and adopt inferences fairly deducible therefrom favorable to plaintiff.

2. Negligence §85(3)—Contributory negligence not imputed to child five years old.

Contributory negligence is not as a rule imputed as a matter of law to a child five years old.

3. Municipal corporations §705(1)—Automobile driver held chargeable with duty of having observations fixed on street intersection.

Automobile driver, approaching intersection on admittedly crowded and busy thoroughfare, held, under Motor Vehicle Act 1915, § 22, subd. (b), chargeable with duty of having his observation fixed on intersection used by pedestrians, notwithstanding section 12 did not require sounding of horn or warning signal.

4. Municipal corporations §706(6)—Automobile driver's negligence at street intersection held for jury.

Evidence held sufficient to go to jury and support finding of culpable negligence of automobile driver, in action for injuries to child at street intersection.

5. Municipal corporations §706(6)—Statement of automobile driver immediately after injury to child held for jury.

Interpretation to be placed on defendant's statement immediately after accident, "If any-

rate answer and defense the defendant pleads that the plaintiff was guilty of contributory negligence; and in a further separate and affirmative defense the defendant alleges that Pacific street "was and is a busy and crowded thoroughfare, traversed by vehicles of all kinds, and was at all times a dangerous place for children of the plaintiff's age to play; and that, while said minor was playing there, he carelessly and negligently ran against the side of the automobile driven by defendant, and thereby suffered the injuries complained of." The cause went to trial before a jury upon the issues as thus framed. The plaintiff and several other persons who witnessed the accident were sworn and testified. Certain other witnesses were also sworn and testified as to the statements made by the defendant both immediately after the accident and at a later time upon the same day in the presence of members of the plaintiff's family. At the conclusion of the plaintiff's case the defendant moved the trial court to grant a nonsuit, which motion was granted, and the judgment which is herein appealed from followed.

[1] It is the contention of the plaintiff and appellant that the trial court was in error in granting said nonsuit. We think this contention must be sustained. It is a well-settled rule applicable to motions for nonsuit that the trial court in passing upon such motions is to assume the truth of all of the evidence adduced in support of the plaintiff's case without regard to the conflicts, if any, appearing therein, and to adopt only those inferences reasonably and fairly deducible therefrom as are most favorable to the plaintiff. *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 340, 208 P. 125, and cases cited. Applying this rule to the evidence presented in this case, we find it to be substantially as follows: That in the afternoon of December 28, 1921, the plaintiff, then a small boy of the age of five years, with two other boys, one seven and the other nine years of age, was upon Taylor street at or near its intersection with Pacific street, or avenue, in said city, and was about to cross the latter thoroughfare at the place used by pedestrians on the western line of such intersection. The two elder boys testified that they ran ahead of the younger, the plaintiff, and had reached the sidewalk upon the other side of Pacific street, when, looking back, they saw the plaintiff on the crossing and in the middle of Pacific street at the moment of his being struck and knocked down by the plaintiff's automobile which had come down Pacific street. Both of the elder boys testified that they heard no sound of horn or gong or signal of any kind before the impact. The plaintiff also testified that he was in the middle of said street when he was struck by the defendant's automobile, and that he did not see the automobile nor hear any gong or signal before he was struck by it. The evidence as to the in-

juries sustained by the boy was in accord with the averments of the complaint. Evidence was also given by one of the witnesses for the plaintiff that a few moments after the collision he held a conversation with the defendant wherein the latter made the statement that, "if anything was wrong with the boy, he would be responsible for everything that happened to him." Certain members of the plaintiff's family also testified that the defendant came to their home and that of the boy upon the evening of the accident, and several hours thereafter, and testified to certain conversations which occurred there, and in the course of which the defendant stated that the boy was not at fault, and he, the defendant, was not at fault, and that, "if something happen to the boy, he pay himself; if the insurance company is not responsible, he is."

[2] Another witness to the same conversation stated that the defendant blamed the boy, saying, "The boy should not have been in the way." The foregoing is substantially all of the evidence offered in support of the plaintiff's case. In considering the same, it is at the outset to be remembered that contributory negligence is not as a rule imputed as a matter of law to a child of the plaintiff's tender years. *Zarzana v. Neve Drug Co.*, 180 Cal. 32, 179 P. 203, 15 A. L. R. 401. It is also to be noted that, while it is true that the Motor Vehicle Act as it read at the time of this accident (section 12, Motor Vehicle Act 1915 [St. 1915, p. 405]), did not in terms require that the driver of an automobile should sound his horn or give other warning signal upon his approach to a street intersection or crossing, it is also true that said Motor Vehicle Act then in force also provided (Motor Vehicle Act 1915, § 22, subd. [b] [St. 1915, p. 409]) that "every person operating or driving a motor or other vehicle on the public highways of this state shall operate or drive the same in a careful and prudent manner * * * having regard to the traffic and use of the highway." In the instant case the defendant in his answer affirmatively alleged that Pacific street at the point in question "was and is a crowded and busy thoroughfare," and further alleged that said street "was at all times and is a dangerous place for children of said age to play." These affirmative admissions would seem to bring this case fully within the rule declared in *Reaugh v. Cudahy Packing Co.*, supra, wherein this court, in commenting upon the foregoing provision of the Motor Vehicle Act, used this language:

"Drivers or operators of vehicles, and more particularly motor vehicles, must be specially watchful in anticipation of the presence of others at places where other vehicles are constantly passing and where men, women, and children are liable to be crossing, such as corners at the intersections of streets or other similar places or situations, where people are

likely to fail to observe an approaching automobile."

[3-5] In the presence of this rule it would seem to be undeniable that it was the duty of the defendant as he approached the intersection of Taylor street with the "crowded and busy thoroughfare" down which he was moving to have his observation fixed upon the intersection of said streets used by pedestrians and which he was about to pass. The evidence in the case affirmatively shows that but a moment before the instant of his collision with the plaintiff herein two other small boys, the latter's companions, had crossed Pacific street upon this very crossing, and that the plaintiff, following them, was in the middle thereof and of Pacific street when he was struck by the defendant's automobile. It would seem to be an almost irresistible conclusion that, if the defendant had been keeping that sharp lookout ahead which the law requires of him when approaching such a crossing, he would have observed these boys, or at least the latter of them, in the act of essaying this crossing just ahead of his on-coming machine, and the inference would seem to be a most reasonable one that, since he did not, as he admitted, see the injured boy before the impact, and no sound of horn or bell or other warning was heard by any of the witnesses to the collision, the defendant was not exercising that degree of prudence and of watchfulness which the law under such circumstances requires. It was the province of the jury to draw such an inference, and, if so drawn, it would have sufficed to support a finding of culpable negligence on the part of the defendant, with a resultant verdict in the plaintiff's favor. The trial court by granting the defendant's motion for nonsuit took from the plaintiff the right to have the jury pass upon this question, and, we think, committed reversible error in so doing. There was also introduced in the course of plaintiff's case a statement to one of his witnesses by the defendant within a few moments after the accident occurred that, "if anything was wrong with the boy, he would be responsible for everything that happened to him." It is the respondent's contention, approved by the trial court in granting the motion for nonsuit, that this language on the part of the defendant involved no suggestion or admission of liability for the accident and consequent injuries to the child; but we are of the opinion that it was for the jury to determine what interpretation should be placed upon the words and acts of the defendant immediately after the collision. In *McPhee v. Lavin*, 183 Cal. 264, 191 P. 23, it

was held that the "defendant's declaration to the plaintiff immediately after the accident that he carried accident insurance that would provide for plaintiff if he had suffered injury, was properly admitted as tending to show an acknowledgment of responsibility by the defendant for the collision"; and in *Scheuermann v. Kuetemeyer*, 186 Cal. 225, 227, 199 P. 13, the statement by the defendant on the day following the accident that she "wanted 'to make right what is right'" was considered by this court as going with other evidence to make a *prima facie* case of negligence in the operation of the defendant's machine which should be submitted to the jury. In the case of *Hammond v. Hazard*, 40 Cal. App. 49, 180 P. 46, a statement by a defendant at the time of the accident that "I will settle all damages," taken in connection with certain other conduct on her part at the time, evoked the comment of the appellate court that "her conduct in thus busy-ing herself with the names of witnesses, and her statements about 'my car,' and that 'I will settle all damages,' clearly evidence the interest of one *who is conscious of liability* as the owner of the car." (Italics added.) We are of the opinion that the jury, had this cause been permitted to be submitted to it, would have been entitled to draw the inference from the defendant's language immediately after the accident that his use thereof arose from a consciousness of his liability for whatever injuries the plaintiff had sustained. The fact that the defendant several hours after the accident, and after a full opportunity for reflection, had in repeating said statement to members of the plaintiff's family coupled with it the statement that he was not to blame for the boy's injuries would not suffice to justify the taking from the jury the right to determine which statement of the defendant was to be credited and what inferences were to be drawn from his unqualified utterances immediately after the accident occurred. We are satisfied that this matter, taken in connection with the other testimony given in support of the plaintiff's case and above commented upon, was sufficient to make out a *prima facie* case in the plaintiff's favor which should have been submitted to the jury.

The order of the trial court granting a nonsuit was therefore erroneous, and hence its judgment based thereon must be reversed. It is so ordered.

We concur: LAWLOR, J., Acting C. J.; SEAWELL, J.; SHENK, J.; LENNON, J.; WASTE, J.; HOUSER, Justice pro tem.

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(240 P.)

In re WALTZ et al.

BARLOW v. SECURITY TRUST & SAVINGS BANK.

(L. A. 8101.)

(Supreme Court of California. Oct. 5, 1925.
Rehearing Denied Nov. 2, 1925.)**Records** ¶9(4)—Land granted with mining reservation is "fee simple" capable of being registered.

Land granted, reserving all mineral and rights relative thereto, held "fee simple" capable of being registered under St. 1915, p. 1932, since section 5 thereof provides for registration of any estate legal or equitable and is "fee simple" as required in section 7; "fee simple" meaning that interest of given estate inheritable and not subject to conditions or collateral determination.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fee Simple.]

In Bank.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Petition by Charles Henry Barlow and others for registration of title, wherein the Security Trust & Savings Bank interposes answer to petition of plaintiff named. From a judgment for defendant, plaintiff named appeals. Reversed.

Jas. W. Bell, of Los Angeles, for appellant.
Newlin & Ashburn, of Los Angeles, for respondent.

HOUSER, Justice pro tem. The facts herein are not in dispute. It appears that certain lands were granted to one Charles Henry Barlow, from which were reserved to the grantor, and excepted from the grant, all minerals and rights in relation thereto, including "all oil, petroleum, asphaltum, and like substances, and the right to mine, dig, or bore for the same, and also all convenient rights of way and of storage over and within the surface of said lands." Such property rights, as were thus reserved by the grantor, were subsequently conveyed to the Security Trust & Savings Bank.

Under the provisions of the Land Registration Act (Stats. 1915, p. 1932), Barlow joined with several other alleged owners of real property in the filing of a petition with the clerk of the superior court of Los Angeles county, wherein, pursuant to the provisions contained in said act, an order of the superior court was sought to be directed to the registrar of titles of said county to register, among other lands, those described in said petition as being the property of said Barlow. The Security Trust & Savings Bank filed an answer to the petition so far as it affected the lands in which said bank was

interested as aforesaid, by which said bank opposed such proposed registration. Judgment on the issues raised by the petition and the answer was rendered in favor of the Security Trust & Savings Bank, and Barlow has appealed therefrom.

Section 7 of the Land Registration Act provides, in part, that:

"No mortgage, lien, charge, or lesser estate than a fee simple shall be registered unless the fee simple to the same land is first registered."

The basis of respondent's objection to the registration of Barlow's land was that his title, being subject to the mineral rights of the respondent and, in the language of the Registration Act, being a "lesser estate than a fee simple," could not be registered.

In the case of *Wallace v. Harmstead*, 44 Pa. 492, may be found an exhaustive treatment of the general subject of tenures, wherein it is held, even as affecting lands in Pennsylvania, that the tenure is allodial and not feudal and in the early case of *Matthews v. Ward* (1839) 10 Gill & J. (Md.), 443, it is laid down (syllabus) that:

"After the Revolution, lands in this state [Maryland] became allodial, subject to no tenure, nor to any services incident thereto. * * *

Notwithstanding such rule, it may be both argued by counsel and assumed by this court that the intention of the people in adopting by initiative the act in question was to follow the early English system of tenure and thereby to appropriate to the use and the construction of the statute the English terminology respecting the manner of acquiring and holding lands. By so doing it becomes necessary to inquire into the meaning of the term "fee simple," and to determine its effect upon the act here under consideration.

In *Bouv. Law Dict.* "fee simple" is defined as—

"An estate of inheritance. Co. Litt. 1 b; 2 Bla. Com. 106. The word simple adds no meaning to the word fee standing by itself. But it excludes all qualification or restriction as to the persons who may inherit it as heirs, thus distinguishing it from a fee tail, as well as from an estate which, though inheritable, is subject to conditions or collateral determination. 1 Washb. R. P. 51; Wright, Ten. 146; 1 Prest. Est. 420; Littleton, § 1."

"Fee simple" therefore merely means that the interest of a given estate is inheritable and not subject to "conditions or collateral determination." Nor is the inheritable quality of the estate at all affected by the nature thereof. In 1 Cooley's *Blackstone* (4th Ed.) p. 514, after defining what is meant by the term "tenant in fee simple," it is said:

"Taking, therefore, fee for the future, unless where otherwise explained in this its secondary sense, as a state of inheritance, it is applicable to, and may be had in, any kind of hereditaments either corporeal or incorporeal. * * *

"The dominicum or property is frequently in one man, while the appendage or service is in another. Thus Gaius may be seised as of fee of a way leading over the land, of which Titius is seised in his demesne as of fee.

"The fee simple or inheritance of lands and tenements is generally vested and resides in some person or other; though divers inferior estates may be carved out of it. As if one grants a lease for twenty-one years, or for one or two lives, the fee simple remains vested in him and his heirs; and after the determination of those years or lives, the land reverts to the grantor or his heirs, who shall hold it again in fee simple. Yet sometimes the fee may be in abeyance, that is (as the word signifies) in expectation, remembrance, and contemplation in law."

It thus appears that by the common law of England, as applied to the land here in question, the estate held by Barlow being unquestionably inheritable and not subject to any restriction as to heirs, etc. (as in fee tail), was fee simple in its nature, and the fact that some rights of entry thereon for the purpose of mining in presumably all of its varied branches were possessed by another, to wit, the Security Trust & Savings Bank, had no effect upon the inheritable quality of the estate remaining in Barlow.

It may be noted that, as heretofore indicated, the fee-simple estate of early England was never considered as absolute, as were lands in allodium, but were subject to some superior on condition of rendering him service, and in which superior the ultimate ownership of the land resided. 1 Cooley's Blackstone (4th Ed.) p. 512. One of the incidents to such property rights in the sovereign was that of the privilege of taking as his own any mines of gold or silver discovered thereon. 1 Plowd. 310; 2 Coke, Institutes, 577; 3 Kent's Com. 378n; 1 Lindley on Mines (3d Ed.) p. 7; Hicks v. Bell, 3 Cal. 219; Stoakes v. Barrett, 5 Cal. 36; Moore v. Smaw, 17 Cal. 199, 222, 79 Am. Dec. 123. As an independent proposition, and but remotely connected with the solution of the question here involved, it has been held, overruling the case of Hicks v. Bell, 3 Cal. 219, that the mines of gold and silver found in public lands of this state are not the property of the state by virtue of her sovereignty. See, also, Doran v. Central Pac. R. R. Co., 24 Cal. 245; Fremont v. Seals, 18 Cal. 433; Ah Hee v. Crippen, 19 Cal. 491.

In 1 Thomson on Real Property, § 87, it is said:

"Since minerals in place are part of the land, the owner of the fee in the land has the absolute

right of property in the mines and quarries beneath the surface (citing cases), and all the mineral substances, while thus in place, are things of a real, and not a personal character (citing cases). As we have seen, that part of the land consisting of minerals, or specified minerals, may become the subject of separate ownership by grant of the minerals by the owner of the land, or by a grant of the land with an exception of the minerals, and in either case an estate in fee simple is created in the minerals, as corporeal hereditaments. (Citing cases.)"

It follows that, with reference to the respective rights of the parties litigant to the lands in question, each was the owner of a fee-simple estate.

So far as the term "fee simple" may be considered, as connected with the tenure of the lands in question, the conclusion here intended to be reached is that lands originally held in fee simple, according to the common law of England, and consequently inheritable, were nevertheless subject to an independent and wholly detached right existing in another person, to wit, the sovereign, to mine such lands, at least for gold and silver, and that the exercise of such right by the sovereign in no way affected the fee-simple title of the owner of the surface of the land. And so in the instant case, a "fee-simple" title may exist in Barlow as to the surface of the lands in question, without in any manner being affected by the right of the Security Trust & Savings Bank (analogous to that of the early English sovereign with respect to English lands) to "mine, dig or bore" for mineral substances thereon and therein.

By section 5 of the statute here under consideration, it is provided that, "all land may be brought under the operation of this act by the owner or owners of any estate or interest therein, whether legal or equitable. * * * " And in section 7 of the act, immediately following the provision heretofore quoted herein, to the effect that "no * * * lesser estate than a fee simple shall be registered unless the fee simple * * * is first registered," the language of the statute is that "It shall not be an objection to bringing land under this act, that the estate or interest of the applicant is subject to any outstanding lesser estate, mortgage, lien, or charge; but every such lesser estate, mortgage, lien or charge shall be noted upon the certificate of title and the duplicate thereof. * * * "

It appearing that the estate held by Barlow is in fact "fee simple," it was entitled to registration under the precise terms of the act.

The judgment is reversed.

We concur: LAWLOR, J., Acting C. J.; RICHARDS, J.; LENNON, J.; SEAWELL, J.; SHENK, J.; WASTE, J.

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In re WELLINGS' ESTATE.

MICHIGAN TRUST CO. v. BRONSON et al.

(L. A. 8247.)

(Supreme Court of California. Sept. 29, 1925.
Rehearing Denied Oct. 29, 1925.)

1. Wills ⚡681(2)—Testamentary trustee is devisee, and devise vests on death of testatrix.

Trust company, to which testatrix devised residue and remainder of estate in trust, held a devisee under law, to take as trustee under the will at death of testatrix.

2. Constitutional law ⚡93(1)—Testamentary disposition to foreign trust company vested on testatrix's death, and it could not be divested by subsequent act of Legislature nor company prevented from executing trust.

Where testatrix made devise to foreign trust company as testamentary trustee, such estate vested in trust company immediately upon death of testatrix, in view of Civ. Code, §§ 1341, 1342, and trust company could not be divested of such estate by subsequent act of Legislature (St. 1923, p. 169), withdrawing and abrogating right of foreign corporations to act as trustees.

3. Executors and administrators ⚡314(12)—Order for distribution, made while appeal pending from order denying distribution of estate to trust company, void.

Where appeal from order denying distribution of estate to trust company was pending, order distributing estate to granddaughters of deceased was void; appeal from order of distribution suspending execution of decree.

4. Wills ⚡672(2)—Word "bargain," as used by testatrix in creating trust, held to be used in sense of selling property for cash or on terms and not to trade or exchange property.

Where testatrix, in creating trust, provided that trustee might "bargain," sell, and convert property into money, held that word "bargain" was used in sense of selling property for cash, or on terms, as against contention that word was used in sense of trading or exchanging, and without legal purposes of trust, provided in Civ. Code, § 857.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bargain.]

5. Wills ⚡672(2)—Trust providing trustee might bargain, sell, and convert estate with all powers and authority deceased would have, if living, held valid.

A trust providing that trustee might bargain, sell, and convert estate with all powers deceased would have possessed, if living, held valid, as against contention that trust must be imperative and not discretionary, and contention is that such authority was not contemplated by Civ. Code, § 857.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

In the matter of the estate of Myra Josephine Wellings, deceased. From orders of the probate court by which the estate was distributed to Marion Frances Bronson and Ruth Doris Bronson, and an order denying distribution of the estate to the Michigan Trust Company, as trustee, under the will, the trustee appeals. Reversed.

See, also, 192 Cal. 506, 221 P. 628.

Flint & MacKay and Robert B. Jackson, all of Los Angeles, for appellant.

Leland J. Allen, of Los Angeles, for respondents.

HOUSER, Justice pro tem. This appeal involves two separate orders made by the probate court in the course of final distribution of the assets of the estate of Myra Josephine Wellings, deceased.

The first of the two orders from which an appeal is taken is that entitled, "Order settling final account and distributing the property under the will," and the second thereof was an order denying distribution of said estate to the Michigan Trust Company as trustee under the provisions of the will.

The facts material to this inquiry are that, following the death of her husband, Mrs. Wellings also died, leaving a will, by the third paragraph of which it was provided:

"If my husband shall not survive me, then I give, devise and bequeath all the said rest, residue and remainder of my estate unto the Michigan Trust Company, organized and existing under the laws of the state of Michigan, of Grand Rapids, Michigan, in trust, however, for the following purposes. * * *

In connection with the said trust, the will contained appropriate directions regarding the payment of the income to be derived from the assets of the estate to Marion Frances Bronson and Ruth Doris Bronson, granddaughters of the testatrix, and finally, after a lapse of several years, the payment to the same persons of the "residue and remainder" of the estate.

In the due course of administration, a petition was presented to the probate court praying for the settlement of the final account of the administrator with the will annexed and for distribution of the estate to the said granddaughters of the testatrix, the effect of which petition was to except the Michigan Trust Company from said distribution. Between the time of the death of the testatrix and the date of filing the petition for distribution of the estate, the Michigan Trust Company had fully qualified for the purpose of acting as trustee, as provided by the terms of said will. Estate of Wellings, 192 Cal. 506, 221 P. 628.

Thereafter the Michigan Trust Company filed its objections to the said petition for distribution, and prayed that the said estate be distributed to it, as trustee of said estate

under the said will; following which, objections were filed by the said granddaughters of decedent to the appointment of said Michigan Trust Company as trustee, etc. Thereupon an order of said probate court was made denying distribution to the Michigan Trust Company (but without making any order of distribution to the said granddaughters), from which order the Michigan Trust Company appealed to this court, and which appeal resulted in an order reversing the said order of the probate court, the language used by this court in the course of its opinion thereon being:

"Appellant [Michigan Trust Company], having complied with the laws of this jurisdiction governing the right of foreign corporations to do business in this state, and being a devisee under the will, it was entitled to have distribution of the estate made to it pursuant to the terms of the will of the deceased testatrix. Estate of Rawitzer, 175 Cal. 585, 593 [166 P. 581]."

While said appeal was pending and undetermined, and about six weeks before the rendering of the decision therein, the administrator with the will annexed of said estate filed a supplemental account and again prayed for distribution "of all said estate to the persons entitled thereto"; whereupon "the order settling final account and for distribution under will" was made by the court, by which it was decreed that the estate be distributed to the said granddaughters of the testatrix.

Within approximately three weeks after this court had decided that the Michigan Trust Company was "entitled to have distribution of said estate, made to it pursuant to the terms of the will of the deceased testatrix," the Michigan Trust Company made application to said probate court to vacate and set aside its said order of distribution, and which application was by said court denied. Thereafter the Michigan Trust Company again petitioned said court for distribution of said estate to it in accordance with the provisions of said will of said testatrix, which petition was likewise denied by said court.

As heretofore stated, this appeal applies, first, to the order by the probate court by which the estate was distributed to the granddaughters of the testatrix, and, secondly, to the order which denied distribution of the estate to the Michigan Trust Company, as trustee under the provisions of the will. A decision by this court as to one of such orders is necessarily conclusive as to the other.

The Michigan Trust Company is now and at all times mentioned herein was a corporation organized and authorized to transact a trust business under and by virtue of the laws of the state of Michigan. It was therefore, so far as the state of California

was concerned, a foreign corporation. The decision by this court to which reference herein has been had (Estate of Wellings, 192 Cal. 506, 521, 221 P. 628), that under the terms of the will of the deceased testatrix said Michigan Trust Company was entitled "to have distribution of the estate made to it," was rendered on December 11, 1923, notwithstanding the fact that on May 2, 1923, which date preceded by several months the date of the filing of the said opinion by this court (December 11, 1923), by an act of the Legislature (Stats. 1923, p. 169), the right theretofore existing of foreign corporations to act as trustees of wills in this state (Estate of Wellings, 192 Cal. 506, 221 P. 628) was withdrawn and abrogated. On the petition to this court for rehearing in said case it was suggested by the petitioner:

"That the opinion, we think, failed to take into consideration the fact that the Legislature of the state has recognized the injustice of permitting foreign corporations to act as trustees under wills in this state and have repealed those very portions of the Bank Act which this court now holds are constitutional."

With full knowledge, therefore, on the part of this court that the law authorizing foreign corporations to transact in this state a trust business of the nature herein involved had been repealed by legislative enactment, the petition for rehearing was denied. Nevertheless respondent here urges that because of such last-mentioned act the Michigan Trust Company is not an aggrieved party, and hence not entitled to maintain this appeal, for the reason that, since the taking effect of said act said corporation cannot qualify as a trustee under the will in question.

The argument made by respondent to the effect that the execution of the said trust by the foreign corporation, Michigan Trust Company, would constitute "doing business in this state" is conceded by appellant to be unanswerable (Estate of Wellings, 192 Cal. 506, 221 P. 628), as is also respondent's further contention that a foreign corporation may be entirely excluded from the state, or, having been once granted the right of transacting business therein, may thereafter have such privilege denied it. With so much being admitted, the primary question or questions to be solved are, first, whether the right of the appellant to act as a trustee was "vested," and, if so, secondly, whether subsequent legislation may impair it.

On the former appeal (Estate of Wellings, 192 Cal. 506, 510, 221 P. 628, 630), this court, in dealing with the question of the rights of the appellant therein and herein, used the following language:

"An executor appointed by will has the right to act unless there is some express provision of law disqualifying him. Bauquier's Estate, 88 Cal. 302, 309, 26 P. 178 [532]. A trustee under

a will has even a more substantial right to be recognized by the court. He does not become a trustee by virtue alone of the decree of distribution, although his fuller and more complete powers and duties are thus devolved upon him. A testamentary trustee is a devisee under the will, and takes as trustee under the will at the death of the testator. Civ. Code, § 1341; Estate of O'Connor, 2 Cal. App. 470, 475, 84 P. 317; Title Ins. & Trust Co. v. Duffill, 191 Cal. 629, 218 P. 14. He does not derive title from the decree of distribution, which merely declares the title that accrued under and by the will, but from the will itself. Western Pac. Ry. Co. v. Godfrey, 166 Cal. 346, 349, Ann. Cas. 1915B, 825, 136 P. 284."

Section 1341 of the Civil Code provides:

"Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death."

Section 1342 of the Civil Code contains the following provision:

"A testamentary disposition, when vested, cannot be divested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose."

Beginning with the case of Brenham v. Story, 39 Cal. 179, and reiterated, in principle, at least, in Estate of Packer, 125 Cal. 396, 58 P. 59, 73 Am. St. Rep. 58, Smith v. Olmstead, 88 Cal. 582, 26 P. 521, 12 L. R. A. 46, 22 Am. St. Rep. 336, Bates v. Howard, 105 Cal. 173, 38 P. 715, and Estate of Patterson, 155 Cal. 626, 102 P. 941, 26 L. R. A. (N. S.) 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625, the rule is announced that upon the death of the ancestor the heir becomes vested at once with the property, and his estate is indefeasible excepting only as to liens thereon, if any, then existing. In some of the same cases, notably Estate of Patterson, 155 Cal. 626, 102 P. 941, 26 L. R. A. (N. S.) 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625, the law is said to be that—

"There can be no doubt of the rule that if the estate once vested in the heirs the Legislature had no power thereafter by a subsequent law to divest it."

In 5 Cal. Jur. 751, the law on the question is stated as follows:

"The power of the Legislature to repeal such vested rights as are protected by constitutional guaranties has been repeatedly denied by the court."

See, also, People v. Sacramento Drainage Dist., 155 Cal. 373, 103 P. 207; 5 Cal. Jur. 752, 754; James v. Oakland Traction Co., 10 Cal. App. 785, 103 P. 1082.

In considering a statute, the effect of which, like the statute herein referred to (Stats. 1923, p. 169), might be to impair the obligation of contractual or "vested" rights, it is said, in volume 8 of Fletcher Cyclopaedia Corporations, § 5757, that—

"If a state has permitted a foreign corporation to make contracts or acquire property within its limits, a statute subsequently enacted cannot impair the corporation's right to enforce such contracts or deprive it of its right to the property. To give the statute such an operation would render it unconstitutional"—citing cases.

[1, 2] From the authorities heretofore cited herein, it would seem indisputable that the Michigan Trust Company was "entitled to have distribution of the estate made to it"; that, as a testamentary trustee, it was a devisee under the law, and took as trustee under the will at the death of the testatrix (Estate of Wellings, 192 Cal. 506, 510, 221 P. 628); that such estate was consequently vested in the Michigan Trust Company as such trustee; and that it could not be divested of such estate by the subsequent act of the Legislature, nor prevented from executing the trust.

[3] A point is raised as to the legal propriety of the lower court making the order for distribution of the estate to the granddaughters of the decedent at a time when the former appeal from the order denying distribution of the estate to the Michigan Trust Company was pending. Regarding such asserted authority of the lower court to make such order of distribution, the cases of Firebaugh v. Burbank, 121 Cal. 186, 53 P. 560, Estate of Garraud, 36 Cal. 277, and In re Schedel, 69 Cal. 241, 10 P. 334, in principle hold that an appeal from an order of distribution of an estate has the effect of suspending the execution of the decree.

In Estate of Garraud, 36 Cal. 277, the ruling is (syllabus):

"A final decree of the probate court making distribution of an entire estate is, until reversed or modified on appeal, an investiture of the absolute right and title to the same in the distributees; and a further order of the court making a different disposition of a portion of the estate, made pending an appeal which was perfected from said final decree, is void."

And in Firebaugh v. Burbank, 121 Cal. 186, 190, 53 P. 560, 561, it is said:

"In the decree of distribution of November 27, 1893, the court allowed the sum of \$3,500 for the services of the plaintiff to the executors up to the date of that decree, and refused to make to the executors any allowance for extraordinary services in the administration of the estate. The appeal by the widow from this decree suspended its execution, and until the determination of that appeal the executors were not only precluded from distributing the estate in accordance with its terms, but were required to retain the property in their care and custody."

But if, in ruling on the principal issue herein, it be determined that the court was without authority to order distribution of the estate to the granddaughters of the testatrix, the question as to the time when such order was made becomes immaterial. This

court decided, in *Estate of Wellings*, 192 Cal. 506, 221 P. 628, that the Michigan Trust Company was entitled to have the estate distributed to it, and that decision is here affirmed. Under the terms of the will, the Michigan Trust Company, and not the granddaughters of the testatrix, was entitled to the distribution of the estate.

[4] It is contended by the respondents that the trust itself is invalid, because the will provides, among other things, that the Michigan Trust Company shall hold the property of the decedent in trust for the following purposes:

"(a) To care for, manage and control the same, to (Myra Josephine Wellings) bargain, sell and convert into money any part or all thereof and to invest and reinvest the same, or the proceeds thereof, in such interest-bearing or income-producing securities or properties as to said trustee, in the exercise of its discretion, may seem best, with all the powers and authority I would possess if living."

Attention is particularly directed to the word "bargain," occurring in the declaration of the purposes of the trust, as well as to the words, "with all the powers and authority I would possess if living."

In another paragraph of the will the following provision appears:

"Giving and granting unto my said trustee full power and authority to bargain, sell, transfer, and convey, and in any manner dispose of my estate, real or personal, or any part thereof. * * *

It is urged by the respondents that by the use of the word "bargain" the trustee is authorized to trade or exchange the property of the estate for other property, contrary to the provisions of section 857 of the Civil Code, which limits the purposes for which a trust may be created, and which purposes do not in terms include the right to make exchanges with the trust property. But assuming, without deciding, that if there were a clear expression within the terms of the trust instrument, giving to the trustee the power to exchange the trust property, such power would be without the legal purposes of a trust, as provided by section 857 of the Civil Code, it is not certain that the testatrix of the will here in question intended to confer any such powers on the trustee of her will. The word "bargain" is commonly used in conveying property in connection with the word "sell." The ordinary bargain and sale deed contains the phrase that the grantor "does by these presents grant, bargain, sell and convey," etc.; and which words from a practical standpoint mean nothing more than that a sale of the described property is made for cash, or on such terms as may have been agreed upon by the parties to the transfer. In 1 Words and Phrases, First Series, p. 706, the authorities are collected with reference to the use of the word "bargain,"

expressed singly, also to its use with the word "sale." As there stated:

"A bargain is a contract or agreement between two parties, the one to sell goods or land, and the other to buy them. *Hunt v. Adams*, 5 Mass. 358, 360, 4 Am. Dec. 68."

Under the heading "Bargain and Sale" it is said:

"A 'bargain and sale' is the transfer and delivery of personal or real property, or chose in action by one person to another, for a consideration agreed on between them as the value of the property sold. *Brittin v. Freeman*, 17 N. J. Law (2 Har.) 191, 231. It is a real contract, for a valuable consideration, for passing the title of land from one to another.' *Clairborne v. Henderson* (Va.) 3 Hen. & M. 322, 349. It is a real contract, upon a valuable consideration, for passing lands by deed indented. 2d Inst. 672. *Guest v. Farley*, 19 Mo. 147, 150. As defined by Blackstone, it is a real contract whereby a person contracts to convey land. Cruise says that it is 'where a contract is made by which a person conveys his lands to another for a pecuniary consideration, in consequence of which a use arises to the bargainee.' *Perry v. Price*, 1 Mo. 553, 554. Bargain and sale is a method of conveyance founded on the statute of uses. 'The bargainor contracts to sell the land, and receives the purchase money. After this he is, in equity, considered as seised of the land to the use of the bargainee, and the statute unites the possession to the use, so that the very instant the use is raised the possession is joined to it, and the bargainee becomes seised of the land. The words of transfer applicable to this conveyance are 'bargain and sell,' but they are by no means necessary nor material to its operation. There must be a pecuniary consideration; but, if a man for such a consideration covenants to stand seised to the use of another person, a use is thereby raised, which the statute will execute.' *French v. French*, 3 N. H. 234, 261."

It would therefore seem apparent that the testatrix in making the will in question and in providing therein that the trustee might "bargain, sell and convert into money any part" of the estate, or, as provided in a subsequent part of the will, that he might "bargain, sell, transfer and convey, and in any manner dispose of my estate," used the word "bargain" and the other words in connection therewith in the sense of selling the property for cash, or on terms, rather than in the sense of trading or exchanging such property.

The other words to which objection is made, to wit, "with all the powers and authority I would possess if living," clearly refer to the words which precede them, which, as heretofore indicated regarding the word "bargain," apply merely to the right of making sales of the property belonging to the estate.

[5] Other objections by the respondents to the form of the trust as affecting the powers conferred upon the trustee, such, for example, that a trust "for the purpose of sale must be imperative, not merely discretionary," are

answered, not only by the language of the will itself with reference to the powers of sale, but as well by the indicated rulings by this court in Estate of Heywood, 148 Cal. 184, 82 P. 755, Estate of Aldersley, 174 Cal. 366, 163 P. 206, and Aldersley v. McCloud, 35 Cal. App. 17, 168 P. 1153.

In the case entitled Estate of Heywood, 148 Cal. 184, 82 P. 755, it appears that the will provided:

"In case it may be necessary or in case it may be deemed advisable by my trustees * * * they are hereby authorized to sell at any time the said * * * property * * * and to re-invest the proceeds in income-paying real estate or other safe income-paying securities to the end that my wishes herein expressed may be carried out for the maintenance and protection of my said wife and my adopted daughter."

In deciding in that case that the will was valid, no great attention was devoted by the court to the particular point here under consideration. Nevertheless, among other things, the court said:

"In construing testamentary dispositions of property it is a cardinal rule that a liberal construction should be given to them and all reasonable intendments indulged in, with a view of sustaining the purpose which it is disclosed the testator had in view. No particular form of expression is necessary to constitute a valid trust. It is sufficient that from the language used the intention of the testator is apparent, and that the disposition in trust which he endeavors to make of his estate is consistent with the rules of law. The intent of the testator is the matter for primary consideration, and it is immaterial what method of expression is employed as long as that intention can be ascertained. As said in Hill on Trustees (p. 101), 'It is one of the fixed rules of equitable construction that there is no magic in particular words'; and this court has said that, 'Of course, it is a fundamental principle that a construction of a will favorable to testacy will always obtain when the language used reasonably admits of such construction, and that it will not be held to contain a void trust, unless the invalidity of the trust is beyond question * * *

and cannot be reasonably construed otherwise.' Estate of Dunphy, 147 Cal. 95, 81 P. 315."

In the case of Aldersley v. McCloud, 35 Cal. App. 17, 168 P. 1153, a trust provision in a will similar to that here being considered was held valid.

It is suggested by respondents that, under the clause of the will whereby the trustee is given "all" the powers and authority that the decedent would have if living, the trustee might make "extensive and substantial improvements" on the trust property, which authority is not contemplated by the provisions of section 857 of the Civil Code. No authorities are cited by respondents to sustain their contention in this regard. Section 857 of the Civil Code does not purport to enumerate the various rights which a trustee may possess under a general authority such as may be provided in a will creating a trust like that here under consideration. A similar question was presented in the case of Estate of Heywood, 148 Cal. 184, 82 P. 755. With reference thereto, the court disposed of the question in the following manner:

"In order to give countenance to the contention of appellant it would be necessary to interpolate language into the subdivision directing the trustees to do what confessedly the subdivision does not directly prescribe they shall do, and having made the interpolation then declare the trust invalid as a trust 'to divide.' This a court will never do. It is only when the language actually used by the testator will admit of no other reasonable construction than that it creates an invalid trust that a court will declare this to be its effect."

And see generally, in this connection, with reference to the validity of the trust, Estate of Dunphy, 147 Cal. 95, 81 P. 315.

It follows that each of the orders from which an appeal is taken herein should be reversed. It is so ordered.

We concur: LAWLOR, J., Acting C. J.; WASTE, J.; LENNON, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.

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FROST et al. v. RAILROAD COMMISSION OF CALIFORNIA et al. (L. A. 8473.)(Supreme Court of California. Oct. 1, 1925.
Rehearing Denied Oct. 29, 1925.)

1. Carriers ⚡5—Auto Stage and Truck Transportation Act held applicable to transportation company engaged in business of transportation as private carrier on public highways between fixed points, as well as common carriers.

Auto Stage and Truck Transportation Act is not limited in its application to common carriers, in view of section 1 thereof, as amended by St. 1919, p. 458, § 2, but is applicable as well to transportation company engaged in "business of transportation" for compensation between fixed points on public highway, though such one is operating solely under private contract.

2. Carriers ⚡5—"Transportation company," though private carrier, held subject to regulations of Railroad Commission as to rates, facilities, and service.

Under Auto Stage and Truck Transportation Act defining "transportation companies" as including private carriers, it follows that such carrier, in view of Const. art. 12, §§ 20-22, must first secure consent of Railroad Commission to change rates, cannot discriminate in according facilities, and cannot render transportation service at less rates than named in tariff rates established by commission.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Transportation Company.]

3. Carriers ⚡5—When private carrier subject to disabilities and limitations circumscribing common carrier stated.

A private carrier is at least subjected to disabilities and limitations circumscribing a public or common carrier when it is required to file schedule of rates with Railroad Commission, compelled to render transportation service of kind required by commission, and is disabled to enter into contract for transportation at rates other than prescribed rate.

4. Carriers ⚡1—State has no power to transmute a private utility into a public utility or private carrier into a public carrier.

A state has no power by mere legislative act, or even by constitutional enactment, to transmute a private utility into a public utility or a private carrier into a public carrier.

5. Carriers ⚡8—Right of carrier to use public highways not a vested or natural right, but a privilege or license, which Legislature may grant or withhold in its discretion.

Right of a private or common carrier to use the public highways for the conduct of its business is not a vested or natural right, but a mere privilege or license, which the Legislature may grant or withhold in its discretion or grant upon such conditions as it sees fit.

6. Carriers ⚡8—State, in granting use of special privileges in highways to private carrier, has power to impose such conditions as it sees fit.

In granting special privilege of use of highways to private carrier, state has power to demand in consideration therefor a reasonable quid pro quo to the public, and in effect this was done in and by St. 1919, p. 457, amending Auto Stage and Truck Transportation Act, in requiring a certificate of convenience and necessity.

7. Carriers ⚡2—Constitutional grant of authority to Legislature to confer additional powers on Railroad Commission limited to such additional powers as are cognate and germane to regulation of railroads and other transportation companies.

Under Const. art. 12, § 22, granting authority to Legislature to confer additional powers on Railroad Commission, such additional powers are limited to those as are cognate and germane to the regulation of railroads and other transportation companies.

8. Carriers ⚡5—Regulation of private carrier, when engaged in business of transportation as described in statute, held cognate and germane to regulation of common carriers engaged in like business.

The regulation of private carriers, when engaged in the business of transportation described in Auto Stage and Truck Transportation Act, § 1, as amended by St. 1919, p. 458, § 2, is cognate and germane to the regulation of common carriers engaged in like business, for, the primary purpose of regulating common carriers being conceded to be to secure reliability, regularity of service, and reasonable rates, it follows that to permit private carriers to engage in same business without responsibilities of common carriers would defeat purpose of Auto Stage and Truck Transportation Act.

9. Evidence ⚡20(1)—Common knowledge that unregulated transportation companies interfere seriously with revenues of controlled public utilities.

It is common knowledge that unregulated motor transportation companies interfere seriously with the revenues of those carriers which are under public control.

10. Carriers ⚡5—Fact that Auto Stage and Truck Transportation Act adopts by reference procedural provisions of Public Utilities Act does not render former inapplicable to private carriers.

The fact that Auto Stage and Truck Transportation Act, § 7, adopts by reference procedural provisions in Public Utilities Act does not render former inapplicable to private carriers.

11. Carriers ⚡8—Constitutional law ⚡235, 292—Eminent domain ⚡2(11)—Auto Stage and Truck Transportation Act not a regulation of use of highways, but a conditional offer of special privilege.

Auto Stage and Truck Transportation Act regulating transportation companies, including private carriers, is not in fact a regulation of the use of the highways, nor does it take pri-

vate property for public use without compensation in violation of Const. Cal. art. 1, § 13, and Const. U. S. Amend. 14, nor does it violate the due process clause; but what the act does, in effect, is to make a conditional offer of a special privilege.

12. Carriers ⇐8—Conditional offer of special privilege in Auto Stage and Truck Transportation Act requires that offeree shall in return submit himself to conditions, regulations, and restrictions specified therein.

Auto Stage and Truck Transportation Act, which makes a conditional offer of highways, requires that offeree shall, in consideration for such special privilege, submit himself to conditions, regulations, and restrictions specified in the act.

In Bank.

Application by Marion L. Frost and Wesley H. Frost, copartners doing business under the name and style of Frost & Frost Trucking Company, for a writ of certiorari to review an order of the Railroad Commission commanding petitioners to desist from transportation of property by auto truck over a certain route. Writ denied.

Rehearing denied; Shenk, J., dissenting.

Leonard, Surr & Hellyer, of San Bernardino, and Thelen & Marrin, of San Francisco, for petitioners.

Sanborn & Roehl and De Lancey C. Smith, all of San Francisco, amici curiæ.

Carl I. Wheat and Woodward M. Taylor, both of San Francisco, for respondents.

MYERS, C. J. Review to annul a decision and order of the respondent commission commanding petitioners to desist from the transportation of property by auto truck over a regular route and between fixed termini upon the public highways of the state for compensation unless and until they shall obtain a certificate of public convenience and necessity so to do from the respondent commission.

[1] Petitioners were engaged in the transportation of citrus fruits belonging to the Redlands Orange Growers' Association, a corporation, between the city of Redlands and Los Angeles harbor in this state, pursuant to a contract with said association. Petitioners were brought regularly before the commission to answer to a complaint of a competing carrier, who was engaged in the transportation of property between those points as a common carrier under a certificate of public convenience and necessity issued by the commission, and who alleged that the business of transportation being carried on by petitioners under their contract with the Redlands Orange Growers' Association, without the issuance of a certificate of public convenience and necessity, was in violation of the Auto Stage and Truck Transportation Act (Stats. 1917, p. 330), as amended (Stats. 1919,

p. 457). There is no dispute as to any of the facts herein. All of the essential facts are conceded to be correctly set forth in the allegations of the petition and the exhibits attached thereto. Petitioners had entered into a purported contract of lease with the Redlands Orange Growers' Association whereby petitioners purported to lease to the association certain auto trucks owned by petitioners to be used by the association in the transportation of its fruit from Redlands to Los Angeles harbor, but which trucks were to be operated in such transportation by petitioners. The commission, after an analysis of the provisions of the purported lease, found and determined, correctly as we think, that the same did not constitute a lease and that the real contract between the parties was a contract for transportation whereby petitioners undertook and agreed to transport the fruit of the association between Redlands and Los Angeles harbor during the period of time and for the compensation therein specified. The correctness of this conclusion of the respondent commission is not seriously questioned by petitioners herein, and the question is therefore, whether one who is engaged as a business in the transportation of property by auto truck for compensation over the public highways of the state between fixed termini and over a regular route, but operating solely under a private contract, is subject to the provisions of the Auto Stage and Truck Transportation Act, supra, as amended. Section 1 of the act defines the term "transportation company" as used therein to include:

Every person "operating * * * any automobile, jitney bus, auto truck, stage or auto stage used in the *business* of transportation of persons or property, or as a common carrier, for compensation, over any public highway in this state between fixed termini or over a regular route, * * *" (with certain exceptions not pertinent herein).

The italicized words "business of" and "or" were added to the section by the amendment of 1919, St. 1919, p. 458, § 2. Petitioners would have us in construing this section read the phrase "or as a common carrier" as if it were "and as a common carrier," substituting the conjunctive "and" in place of the disjunctive "or," and thus conclude that the act as amended is applicable only to those who are engaged in such business of transportation as common carriers. We are unable to adopt this conclusion. To so hold would be to say, in effect, that the Legislature accomplished nothing and intended nothing by this amendment. The definition of "transportation companies" contained in this section of the act as originally enacted plainly and unmistakably limited the same to common carriers. If any meaning or purpose whatsoever is to be ascribed to the amendment of 1919, it can be only the meaning and purpose of extending

the act to make it applicable also to private carriers of the sort there described.

The question then arises whether under the provisions of the state and federal Constitutions the act is valid in its application to such private carriers. Various points relating to this question are ably discussed by counsel and by amici curiæ, who have filed briefs herein. It is contended in behalf of petitioners that this act in its application to private carriers has the effect of transforming them into public carriers by legislative fiat. Counsel for respondents vigorously deny that such is the effect, but it cannot be denied that the provisions of the act as applied to private carriers do closely approximate this result.

Section 2 provides that no transportation company may operate "except in accordance with the provisions of this act."

Section 3 forbids such operation unless a permit has first been secured as therein provided, and requires the applicant for such permit to specify the highways and the route over which the applicant intends to operate, and furnish description of each vehicle which applicant intends to use, including the seating capacity thereof, if for passenger traffic, or the tonnage, if for freight traffic, together with a schedule or tariff showing the passenger fares or freight rates to be charged. It provides that such permit may be issued or refused, or issued upon such terms and conditions as in the judgment of the commission the public convenience and necessity may require. It provides further that no permit so issued may be assigned or transferred without the consent of the granting authority.

Section 4 empowers the Railroad Commission to supervise and regulate every such transportation company, to fix its rates, fares, charges, classifications, rules, and regulations, to regulate its accounts, service, and safety of operations, to require the filing of annual and other reports, and to supervise and regulate transportation companies "in all other matters affecting the relationship between such companies and the traveling and shipping public."

Section 5 forbids operation even under a franchise or permit granted by any incorporated city or town, city and county, or county, without first having obtained from the Railroad Commission a certificate declaring that public convenience and necessity require the exercise of such right or privilege, and provides further that the commission may attach to the exercise of the rights granted by such certificate such terms and conditions as in its judgment the public convenience and necessity may require.

Section 6 forbids the issuance of any stock, stock certificate, or bond by such transportation company except pursuant to an order first secured from the Railroad Commission.

Section 7 provides that as to applications and complaints and procedure subsequent thereto all transportation companies will be

subject to regulation by the commission "under the conditions and subject to the limitations and with the effect specified in the public utilities act."

Section 8 makes the violation of any of the provisions of the act or of any order, decision, rule, regulation, or direction of the commission a misdemeanor and prescribes the punishment therefor.

[2-4] Furthermore, if the Legislature is competent to thus define "transportation companies" to include private carriers, it follows that they cannot raise any charge or rate without first securing the consent of the Railroad Commission (Const. art. 12, § 20), cannot accord to one person any rate or facility different from that accorded to any other person (Const. art. 12, § 21), and cannot render a transportation service for any rate or charge less than that named in the tariff rates established by the commission (Const. art. 12, § 22). A carrier who files with the Railroad Commission a schedule of his routes, tariffs, and charges, who is under compulsion to render transportation service of the kind, character, and quality prescribed by the commission, who is disabled to enter into a contract for the rendition of transportation service of any kind, quality, or character different from that prescribed, or for a rate of compensation either greater or less than the prescribed rate, is at least subjected to the disabilities and limitations which circumscribe a public or common carrier. 10 C. J. 37 et seq. It is conceded that the state has no power by mere legislative fiat, or even by constitutional enactment, to transmute a private utility into a public utility, or a private carrier into a public carrier. *Producers' Transportation Co. v. R. R. Comm.*, 176 Cal. 499, 169 P. 59; *Associated Pipe Line Co. v. R. R. Comm.*, 176 Cal. 518, 169 P. 62, L. R. A. 1918C, 849; *Van Hoosear v. R. R. Comm.*, 184 Cal. 553, 194 P. 1003; *Allen v. R. R. Comm.*, 179 Cal. 68, 175 P. 466, 8 A. L. R. 249; *Stratton v. R. R. Comm.*, 186 Cal. 119, 198 P. 1051; *McCullagh v. R. R. Comm.*, 190 Cal. 13, 210 P. 264; *Richardson v. R. R. Comm.*, 191 Cal. 716, 218 P. 418; *Klatt v. R. R. Comm.*, 192 Cal. 689, 221 P. 926; *Producers' Transportation Co. v. R. R. Comm.*, 251 U. S. 228, 40 S. Ct. 131, 64 L. Ed. 239. It is argued by respondents, however, that the state does have the power either to grant to or withhold from its citizens the privilege of using its public highways for the purpose of transacting their private business thereon. As was said by the Supreme Court of West Virginia (*Ex parte Dickey*, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840):

"The right of a citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the

usual and ordinary right of a citizen, a common right, a right common to all; while the latter is special, unusual and extraordinary. As to the former, the extent of legislative power is that of regulation; but, as to the latter, its power is broader, the right may be wholly denied, or it may be permitted to some and denied to others, because of its extraordinary nature. This distinction, elementary and fundamental in character, is recognized by all the authorities."

[5] The argument is that the privilege of using the public highways as a place for the transaction of private business is not a vested right but a privilege which the state may grant or withhold at its pleasure; that, having the right to withhold such privilege, it may grant the same upon such terms and conditions as it may see fit to impose; that it may say in effect to the applicant for such special privilege:

"I will grant you the privilege of using the public highways for private gain in the transaction of your business upon the condition that you in turn shall dedicate the property used by you in such business to the public use of public transportation."

There is much force in this contention. It has been repeatedly decided that the right of a common carrier to use the public highways for the conduct of his business as such is not a vested or natural right, but is a mere privilege or license, which the Legislature may grant or withhold in its discretion or which it may grant upon such conditions as it may see fit to impose. *Ex parte Lee*, 28 Cal. App. 719, 153 P. 922; *Hadfield v. Lundin*, 98 Wash. 657, 168 P. 516, L. R. A. 1918B, 909, Ann. Cas. 1918C, 942; *Le Blanc v. City of New Orleans*, 138 La. 243, 70 So. 212; *Greene v. City of San Antonio* (Tex. Civ. App.) 178 S. W. 6; *Gizzarelli v. Presbrey*, 44 R. I. 333, 117 A. 359; *Morin v. Nunan*, 91 N. J. Law, 506, 103 A. 378; *Lutz v. City of New Orleans* (D. C.) 235 F. 978; *Cummins v. Jones*, 79 Or. 276, 155 P. 171; *Packard v. Banton*, 264 U. S. 140, 44 S. Ct. 257, 68 L. Ed. 596; *Memphis St. R. Co. v. Rapid Transit Co.*, 133 Tenn. 99, 179 S. W. 635, L. R. A. 1916B, 1143, Ann. Cas. 1917C, 1045; *Cutrona v. Mayor, etc.* (Del. Ch.) 124 A. 658; *Taylor v. Smith* (Va.) 124 S. E. 259; *Schoenfeld v. Seattle* (D. C.) 265 F. 726; *Ex parte Tindall*, 102 Okl. 192, 229 P. 125; *Pub. Service Comm. v. Fox*, 96 Misc. Rep. 283, 160 N. Y. S. 59; *Ex parte Sullivan*, 77 Tex. Cr. R. 72, 178 S. W. 537; *Child v. Bemus*, 17 R. I. 230, 21 A. 539, 12 L. R. A. 57; *Ex parte Bogle*, 78 Tex. Cr. R. 1, 179 S. W. 1193; *Fifth Ave. Coach Co. v. N. Y.*, 194 N. Y. 19, 86 N. E. 824, 21 L. R. A. (N. S.) 744, 16 Ann. Cas. 695.

The Supreme Court of Washington said in *Hadfield v. Lundin*, *supra*:

"If any proposition may be said to be established by authority, the right of the state, in the exercise of its police power, to prohibit the use of the streets as a place of private business or as the chief instrumentality in conducting

such business, must be held so established. Nor can it be questioned that the power to prohibit includes the power to regulate, even to the extent that the regulation under given conditions may be tantamount to a prohibition. Where the power to prohibit exists, the reasonableness of any regulation is palpably a legislative question, pure and simple."

[6] The foregoing cases all had to do with the right of common carriers. Whether the same rule should apply with equal force to private carriers engaged in using the streets as a place of private business or as the chief instrumentality in conducting such business has not been directly passed upon in any case which has come to our notice except as it may be said to have been impliedly adjudged in *State v. Price*, 122 Wash. 421, 210 P. 787. Upon principle, however, we perceive no reason why the rule should not apply with equal force to the case of a private carrier who proposes to use the street as a place of private business or as the chief instrumentality thereof. The rule does not rest upon the circumstance alone that the carrier is engaged in operating a public utility and that his business is therefore affected with a public interest, but it rests equally upon the circumstance that he is using the public highways as the chief instrumentality of a private business conducted for private gain. In other words, he is enjoying a special privilege in the highways which are constructed and maintained at public expense and designed for the common use of all. Many of the cases expressly rest their decisions upon this latter ground. We are of the opinion that the state has the right in the granting of such special privileges in its public highways to require that the recipient thereof in consideration therefor return a reasonable quid pro quo to the public and that such in effect is what was done in and by the 1919 amendment to the Auto Stage and Truck Transportation Act. The recent decision of the Supreme Court of the United States in the case of *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570, 45 S. Ct. 191, 69 L. Ed. 445, 36 A. L. R. 1105, seems at first blush to be at variance with this conclusion, but we think that upon analysis it will be found not to conflict therewith. The Michigan statute is essentially similar to our Auto Stage and Truck Transportation Act in its relation to the questions here under consideration, except that it expressly provides what is claimed to be the necessary implication of our own statute, namely:

"Any and all persons * * * engaged * * * in the transportation of persons or property for hire by motor vehicle, upon or over the public highways of this state [between fixed termini or over a regular route] shall be common carriers. * * *" *Pub. Acts Mich. 1923, No. 209, § 3.*

It also prohibits the engaging in the business of such transportation without a per-

mit from the Public Utilities Commission, which shall be issued in accordance with the public convenience and necessity, and requires the payment of fees, the carrying of insurance, and the furnishing of an indemnity bond. Duke was engaged in the transportation by auto truck of automobile bodies from Detroit, Mich., to Toledo, Ohio, under three private contracts with the manufacturers thereof. He had been doing such hauling for some years and had a large investment in property used exclusively for that purpose, was engaged in no other business, and did not hold himself out as a carrier for the public. The court held that the requirements and limitations of the statute as applied to him would impose an unlawful burden upon interstate commerce. It also said:

"Moreover, it is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment"—citing cases.

The essential difference between that case and this rests in the fact that Duke was operating under contracts subsisting before and at the time of the enactment of the Michigan statute, which contracts remained in part unperformed. The statute afforded to him no liberty of choice. It required him to devote his property at once to public transportation and thus would have disabled him to perform his subsisting contracts. To give it effect in its application to his situation would have been to impair the obligation of those contracts. If the contracts under which petitioners herein are operating had been entered into prior to the enactment of the 1919 amendment to our statute, and had been then subsisting and unperformed, petitioners would have been in position to invoke the authority of the Duke Case. But petitioners' contract was not made until 1923, and they were under no compulsion to enter into it. They were free to elect as to whether they would engage in the business of transportation upon the public highways between fixed termini or over a regular route and thus subject themselves to the conditions and limitations of the statute, or whether they would refrain from so doing and thus retain their status of unregulated private carriers. They voluntarily chose the former course and thereby subjected themselves to the regulations imposed by the statute. The following language from the opinion in *Le Blanc v. City of New Orleans*, supra, is pertinent in this connection:

"The streets of the cities and towns in Louisiana being among the things that are 'public' and 'for the common use,' no individual can have a property right in such use for the purposes of his private business, unless, speaking

generally, that business being in the nature of a public service or convenience, such as would authorize the grant, the right has been granted by the state, which alone has the power to make or authorize it, or, by the particular city or town, acting under the authority of the state, and in such case the right can be exercised only in accordance with the conditions of the grant; that is to say, an individual seeking, but not possessing, a right of that kind, may accept the grant, with the conditions imposed by the offer, in which case he becomes bound by the conditions, or he may refuse to accept the conditions, in which case there is no grant, and without the grant so offered, or some other, from the authority competent to make it, he can never acquire the right to make use of a street as his place of business."

Aside from the foregoing considerations, it would seem that the fact that petitioners' business is of necessity carried on almost wholly upon the public highways would of itself cause such business to be so affected with a public interest as to subject it to governmental regulation, but, as this point has not been discussed by counsel, we do not pursue it further.

[7] It is contended that the Constitution does not, and the Legislature cannot, confer upon the Railroad Commission jurisdiction or authority to supervise or regulate a private act of the nature involved herein or the business of a private carrier. The Constitution provides (article 12, § 22):

"Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies."

In the case of *Western Association of Short Line Railroads v. Railroad Commission*, 173 Cal. 802, 162 P. 391, 1 A. L. R. 1455, it was held that this section of the Constitution was self-executing to the extent that it conferred upon the Commission regulatory powers over companies transporting freight or passengers as common carriers for hire on the public highways by means of motor trucks and automobile stages. It is insisted that the phrase "other transportation companies" must be taken to mean other like transportation companies; that is to say, other transportation companies which like railroads operate as common carriers. Section 22 of article 12 also provides that—

"No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Railroad Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Railroad Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution."

It must be taken as settled that this grant of authority to confer additional powers is limited (so far as applicable to the question

here under consideration) to such additional powers as are cognate and germane to the regulation of railroads and other transportation companies. *Pac. Telephone, etc., Co. v. Eshleman*, 166 Cal. 640, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822; *City of Pasadena v. R. R. Comm.*, 183 Cal. 526, 192 P. 25, 10 A. L. R. 1425; *City of San Bernardino v. R. R. Comm.*, 190 Cal. 562, 213 P. 980.

[8] The question thus presented is whether the regulation of the business of a private carrier engaged in the business of transporting property for hire upon the public highways between fixed termini or over a regular route is cognate and germane to the regulation of the business of a common carrier who is engaged in like transportation. We think this question must be answered in the affirmative. It is at once apparent that the private carrier is or at least may be in direct competition with the public carrier, who is operating over the same route, and whose business it is the duty of the commission to supervise and regulate. The primary purpose of such regulation is to secure the adequacy, regularity, and reliability of service and the reasonableness of rates and charges therefor. *Franchise Motor Freight Ass'n v. Seavey* (Cal. Sup.) 235 P. 1000. To accomplish this end there must of necessity be some restriction upon competition. As was said by the Supreme Court of Washington:

"The purpose of the Transportation Act * * * is to permit the establishment of regular and dependable service wherever public necessity and convenience requires. No adequate service can be given without proper equipment. * * * An income must be earned which will cover operating costs and depreciation and give some return on the investment or the service cannot be long continued. In the case of *Public Utilities Commission of Utah v. Garviloch*, 54 Utah, 406, 181 P. 272, the Supreme Court of Utah said: 'The granting of a certificate of convenience and necessity by the commission to Chandler, therefore, was in the nature of a limited franchise which authorized him to operate his automobile stage line over the route designated in the certificate for the time and under the conditions therein specified. The certificate, therefore, not only confers authority to operate the stage line, but it necessarily also affords him protection against any one who unlawfully interferes with the right thereby conferred. If such is not the legal effect of the certificate, then the operation of utilities may easily become detrimental rather than beneficial to the public and thus result in a farce.'" *Davis v. Nickell*, 126 Wash. 421, 218 P. 198.

[9] If petitioners, while engaged in transportation business of the kind and character described in the Auto Stage and Truck Transportation Act, may exempt themselves from all of the limitations and conditions of that act by the simple device of entering into a special contract for such transportation, there is no limit to the extent to which they may avail themselves of such device. If they

may make one such contract, they may with equal right make a dozen or hundred. By this means they could take away from their competitor, who is operating as a common carrier under the restrictions and limitations imposed by the act, all of the most profitable and least burdensome of his business, leaving him obligated to carry the unprofitable remainder thereof, and thus disable him to render the service which the public interest requires. Transportation companies could thus secure all of the special privileges afforded to common carriers without assuming any of their duties or obligations. This would, of course, defeat in large measure the purpose not only of the Auto Stage and Truck Transportation Act, but of the constitutional provision conferring jurisdiction upon the Railroad Commission to regulate transportation companies. The language of this court in the case of *Western Association, etc., v. Railroad Commission*, supra, while used in a different connection is, nevertheless, pertinent to the present consideration. It was there said:

"* * * It is not only a matter of common knowledge, but is presented in these cases, that in many instances these unregulated companies interfere seriously with the revenues of controlled public utilities, a percentage of whose revenues goes by way of taxes to the support of the state."

We are satisfied that the regulation of private carriers, when engaged in the business of transportation described in section 1 of the Auto Stage and Truck Transportation Act, is cognate and germane to the regulation of common carriers engaged in like business. This conclusion is suggested, though not decided, in the case of *City of Pasadena v. R. R. Comm.*, supra, wherein it was said:

"Considering all these circumstances, the only reasonable conclusion is that the authority intended to be given to the Legislature by this section to confer powers upon the Railroad Commission must be limited to the subject of powers over common carriers and transportation and the control and regulation thereof by the commission, *and such other things as may be necessary or convenient for the proper and effectual exercise of such powers of regulation and control.*" (Italics added.)

[10] The fact that the Auto Stage and Truck Transportation Act, in section 7 thereof, adopts by reference the procedural provisions of the Public Utilities Act (St. 1915, p. 115), does not have the effect of rendering the former act inapplicable to private carriers. The fact, for example, that section 869 of the Code of Civil Procedure, in title 11 thereof relating to justices' courts, adopts by reference certain provisions of title 7 relating to superior courts, does not have the effect of making justices' courts courts of record. It is conceded that the Public Utilities Act applies only to public utilities and does not of its own force apply to any private carrier,

but this fact does not disable the Legislature to extend its procedural provisions by subsequent legislation so as to make them applicable to other subjects.

[11] We agree with amici curiæ for the petitioners that the Auto Stage and Truck Transportation Act does not purport to be and is not in fact a regulation of the use of the highways. *Buck v. Kuykendall*, 267 U. S. 307, 45 S. Ct. 324, 69 L. Ed. 623; *People v. Yahne* (Cal. Sup.) 235 P. 50. This renders it unnecessary to discuss the various contentions of amici curiæ based upon the hypothesis that the act might be so construed. The contentions that the act takes private property for public use without compensation in violation of section 13 of article 1 of the state Constitution and of section 1 of the Fourteenth Amendment to the federal Constitution, and that it violates the due process clause of the Fourteenth Amendment, are based upon the predicate that the effect of the act is to transmute a private carrier into a public carrier against his will by legislative fiat. As we have indicated above, our view is that the act does not and cannot have this effect. What the act does, in effect, is to make a conditional offer of a special privilege. The offeree is not entitled to this privilege as a matter of right and therefore in order to obtain it he must submit to the conditions attached to the offer. He is not compelled to submit to these conditions, but if he does not do so he cannot avail himself of the privilege. If he does avail himself of the privilege under these circumstances, he is deemed to have thereby consented to the conditions. An analogous situation is presented by the provisions of article 1, section 14, of our Constitution, which provides:

That the taking of private property for a logging or lumbering railroad "shall be deemed a taking for a public use, and any person, firm, company or corporation taking private property under the law of eminent domain for such purposes shall thereupon and thereby become a common carrier."

This is simply an offer of a special privilege to an offeree who is not otherwise entitled to it upon condition that he return the quid pro quo specified therein. If the owner of a private logging railroad should avail himself of this offered privilege by exercising the right of eminent domain, it cannot be seriously doubted that he would thereby become a public carrier. In such case it could not be said that his property had been taken for public use without compensation, but rather it should be said that he had voluntarily dedicated it to the public use, or quasi public use, of common carriage, and that his compensation therefor was the special privilege which he obtained thereby and to which he was not otherwise entitled. Having voluntarily elected to accept this privilege as

compensation, he would not be heard thereafter to assert that it was not adequate compensation.

[12] By the Auto Stage and Truck Transportation Act the state offers the special privilege of using the public highways for the transaction of private business, a privilege to which no one is entitled as a right. But the offer is conditional that the offeree shall return a consideration therefor by dedicating his property to the quasi public use of public transportation, or, at least, by submitting himself to the conditions, regulations, and restrictions specified in the act. The offeree is not compelled to submit himself to those conditions, regulations, and restrictions, but, if he does not, he is not entitled to the privilege offered. If he does avail himself of the offered privilege, he must be deemed to have accepted the conditions of the offer.

The demurrer to the petition is sustained, and the order to show cause is discharged.

We concur: RICHARDS, J.; LAWLOR, J.; SEAWELL, J.; WASTE, J.; LENNON, J.; KNIGHT, Justice pro tem.

74 Cal. App. 278

MCCORMICK SAELTZER CO. v. GRIZZLY CREEK LUMBER CO.

REDDING FEED CO. v. SAME.

(Civ. 2659, 2660.)

(District Court of Appeal, Third District, California. Aug. 31, 1925. Hearing Denied by Supreme Court Oct. 29, 1925.)

1. Corporations ⇐432(12)—Evidence held sufficient to support finding that parties signed agreement as agents of corporation.

In action to recover obligations assumed by corporation in purchase of sawmill, evidence held sufficient to support finding that parties signing agreement acted as agents for corporation, of which they were directors, binding it to pay obligations as specified in agreement.

2. Corporations ⇐432(6)—Unsigned document held properly excluded as no evidence on issue whether persons purchasing assets of corporation were agents of defendant corporation.

In action against corporation to enforce obligations of another company, whose entire assets it purchased, the refusal to admit an unsigned document in evidence on the issue of whether persons who made purchase were defendant's agents held not error.

3. Corporations ⇐406(1)—Contracts of controlling majority of directors binding on company.

The conduct, actions, and promises of corporate directors constituting controlling majority of board will bind corporation to con-

tracts made in furtherance of its business, as corporation will be deemed to have knowledge of their acts.

4. Corporations ⚡425(5)—Corporation taking possession of property under contract is estopped from denying obligations under same.

Where corporation under contract made by directors had taken possession of principal assets of another corporation, it was estopped from denying obligation to pay debts assumed under same contract, in view of Civ. Code, § 1589.

5. Corporations ⚡306—Not particular in determining as to whether one who owns all stock in corporation signs contract for corporation or in individual capacity.

Law is not particular in discriminating between contracts of one who practically owns all the stock of corporation and controls its affairs as to whether he executed contract relating to corporate business in individual or corporate capacity.

6. Appeal and error ⚡926(2)—On failure to include in transcript document excluded by trial court, Supreme Court must assume exclusion was proper.

Where appellant permitted settlement of transcript on appeal under Code Civ. Proc. § 953a, without including document excluded from evidence by trial court, Supreme Court must assume that action of trial court was right, in absence of any showing to the contrary.

7. Evidence ⚡161(1)—Evidence as to contents of document before court inadmissible.

Refusal to admit evidence as to contents of document which was before court was proper, since document itself was best evidence.

Appeals from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Separate actions by the McCormick Saeltzler Company and the Redding Feed Company against the Grizzly Creek Lumber Company. From judgments for plaintiffs, defendant appeals. Affirmed.

John F. Barnett, of San Francisco, for appellant.

Carr & Kennedy, of Redding, for respondents.

THOMPSON, Justice pro tem. These are actions tried jointly upon an alleged promise of defendant Grizzly Creek Lumber Company to pay the indebtedness of Shasta Mill & Lumber Company to the respective plaintiffs for goods and merchandise sold and delivered. By stipulation both cases were submitted on the same evidence. The defendant Shasta Mill & Lumber Company defaulted. Both plaintiffs had judgment as prayed for. For convenience the Grizzly Creek Lumber Company will be referred to as defendant.

The Shasta Mill & Lumber Company was operating a lumber mill in Shasta county. It was indebted to plaintiff McCormick Saeltzler

Company in the sum of \$982.69, and to plaintiff Redding Feed Company in the sum of \$598.71 for merchandise sold and delivered. The evidence disclosed but one other outstanding debt to Miles & Westover for \$3,500 for stumpage. The defendant Grizzly Creek Lumber Company was incorporated March 26, 1920. This corporation was promoted by J. T. Reed and W. L. Whitaker. They were also the principal stockholders. The others were mere nominal stockholders. Reed became president and Whitaker secretary. John F. Barnett was their attorney; also attorney for the Grizzly Creek Lumber Company, as well as vice president and director. Mr. Barnett was practically the only material witness for defendant at the trial. Much of his evidence was hearsay and incompetent, and admitted over the objection of plaintiff, as the trial court said, because there was no jury. It must be assumed the trial court disregarded this hearsay evidence.

Harry E. Scott was the president of the Shasta Mill Lumber Company. April 1, 1920, negotiations began between the Grizzly Creek Lumber Company and the Shasta Mill & Lumber Company for the purchase of the latter corporation and equipment. April 7th a majority of the members of the boards of directors of both corporations met at the office of Elmer E. Robinson, attorney for Shasta Mill & Lumber Company. In a conference at this office an oral agreement was entered into between the respective parties for the purchase and sale of the entire milling business, stock, and equipment of the Shasta Mill & Lumber Company for a consideration of \$2,500 cash; the defendant agreeing to assume and pay, in addition thereto, the outstanding indebtedness of the Shasta Company in an aggregate sum not to exceed \$5,000. Mr. Scott maintains that throughout these negotiations Reed and Whitaker held themselves out as the representatives of the Grizzly Creek Lumber Company. The sale was consummated on or about the 12th of April, according to the terms mentioned. The capital stock, stumpage contracts, equipment, and all property of the Shasta Company was thereupon transferred to Reed and Whitaker. Mr. Scott was given \$1,000 in cash and three promissory notes of \$500 each, signed by Reed and Whitaker. The Shasta Company board of directors then resigned, and Reed, Whitaker, and Barnett were immediately elected directors of that corporation, and assumed control thereof. Reed and Whitaker then immediately agreed to transfer all the property of the Shasta Company to the Grizzly Creek Lumber Company, including stumpage contracts with Miles and Westover, in consideration of \$85,300. They were to receive \$75,000 in capital stock of the Grizzly Creek Company and \$10,300 in cash. This was done. Shortly thereafter all the property of the Shasta Mill & Lumber Company was assigned and trans-

ferred to the Grizzly Creek Lumber Company. At this time Reed, Whitaker, and Barnett were all officers and directors of both corporations.

Subsequently the Oregon Pine Lumber & Box Company entered into a contract with the Grizzly Creek Lumber Company for the purchase of its output of lumber. Mr. W. H. Pyburn, president of this Oregon Pine Lumber Company, testified that they advanced upon this contract the sum of \$1,000, which was the initial sum paid upon the purchase of the Shasta Lumber Company. The Grizzly Creek Lumber Company did not prosper. The debts of the Shasta Company were not paid, and these suits were therefore prosecuted.

The defendant maintains that the evidence does not support the findings of the court to the effect that in the purchase of the property of the Shasta Company, and the promise to assume and pay its debts, Reed and Whitaker were acting as the representatives of the Grizzly Creek Lumber Company; that a certain written proposed agreement of sale referred to in the evidence, but which was never signed or accepted by the parties, was wrongfully excluded from the evidence; and that the evidence of Harry E. Scott respecting the agency of Reed and Whitaker was conflicting and not worthy of credit.

Mr. Scott, the former president of the Shasta Mill & Lumber Company, testified respecting the agency of Reed and Whitaker to bind the Grizzly Creek Lumber Company to assume and pay the outstanding debts of the former corporation as follows:

"We started negotiations with the Grizzly Creek or with Reed and Whitaker about the 1st of April, 1920, to make a sale of the stock and holdings of the Shasta Mill & Lumber Company. * * * Mr. Reed and Whitaker and Barnett, the attorney, were present. * * * The consideration was \$2,500 in cash, of which \$1,000 was to be paid at that time, and that the Grizzly Creek Lumber Company was to assume and pay all indebtedness against the Shasta Mill & Lumber Company. * * * There was \$1,000 paid at that time, and three notes of \$500 each given. * * * Mr. Reed was the president of the Grizzly Creek Lumber Company at that time, * * * and Mr. Whitaker was secretary. * * * And that was the consideration for the agreement just described. * * * It embraced the accounts owing to the McCormick Saeltzler Company, * * * and the Redding Feed Company. * * * We would never have turned it over had we realized that there was going to be any trouble about these bills, because that was the main object we had in turning it over, was to get our indebtedness paid up. * * * The goods were delivered to the Shasta Mill & Lumber Company."

On cross-examination Mr. Scott further testified:

"Q. Are you correct in stating that a sale was made to the Grizzly Creek Lumber Company? A. I am correct to this extent, that J.

A. Reed and Mr. Whitaker who represented the Grizzly Creek Lumber Company—

"Q. (Interrupting) You say they represented that company. * * * Isn't it a fact that you were dealing with these men personally, in their personal capacity? A. Mr. Reed and Mr. Whitaker were the parties with whom we were negotiating.

"Q. Is it not a fact that nobody ever said to you during those negotiations that Reed and Whitaker were representing the Grizzly Creek Company? A. That is a fact.

"Q. You just jumped at the conclusion. A. No; they represented themselves as the Grizzly Creek Lumber Company. * * * We recognized them as representing the Grizzly Creek Lumber Company. * * * My dealings were with J. T. Reed and Whitaker representing themselves to be the Grizzly Creek Lumber Company. * * * This company was supposed to have a mill in Humboldt county, and Mr. Reed represented to me, and to Mr. Thomas and Robinson, that they could not get their mill started, and they wanted to get immediate action, and were looking for a mill like Shasta ready to operate, and, when we entered into negotiations with them, we supposed we were doing business with a going concern, and Reed and Whitaker were supposed to represent that concern. * * * There is no question in my mind but that they represented themselves as the Grizzly Creek Lumber Company. * * * The capital stock was made over to the names of Reed and Whitaker."

It was admitted that at the time of these negotiations the Grizzly Creek Lumber Corporation was already incorporated, and that Reed was its president and Whitaker its secretary. All the Shasta property and assets were immediately transferred to the Grizzly Creek Company, and the initial payment of \$1,000 was made by the Grizzly Creek Company from money advanced on contracts for output of lumber paid to it by the Oregon Pine Lumber Company.

[1, 2] The testimony of Scott is not conflicting, but seems entirely consistent. It is also in harmony with the conduct of the parties in the entire transaction. Neither Reed nor Whitaker was called to contradict these statements. If it be a fact that some one had drawn a tentative agreement of sale, which was never signed or accepted by the parties, in which the names of Reed and Whitaker appeared as purchasers, that would not be conclusive. For Reed and Whitaker did in fact take the capital stock in their own names, but immediately transferred all property over to the Grizzly Creek Company. They were the promoters of that company. The evidence taken as a whole is sufficient to support the findings to the effect that Reed and Whitaker acted as agents for the Grizzly Creek Lumber Company, and bound it in their promise to pay the obligations of the Shasta Company. Nor was there error in excluding the document which was neither signed nor accepted by any of the parties.

[3, 4] It appears from the evidence, and chiefly from the admissions of Mr. Barnett,

that Reed and Whitaker were the promoters of the Grizzly Creek Lumber Company. They owned practically all the stock; 7,500 shares having been issued to them. The other stockholders were mere nominal ones, holding not more than one to five shares, merely to comply with the law and qualify them as directors. They employed Mr. Barnett, the attorney, and dominated the affairs of the corporation. Reed, Whitaker and Barnett held the principal offices of the corporation; namely, president, vice president, and secretary. All three were present at the time the agreement to assume the obligations of the Shasta Company was made. They became the directors and controlling factors of both corporations. They planned and executed the transfer of property. While strictly speaking, this corporation may not be said to be what the law calls a "one-man corporation," evidently it was a two-man corporation. The principle is the same. Under such circumstances the conduct, actions, and promises of these officers, constituting a controlling majority of the board of directors, will bind the corporation. The corporation will be deemed to have knowledge of their conduct and contracts. Having obtained and held the property constituting a material part of the contract of purchase, the corporation will be estopped from denying its obligation to pay the debts, which was a material part of the agreement. Having accepted the fruits of the contract, it may not refute the burdens. Civ. Code, § 1589; 3 Cook on Corporations, No. 712, p. 2237, and No. 716, p. 2290; 14A C. J. No. 2228, p. 368, and No. 2241, p. 387; 10 Fletcher on Corporations, No. 2199, No. 2207, p. 370.

In *Goodwin v. Central Broadway Building Co.*, 21 Cal. App. 376, 131 P. 896, it is said:

"Where, with full knowledge of all the facts involved, a principal reaps the fruits of the unauthorized contract of his agent, and for some time yields acquiescence to its provisions, he will be deemed to have ratified it, and will be estopped * * * from repudiating it to the injury of the latter. And this doctrine applies to corporations equally with individuals." *Gribble v. Columbus Brewing Co.*, 102 [100] Cal. 71, [34 P. 529]; *Clarke on Corporations*, p. 278.

[5] The appellant contends that the corporate entity of the defendant, in contemplation of law, is separate and distinct from that of the individual officers, or stockholders, and that therefore it cannot be held responsible for their acts or promises. In *Erkenbrecher v. Grant*, 187 Cal. 7, 200 P. 641, it is said:

"While it is the general rule that a corporation is an entity separate and distinct from its

stockholders, it is also equally well-settled that both law and equity will, when necessary to circumvent fraud, protect the rights of third persons, and accomplish justice, disregard this distinct existence and treat them as identical * * *"

In order to cast aside this legal fiction, "the law is not scrupulously particular in discriminating between the contracts of one who practically owns all the stock of a corporation and controls its affairs, as to whether he executes a contract relating to the corporate business in his individual or in the corporate capacity." *Swartz v. Burr*, 43 Cal. App. 445, 185 P. 411.

[6] The exclusion of the tentative agreement was not error. It appears that it was not signed by any of the parties. It appears to have been rejected by Reed, Whitaker, and Barnett. The contents of the instrument do not appear in evidence. The court permitted it to be marked for identification, and yet it does not appear in the record on appeal. There was no application to supply it by diminution of the record or otherwise. It was negligence on the part of appellant to have permitted the settlement of the transcript on appeal under the alternative method provided by section 953a, Code of Civil Procedure, without including this document, if he wished to use it on appeal. *Espinosa v. Gould*, 47 Cal. App. 316, 190 P. 481. Since it is not included in the transcript, and the contents of the document are not before this court, it is impossible to determine whether it was competent or not. Therefore, in the absence of any showing to the contrary, this court must assume that the ruling of the trial court in excluding the document was proper. *Espinosa v. Gould*, supra; 2 Cal. Jur. No. 395, p. 689, and No. 401, p. 697; *Beck v. Schmidt*, 13 Cal. App. 448, 110 P. 455; *S. F. Commercial Agency v. Hogan*, 6 Cal. App. 408, 92 P. 312.

Nor was it error to sustain an objection to the following questions with relation to that written document which was before the court, to wit:

"Q. Now, what is the subject of that agreement; that is an agreement of sale, is it not?"

And:

"Q. What is dealt with in that agreement as a subject of sale?"

[7] The instrument itself was the best evidence of the subject-matter and of its contents. The objection was sustained on that ground. This ruling was correct.

The judgments are therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

74 Cal. App. 164

PEOPLE v. MITCHELL. (Cr. 852.)

(District Court of Appeal, Third District, California. Aug. 22, 1925.)

1. Criminal law §323—Not presumed that officers and directors of corporation, other than president thereof, did not have knowledge of receipts and disbursements.

It will not be presumed that officers and directors of a corporation, other than the president thereof, did not have knowledge of receipts and disbursements of funds representing proceeds of sale of shares of corporate stock.

2. Embezzlement §11(1)—Deposit by president of corporation, of corporate funds with intent to devote them to his own use, constitutes embezzlement.

Deposit by president of corporation in his own name of corporate funds, with intent to devote them to his own use, constitutes embezzlement, whether or not he thereafter actually devoted to such use the money so deposited.

3. Embezzlement §41—Receipts by defendant of money for corporation and distribution and use made thereof by him held admissible.

In a prosecution against the president of a corporation for embezzling corporate funds representing proceeds of sale of shares of stock, prosecution held entitled to show receipts by defendant of money for corporation and distribution and use made thereof by him.

4. Criminal law §400(6)—Prosecution held entitled to prove contents of corporate books of account by testimony of accountant who audited them.

In prosecution of president of corporation for embezzling corporate funds, nonavailability of corporation books of account, held to entitle prosecution to prove their contents by testimony of accountant who audited such books.

5. Embezzlement §44(1)—Evidence held insufficient to sustain conviction.

Evidence held insufficient to convict president of corporation for embezzlement of corporation funds, representing proceeds of sale of shares of stock.

6. Embezzlement §48(4)—Instruction held erroneous, as omitting essential element of fraudulent appropriation.

In a prosecution against president of a corporation for embezzling money received by him in his trust capacity, from sale of shares of corporate stock, instruction held erroneous as omitting essential element of fraudulent appropriation.

7. Criminal law §814(1)—Instruction held erroneous as authorizing conviction of offense not charged against accused.

In a prosecution against president of a corporation for embezzling money received by him in his trust capacity, from sale of shares of corporate stock, instruction held erroneous as au-

thorizing conviction of an offense not charged against accused.

8. Embezzlement §11(1)—Appropriation must be fraudulent.

Appropriation, to constitute embezzlement, must be fraudulent.

9. Indictment and information §171—Accused cannot be convicted of crime not charged.

Accused cannot be convicted of crime with which he is not charged.

10. Criminal law §717—District attorney, convinced that court is in error, should refrain from use of language inclining jurors to accept his statement rather than that of court.

The district attorney, no matter how strong his belief is that the court is in error as to the law, should refrain from the use of any language which might incline the jurors to accept his statement of the law rather than that of the court.

11. Criminal law §843—Practice of noting exceptions to instructions written, and those taken down by reporter, is improper.

Practice of noting exceptions to instructions written, and those taken down by reporter, is improper, in view of Pen. Code, § 1176, providing that such instructions need not be excepted to.

12. Criminal law §713—Attorney may not call court's attention to error in instruction, and request its correction, in such manner as to discredit court's statement of law as given to jury.

Attorney may not call court's attention to error in instruction and request its correction, in such manner as to discredit court's statement of the law as finally given to jury.

Appeal from Superior Court, Sacramento County; Claude F. Purkett, Judge.

H. N. Mitchell was convicted of embezzlement, and from an order granting him a new trial the People appeal. Affirmed.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Clarence W. Morris, of San Francisco, and George E. Foote, of Sacramento, for respondent.

FINCH, P. J. The defendant was held under two informations, each charging him with the crime of embezzlement. The cases were consolidated and tried together, resulting in convictions on both charges. The defendant moved for a new trial and his motion was granted as to both charges. This appeal is from the order granting a new trial. No brief has been filed in behalf of respondent, and the cause was ordered submitted for decision upon the appellant's opening brief.

The first information alleges that the defendant was president of the Modern Laundry Company, a corporation; that there came

into his possession as such officer the sum of \$550 "of the personal property of said Modern Laundry"; and that on the — day of September, 1922, he "did willfully, unlawfully, feloniously, and fraudulently appropriate said money and personal property to his own use, not in due and lawful execution of his trust." The second information, in similar language, charges the embezzlement of \$325 on or about the — day of November, 1922.

The Modern Laundry Company was incorporated March 11, 1922. The defendant was elected president thereof March 30, 1922. He was the active manager of the corporation. His authority is not shown further than may be inferred from his position in the company and his activities in its affairs. The secretary treasurer of the company testified that the minutes do not show that the defendant was authorized "to cash checks for or on behalf of the company" or to deposit "the funds of the company in his own private account." The record is silent as to what the by-laws provide in this respect.

March 30, 1922, the state commissioner of corporations issued his permit, authorizing the company:

"To sell 250 shares of its capital stock to its incorporators for cash, and 14,750 shares to the public for cash, subject to a selling cost not to exceed 20 per cent. of the amount paid in cash account of each subscription upon the condition that the company, on or before the 1st day of October, 1922, impound in a depository to be first selected by the company and approved by the commissioner of corporations, the net sum of \$50,000, otherwise 80 per cent. of each payment was to be returned to each subscriber upon his demand therefor."

The company did not select a depository until March, 1923. "Between six and eight thousand dollars" was then deposited with the depository so selected. This money was at a later time paid to subscribers under the order of the commissioner of corporations, they receiving, in the order of their applications therefor, 80 per cent. of the respective amounts paid by them for stock, until the fund was exhausted. The fund was insufficient to reimburse all subscribers. The sums alleged to have been embezzled by defendant were received by him from two subscribers in payment for stock, and no part thereof was ever repaid to them. The evidence does not show how many shares of stock were sold or the amount of money received therefor. It appears that the defendant received all sums paid in for capital stock, and that he deposited the same to his personal credit in his private bank account. The account books of the company were kept by or under the direction of the defendant. A witness for the prosecution, who had audited the accounts of the corporation, testified that the defendant delivered to him for the purposes of the audit, "stock certificate books and card records of the stockholders' accounts, showing amounts

of the capital stock subscribed and the payments thereof, various canceled checks signed by Mitchell, receipted invoices, * * * one book that was supposed to be the cash book, * * * a record of the receipts from stock subscriptions; it was in a very crude form."

The defendant expended large sums of the money so received in remodeling and repairing a building which, as appears inferentially, was purchased by the company for use as a laundry. Neither the purchase price of the property nor the amount, if any, paid thereon appears from the evidence. Neither does it appear whether the defendant appropriated to his own use any of the funds of the company. It was admitted at the trial that two subscribers for capital stock paid the defendant for the company the sums alleged to have been embezzled, and that he deposited the same to the credit of his personal account. Whether these sums were included in the amount finally turned over to the depository does not appear. The case of the prosecution rests entirely upon the receipt by defendant of these two sums of money in his trust capacity as president of the company and his deposit thereof in his personal bank account.

[1] In *People v. Royce*, 106 Cal. 173, 37 P. 630, 39 P. 524, the defendant received the money there involved in his trust capacity as treasurer of the Veterans' Home Association, and deposited the same to his personal account. He reported the receipt of the money to the bookkeeper of the association and the amount thereof was entered by the bookkeeper upon the ledger of the association. It was held that the evidence was not sufficient to sustain the charge of embezzlement. In this case, as stated, the defendant entered upon the books of the company the amounts received by him. Through a period of about 10 months he paid out large sums in the remodeling and repairing of the company's building. It is not to be presumed that the other officers and directors of the company did not have knowledge of these receipts and disbursements. There is nothing in the record, therefore, to warrant the inference that the defendant secretly made the deposits and expenditures in question. The facts are not distinguishable in principle from those in the *Royce* Case.

[2-4] Whether the deposit of the sums alleged to have been embezzled by the defendant constituted the crime charged depends upon the intent with which such deposits were made. If so deposited with the intent to devote the same to his own use, the defendant thereby committed the crime of embezzlement, regardless of whether he thereafter actually devoted the money to such use. In proof of the intent with which the deposits were made, the prosecution was entitled to show all receipts by defendant of money for the company and the disposition and use made thereof by him. *People v. Ward*, 134 Cal. 301, 66 P. 372; *People v. Cobler*, 108 Cal.

538, 41 P. 401; *People v. Bidleman*, 104 Cal. 608, 38 P. 502; *People v. Lorden*, 62 Cal. App. 501, 217 P. 117. If the books of the company, which the defendant had delivered to the accountant to be audited, were not available, then the prosecution had the right, upon laying a proper foundation, to prove their contents by the testimony of the accountant.

[5-8] The trial court properly held that "the whole evidence taken together is insufficient" to justify a conviction, and that it was error to instruct the jury as follows:

"If you are convinced by the evidence in this case to a moral certainty and beyond all reasonable doubt that Mrs. Ross Burden gave her check for \$325 for the purchase of stock of the Modern Laundry Company, and that Andrew Glaser gave his check for \$550 also for the purchase of stock in the Modern Laundry Company, and if you further are convinced by the evidence to a moral certainty and beyond all reasonable doubt that the permit granted by the Corporation Commissioner for the sale of the stock of said Modern Laundry Company required that not exceeding 20 per cent. of the money received for such sales could be expended for any purpose until such time as a sum equal to \$50,000 was deposited with a depository selected by the corporation and approved by the commissioner of corporations; and if you further believe from the evidence to a moral certainty and beyond all reasonable doubt that the defendant, H. N. Mitchell, cashed these checks and deposited the proceeds to his own personal account in the California National Bank; that money was not deposited with a depository selected by the corporation and approved by the commissioner of corporations; that H. N. Mitchell afterward paid out such money for purposes not allowed or authorized in a sum exceeding 20 per cent. of the total amount received for the sale of the stock of the corporation, so that the money was lost to the corporation, then I charge you that such acts constituted embezzlement upon his part, and you should find him guilty as charged in each case."

[9] The instruction is clearly erroneous. An appropriation must be fraudulent to constitute the crime of embezzlement. This essential element of the crime is entirely omitted from the instruction. The defendant was charged with the fraudulent appropriation of two specified sums of money to his own use, but the instruction states, in effect, that he may be convicted upon proof that he used, for any purpose, "a sum exceeding 20 per cent. of the total amount received for the sale of the stock of the corporation." It is elementary that a defendant cannot be convicted of a crime with which he is not charged.

[10] During the progress of the trial, in the presence of the jury, the trial judge and the

district attorney frequently expressed sharply conflicting opinions relative to the law applicable to the case. Counsel for defendant objected to the admission of certain evidence offered in rebuttal by the district attorney, and the trial judge stated that the evidence was not competent in a criminal case. After a colloquy between the judge and the district attorney, the latter said:

"I know what competent testimony is. I have tried as many cases as your honor has tried, and, if I may add, as many cases as your honor ever will try. I know what competent testimony is and rebuttal testimony."

Four times during the reading of the instructions to the jury the district attorney interrupted the court by announcing his exceptions to as many instructions which had been read, stating the grounds of his respective exceptions as follows: (a) "We contend that isn't the law. * * * I think it is an encroachment on the province of the jury with reference to the facts;" (b) "I would like to except to that instruction * * * on the ground it is not a true statement of the law;" (c) "We enter an exception to the instruction as not properly stating the law. * * * The other instruction (one requested by the district attorney and refused) has the approval of the Supreme Court;" (d) "We except to that instruction * * * as not being a correct construction of the law, and also an encroachment on the rights of the jury as to the facts." When the court stated, in response to one of the exceptions taken, that "the law excepts to any instruction given by the court," the district attorney replied: "I want the jury to know what instructions I except to."

[11, 12] However strongly a district attorney may believe that the court is in error as to the law, he should refrain from the use of any language which might incline jurors to accept his statement of the law rather than that of the court. Section 1176 of the Penal Code expressly provides that written instructions, and those taken down by the reporter, "need not be excepted to." In view of this plain provision, the practice of noting exceptions to such instructions should not be countenanced. An attorney may properly call the court's attention to any error in an instruction and request its correction, but not in such manner as to discredit the court's statement of the law as finally given to the jury.

The order is affirmed.

We concur: THOMPSON, Justice pro tem.; PLUMMER, J.

74 Cal. App. 333

JAKOVICH et al. v. ROMER et al.
(Civ. 5187.)

(District Court of Appeal, First District, Division 2, California. Sept. 3, 1925.)

1. Sales ⇨38(1)—Enumerated acts held insufficient to establish fraud in procuring execution of contract of sale of grapes.

Allegations, that buyers were unfamiliar with English language, and with letters of credit, and as to seller's explanation of contract provision requiring letter of credit, held insufficient, under Civ. Code, § 1572, to establish fraud in procuring execution of contract of sale of grapes.

2. Sales ⇨181(11)—Evidence held insufficient to predicate estoppel of sellers from insisting upon performance of certain clause of contract.

Evidence held insufficient to predicate estoppel of sellers on insisting upon performance of clause in contract of sale of grapes requiring buyer to furnish bank letter of credit.

3. Appeal and error ⇨1011(1)—Finding on conflicting evidence that sellers did not waive provision in contract, requiring buyer to furnish bank letter of credit, not disturbed.

Finding, based on conflicting evidence, that sellers did not waive provision in contract of sale, requiring buyers to furnish letter of credit, will not be disturbed.

4. Sales ⇨337—Sellers of grapes, acting as brokers, held not entitled to retain as liquidated damages amount deposited under contract by buyers.

Brokers, who were not growers of grapes, but engaged in buying and selling them, held not entitled to retain as liquidated damages amount deposited under contract by buyers of grapes, especially where, during the season in which the contract was executed, brokers purchased a large quantity of grapes and sold them at prices as high or higher than buyers had contracted to pay.

5. Judgment ⇨253(1)—Failure of buyers, suing brokers for breach of contract, to pray for return of amount deposited as liquidated damages, did not preclude them from recovering such amount.

Buyers, denied recovery from brokers for breach of contract, held not precluded from recovery of money deposited as liquidated damages merely because of failure to pray for such relief; Code Civ. Proc. § 580, authorizing any relief embraced within issue.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by M. Jakovich and another, copartners doing business under the firm name and style of Jakovich & Dogan, against Robert Romer and another individually, and as copartners doing business under the firm name and style of Robert Romer & Co., and others. Judgment for defendants, and plaintiffs appeal. Reversed.

John R. Tyrrell and Geo. L. Stewart, both of San Francisco (William K. White, of San Francisco, of counsel), for appellants.

Hugh K. McKeivitt, Charles W. Cobb, and R. C. Ramsay, all of San Francisco, for respondents.

STURTEVANT, J. The plaintiffs commenced an action against the defendants to recover damages for an alleged breach of contract. The case was tried in the trial court without a jury. Judgment was rendered in behalf of the defendants, and the plaintiffs have appealed under section 953a of the Code of Civil Procedure.

In their complaint, the plaintiffs pleaded the contract. That instrument consisted of two papers as follows:

"Grape Contract.

"This contract, made between Robert Romer & Co. of San Francisco, Cal., seller, and Jakovich & Dogan, of Chicago, Ill., buyer, witnesseth:

"Said buyer hereby agrees to purchase from said seller, and said seller hereby agrees to sell to said buyer—twenty—carloads of 1920 crop of California—vineyard run—Zinfandels, Missions, Matero, Carrignans, and other black grapes in good shipping condition, upon the terms and conditions following:

"Packing: Grapes to be packed in what is commonly known as Los Angeles lug boxes, in accordance with the standard required by the railroad administration for the loading of cars of said commodity.

"Delivery: To be F. O. B. cars, common shipping point California, as fast as growing crops compel growers to deliver same. A receipt in good order from the railroad company shall relieve the seller from all further liability.

"Quantity: Twenty carloads.

"Price: \$85 per ton F. O. B. cars as above, including lug boxes.

"Deposit: Said seller hereby acknowledges the receipt of \$200 (two hundred dollars) per car on account of the above contract price, and amounting to four thousand dollars. Such deposit to apply upon account of purchase price as deliveries are made at the rate of \$200 per carload. In event of default by the buyer under this agreement, said deposit shall belong to, and be retained by the seller as part consideration for entering into this agreement, and as liquidated damages for such default of buyer. The buyer shall further furnish the seller with an irrevocable bank letter of credit to the amount of \$21,500 within 10 days from date of contract, payable against shipping documents at sight, and good until December 1, 1920.

"Shipping Instructions: Proper instructions shall be furnished by the buyer to the seller as requested by the seller, and the buyer shall be responsible for any demurrage and damage occasioned by delay in furnishing such instructions.

"Freight Charges: Buyer must arrange to prepay same or furnish the originating line or lines with the regular perishable freight bond acceptable to such railroad line to the amount of the shipment.

"Performance of Contract: The place of performance of the terms and conditions of this contract to be the city and county of San Francisco in the state of California.

"Liability: The seller shall not be liable for damage or loss in event of crop failures or destruction or damage of crops, nor for government regulations or restrictions which may interfere with shipments of the grapes covered hereby; nor for matters interfering with or affecting the carrying out of this agreement which are beyond the reasonable control of the seller.

"Executed in duplicate at San Francisco, Cal., this 16th day of June, 1920.

"[Signed] Jakovich & Dogan, Buyer,

"By Michael Jakovich.

"[Signed] Robert Romer & Company, Seller,

"By Robert Romer.

"San Francisco, June 16, 1920.

"Jakovich & Dogan, Chicago, Ill.—Gentlemen: Referring to our contract of twenty cars of grapes, entered into on the 16th day of June, beg to state that the contract in question is understood by us to give you the right of inspection of said cars at point of origin as to said grapes being in accordance with contract.

"In case of a disagreement between us as to quality, it is understood and agreed and made part of the contract above referred to that an inspector from the state horticultural commission of California shall decide as to the quality of the grapes, and his decision shall be final and binding on both parties.

"It is also understood and agreed that if you are not there at the point of origin at the time of shipment that you waive inspection.

"It is also further agreed that we shall refund at the rate of \$200 (two hundred dollars) a car for any and all cars not shipped on the contract herein referred to, if we are unable to ship same for reasons beyond our control as particularly set forth in our contract under the clause of liability, or for any reason no fault of the buyer. However, said stipulation herein mentioned not to be in force and effect if the buyer refuses to accept delivery under the terms and conditions of the contract herein referred to.

"It is also understood and agreed that ten (10) cars of the above twenty will originate out of Santa Cruz county, Cal., or equally as good a district, and the other ten cars out of the Lodi district or other early shipping district.

"Cordially yours,

"[Signed] Robert Romer & Co.,

"By Robert Romer.

"I hereby accept the above modifications to the contract herein referred to.

"[Signed] Jakovich & Dogan,

"By Michael Jakovich."

The plaintiffs also pleaded that they had done and performed all conditions by them to be performed, except that portion of the contract which reads as follows:

"The buyer shall further furnish the seller with an irrevocable bank letter of credit to the amount of \$21,500 within ten days from date of contract, payable against shipping documents at sight, and good until December 1, 1920."

As to that passage, the plaintiffs inserted in their pleading a statement that said con-

dition had not been performed by them and thereupon they allege (1) certain acts as constituting fraud; (2) certain acts as constituting an equitable estoppel; and (3) certain acts as constituting a waiver. These excuses were pleaded in paragraphs 6, 7, 8, 9, and 10 of the complaint. The answer of the defendants put all of said matters in issue and the trial court made findings "that all of the allegations of paragraphs 2, 5, 6, 7, 8, 9, 10, and 11 are untrue."

The appellants claim that the trial court erred in making a finding against the appellants on each one of said excuses.

[1] The facts constituting the alleged fraud, as stated by the appellants, were that before signing said contract at San Francisco on the 16th day of June, 1920, plaintiffs distinctly informed defendants that said plaintiffs were unfamiliar with the English language in general, and with letters of credit in particular, and expressed doubt of their ability to provide same; that the defendants assured the plaintiffs that said letter of credit could be easily arranged thereafter as the same was merely collateral protection to defendants, and that the provision for a letter of credit would not be vital to said contract; that relying upon such assurances plaintiffs signed the contract. No other declaration, representation, or act is alleged as constituting fraud in the inception of the contract. The acts enumerated did not constitute fraud. Civ. Code, § 1572.

[2] It will be noted that the contract was executed on the 16th day of June, 1920. By the terms of the contract, the letter of credit should have been furnished "within ten days from date of contract," that is on or before June 26, 1920. Shortly after the contract was executed, Mr. Jakovich went to Chicago. On arriving there he endeavored to obtain the letter of credit. Failing to do so, on June 25th he telegraphed to the defendants as follows:

"First National Bank not knowing me intimately does not wish to extend credit of \$20,000. They believe can finance the deal without credit."

The defendants, on June 26th, the last day provided in the contract for furnishing the letter of credit, answered by a telegram as follows:

"Your telegram 25th received and in the meantime await your advices by mail. However in the meantime wish to assure you of our good will to assist you in any way we are able. Our Mr. Romer hopes to leave for Chicago in about two weeks."

On June 28, the plaintiffs wrote the defendants:

"I received your telegram to-day, June 28, 1920. We understand that you will be in Chicago in two weeks. Please let me know what day you will arrive, and I will arrange to meet you. When you come to the city we will talk

about the bank business. Please let me know how the price of grapes are going. I understand from a friend of mine that the price is going higher. My banker tells me that monthly deposits are necessary to get a letter of credit."

It will be noted also that the letter was written two days after the time stated in the contract within which the letter of credit should have been furnished. The record discloses the fact that Mr. Romer did not go to Chicago. No other communications were had between the parties before September 14th. On the date last mentioned, Mr. Jakovich came to San Francisco, and during the succeeding two weeks he had many conversations with Mr. Romer. We think it is quite clear that the foregoing facts fall far short of anything that would constitute an estoppel. 10 Cal. Jur. p. 626, § 14.

[3] After Mr. Jakovich arrived in San Francisco, he immediately called upon Mr. Romer. The conversation that followed he testified was as follows:

"I spoke to him about the letter for credit. I told him everything what the bank told me, that they do not furnish me letter for credit. Mr. Romer said, 'Well, I will tell you a letter for credit is only a promise, we can do business just the same.' He said he did not buy any grapes from Lodi and Santa Cruz county and he is going to furnish me grapes from Healdsburg district, and that I should wait one week or two that the grapes is not ripened. He did not say anything to me about the \$4,000. I will be glad if he say something, and then I have a chance to buy grapes and do the business, but he always keep me off. He was very friendly to me, very gentlemanly all the time. He told me why he could not give me grapes from Lodi because they were sunburned and he did not buy them. He said the Healdsburg district is better class of grapes. He did not say anything as to how I was to pay for grapes, now that I was not to furnish the letter of credit. As to the payment for the grapes that were to be furnished we was standing on the contract. I am going to pay for the grapes after they pass inspection, and I will pay before the car leaves California. He is complaining there is a shortage of cars, and he asks me if he gets enough cars. Then I said I was going to some friend and I will try to get some cars. When I was ready to take cars he called a gentleman from the insurance company who took me to the office of the Lyon Bonding Company for the bond to secure the freight money for 20 cars, and I pay \$110 for the bond. Mr. Romer put the shipping points on the surety bond. I was pretty near every day, every second day, in his office. Always he delayed. He always delayed — 'the grapes is not ready yet,' and he says, 'Another four days, another two days,' and so forth. He never said anything about the contract. He always says he is going to deliver the grapes."

On the 11th day of October, 1920, the defendants served a written notice that the buyer was in default, and that the rights of the buyer under the contract had been ter-

minated and ended. The defendants called Mr. Romer as a witness and he testified: At the time the contract was being prepared, he showed to Mr. Jakovich and to Mr. Stewart a form of letter of credit which he had theretofore used and explained the necessity for such a paper. He further testified that the plaintiffs never tendered the defendants cash to cover the 20 cars of grapes. They did not tender the defendants security, or letter of credit, or money, or anything else to secure the payment for the 20 cars. At all times after the transaction and the failure to supply the letter of credit, even after the 10 days had elapsed, the defendants were ready and willing to give the plaintiffs the grapes had they produced the cash or the letter of credit, and even then the defendants were asking the plaintiffs if they could get the security, get the money, or the cash, and put it up so defendants could get the grapes for them. Grapes in the Lodi district come in in the latter part of August and in the Modesto district. But in northern counties they come in later, and in the mountain counties still later. The defendants never agreed with the plaintiffs to eliminate the letter of credit as one of the conditions precedent to their taking delivery of the cars. The witness Romer further testified:

"I told him (Mr. Jakovich) when he came back about September 14—that is the time—and he came in the office there and he did not know how to bring up the subject-matter, and finally he began to apologize about not putting the letter of credit up, and I told Mr. Jakovich then and there that the contract distinctly provided for that, and that the contract was terminated and canceled. Between June 20th and September 14th Mr. Jakovich was in Chicago and I was in San Francisco. The only way I had of communicating with him was by letter or telegram. I did not, by letter or telegram, advise Mr. Jakovich that the \$4,000 was forfeited."

While there is other evidence in the record, it is not necessary to recite it. From what we have quoted, we think it appears that, on the issue of waiver or no waiver, the evidence was conflicting, to say the least, and that the record is not in a form that will justify this court in disturbing the finding made by the trial court on the issue as to waiver.

[4] The appellants contend that in any event the judgment of the trial court should have been in favor of the appellants to the amount of \$4,000, which they had deposited with the respondents. We think this contention must be sustained. The evidence discloses that Mr. Romer was not a grower of grapes, but that he was engaged in buying and selling grapes. It also discloses that during the season of 1920 he purchased a large quantity of grapes in California, and that he sold them at prices as high or higher than the appellants had contracted to pay. It is quite clear that in this transaction he was acting

in the capacity of a broker. All of the facts considered, the case is ruled by the doctrine stated in *Biescar v. Pratt*, 4 Cal. App. 288, 87 P. 1101; *McInerney v. Mack*, 34 Cal. App. 153, 166 P. 867.

[5] Replying to this point, the respondents take the position that the appellants, by their pleading and prayer, asked for different and other relief than the return of the \$4,000 deposited. Be that as it may, such relief was embraced within the issue and the plaintiffs were entitled thereto. Code Civ. Proc. § 580.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

74 Cal. App. 331

Ex parte WILLIAMS. (Cr. 1304.)

(District Court of Appeal, Second District, Division 1, California. Sept. 2, 1925.)

Municipal corporations — 598—Ordinance regulating employment of dance partners held void as indefinite.

A city ordinance, providing that "dance partners, other than such teachers as are necessary, shall not be employed" in dance halls, held void as indefinite and uncertain, inasmuch as it fixed no standard by which to determine what number of teachers in any dancing hall was necessary, but left such standard to be fixed and determined by opinion of court.

Application by Clinton U. Williams for writ of habeas corpus to be directed to the Chief of Police of the City of San Diego, to secure the release of petitioner from custody on charge of violating an ordinance prohibiting the employment of dancing partners. Writ granted.

Edward J. Kelly, of San Diego, for petitioner.

Frank M. Downer, Jr., of San Diego, for respondent.

CONREY, P. J. This matter came on for hearing after writ issued. It was stipulated that the facts of the case are correctly stated in the petition.

Ordinance No. 7760 (as amended by Ordinance No. 7918) of the city of San Diego is an ordinance regulating public dance halls, providing for the licensing thereof, etc. Section 16 of this ordinance, after setting out certain rules concerning teachers or instructors in public dance halls, provides as follows:

"Dance partners, other than such teachers as are necessary, shall not be employed."

Petitioner has been arrested and imprisoned on a charge that he violated said ordi-

nance in this, that at the stated time and place he "did willfully and unlawfully, as owner, proprietor, manager, or person in charge of a public dance hall, employ girls as dance partners at said public dance, or in said public dance hall, who were not necessary teachers or instructors."

Petitioner claims that said ordinance, in so far as it prohibits the employment of dance partners, other than such teachers as are necessary, is unconstitutional and void. The charge that these dance partners were not necessary teachers or instructors admits that they were teachers or instructors. It follows that, if the defendant was charged with any violation of the ordinance, this charge was that, as proprietor of a public dance hall, he employed unnecessary teachers, and permitted them to act also as dance partners.

The ordinance has established no standard by which to determine what number of teachers in any dance hall is necessary, or any limit beyond which it can be said that the teachers employed are unnecessary. We need not go beyond this point in our discussion of the case. The defendant may have believed in good faith, and in good faith may have acted upon the belief, that four teachers were necessary in the conduct of his business. And yet, if this is a valid ordinance, his conviction would be sustained, if the court or jury were of the opinion that only three teachers were necessary. It thus appears that the guilt or innocence of the defendant, in a prosecution under this provision of the ordinance, depends, not upon the law itself, but upon a standard to be fixed and determined by the opinion of the court after the act has been committed.

In *Hewitt v. Board of Medical Examiners*, 148 Cal. 590, 84 P. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750, it was held that a statutory provision for the forfeiture of a physician's license on account of unprofessional conduct, which conduct consisted in advertising "of medical business in which grossly improbable statements are made," was void because it was too indefinite and uncertain to be enforced. "The right of the physician to be secure in his privilege of practicing his profession is thus made to depend not upon any definition which the law furnishes him as to what shall constitute 'grossly improbable statements,' but upon the determination of the board after the statement is made and simply upon its opinion of its improbability." So here, the right of the defendant to employ teachers and use them as "dance partners" is granted, but the limit beyond which he may not legally go is made to depend, not upon any definition which the ordinance furnishes him as to what shall be a necessary number of teachers, but upon the determination of a court, after the act done by the defendant, and simply upon

the court's opinion as to the number of teachers who were necessary.

The petitioner is discharged from custody.

I concur: HAHN, Justice pro tem.

74 Cal. App. 276

PEOPLE v. VILLANUEVA. (Cr. 1220.)

(District Court of Appeal, Second District, Division 1, California. Aug. 28, 1925.)

Criminal law $\Rightarrow$ 517(4)—**Corpus delicti** must be established before admission of confession.

In prosecution under St. 1923, p. 696, prohibiting an unnaturalized foreign-born person from carrying concealed weapons, admission in evidence of defendant's confession that he was born in republic of Mexico, and that he had never been naturalized as a citizen of United States, *held* error, where no other evidence either of defendant's nativity or whether he had been naturalized as an American citizen was introduced.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Jesus Villanueva was convicted of the unlawful possession of a revolver or firearm, and, from the judgment and order denying motion for new trial, he appeals. Reversed.

Drapeau, Orr & Gardner, of Ventura, for appellant.

U. S. Webb, Atty. Gen., Erwin W. Widney, Deputy Atty. Gen., and John L. Flynn, of Los Angeles, for the People.

HOUSER, J. Defendant was convicted under the terms of an act of the Legislature approved June 13, 1923 (Stats. 1923, p. 696), containing, among other things, a provision to the effect that no unnaturalized foreign-born person shall own or have in his possession, or under his custody or control, any pistol, revolver, or firearm having a barrel of less than 12 inches in length, and therefore capable of being concealed upon the person.

Defendant appeals from the judgment and from the order denying his motion for a new trial.

It appears that on the trial, over defendant's objection, evidence was admitted by the court of defendant's confession or admission that he was born in the town of Moratio, in the republic of Mexico, and that he had never been naturalized as a citizen of the United States. No other evidence, either of defendant's nativity, or of the fact as to whether or not he had been naturalized as an American citizen, was introduced in evidence.

The principal point relied on by appellant

for reversal of the judgment is that the fact as to the place of birth of defendant was an essential element of the corpus delicti which could be established only by evidence independent of defendant's confession or admission.

The same point was urged in the case of *People v. Quarez*, or *Juarez* (Cal. Sup.) 238 P. 363 where it is said:

"The corpus delicti of the offense defined in section 2 consists, as we have shown, of two elements—the second being the foreign nativity and nonnaturalization of the appellant. The rule is well settled and the authorities numerous in this state that the extrajudicial statements, admissions or confession of a defendant cannot be used to establish any necessary element of the corpus delicti of the crime charged. The corpus delicti must be established by independent evidence before the extrajudicial statements, admissions or confession of a defendant are admissible. *People v. Jones*, 31 Cal. 565; *People v. Simonsen*, 107 Cal. 345 [40 P. 440]; *People v. Johnson*, 47 Cal. App. Dec. 392 [238 P. 814]."

See, also, *People v. Garcia* (Cal. Sup.) 238 P. 367.

The foregoing cases are conclusive. It therefore appears that prejudicial error was committed by the court against defendant in the admission of the evidence of which complaint is made.

The judgment and the order denying defendant's motion for a new trial are reversed.

We concur: CONREY, P. J.; CURTIS, J.

74 Cal. App. 310

BRUNTSCH v. SALES (two cases).
(Civ. 5139.)

(District Court of Appeal, First District, Division 2, California. Sept. 2, 1925. Rehearing Denied Oct. 1, 1925. Hearing Denied by Supreme Court Oct. 29, 1925.)

1. Attorney and client $\Rightarrow$ 129(2)—Evidence held to show that attorney negotiating lease was acting *sui juris*.

In action to recover secret profits of attorney in negotiating a lease of plaintiff's property for plaintiffs, evidence justified a finding that attorney was acting *sui juris*, and not solely in behalf of his wife, who was also his client, in obtaining lease.

2. Attorney and client $\Rightarrow$ 129(1)—Part owners of property for whom defendant was not acting as agent not entitled to recover secret profits.

In action by part owners of property to recover secret profits of attorney negotiating a lease for them, other owners of property *held* not entitled to recover, where there was no evidence that attorney acted as their agent.

3. Attorney and client ☞129(2)—Evidence held not to show that attorney's wife, part owner of property leased by attorney, was principal.

In action to recover secret profits of attorney negotiating a lease for plaintiffs of their property, claim that attorney's wife, a part owner of property, was principal *held* not sustained by evidence showing attorney and agent of lessor were only principals at beginning of deal, and that in subsequent negotiations wife was principal only in sense in which other owners were.

4. Attorney and client ☞72—Evidence held to show that defendant acted as attorney for all plaintiffs.

In action to recover secret profits in lease of property owned by plaintiffs and wife of defendant attorney, evidence *held* to show that defendant acted as attorney for all plaintiffs.

5. Attorney and client ☞129(1)—Part owners of property and agent of lessor held not necessary or proper parties.

In action by part owners of property to recover secret profits of attorney negotiating a lease for them, other owners of property and agent of lessor *held* not proper or necessary parties.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Separate actions by Herbert A. Bruntsch and Ernest Bruntsch against Dudley D. Sales, consolidated for trial. Judgment for plaintiff in each action, and defendant appeals. Affirmed.

Edward A. Cunha, R. P. Henshall, and R. R. Moody, all of San Francisco, for appellant.

Frank L. Guereña, of San Francisco, for respondents.

STURTEVANT, J. The appellant, Dudley D. Sales, a practicing attorney at law in the city and county of San Francisco, was sued by the respondents Herbert D. and Ernest A. Bruntsch, brothers-in-law of the appellant, for profits alleged to have been secretly made by the appellant in a real estate transaction in which it is claimed that appellant acted as agent and attorney for the respondents. Separate suits were filed by respondents; later they were consolidated, and a trial was had by the court sitting without a jury, judgment was rendered against appellant in each action, and appeals were taken from those judgments.

In the gore block in San Francisco, located between Market street and Eddy street, is a piece of property extending from Market street to Eddy street, rectangular in form, which may be said to be owned as follows: The lot fronting on Market street is owned one-half by the Cooks and the other half by the Bruntsches, and the lot fronting on Eddy

street is owned by the Luchsingers. The findings are as follows:

"I. That defendant is a resident of the city and county of San Francisco, State of California, and has been at all times herein mentioned and now is a duly licensed and practicing attorney at law in and before the courts of said state.

"II. That for several years last past the plaintiff, Margaretha Bruntsch and Tosca Bruntsch Sales, sisters of plaintiff, and Carl C. G. Bruntsch, Ernest A. Bruntsch, and Harold C. Bruntsch, brothers of plaintiff, have been and now are the owners of a one-sixth interest each in the entire one-half interest in the following described land, with the improvements thereon, situated in the city and county of San Francisco, and more particularly described as follows: [Describing the Cook-Bruntsch lot.]

"III. That by instrument dated September 1, 1920, the said land and the buildings thereon were leased by the persons named in paragraph II hereof, and by the owners of the other one-half interest in said property, to Universal Film Manufacturing Company, a New York corporation, hereinafter referred to as the 'company'.

"IV. That negotiations for the leasing of said property were carried on for about nine months immediately preceding September 1, 1920; that said negotiations on the part or for the behoof and benefit of said company were negotiated and carried on by John H. Merrill: that in said negotiations the interest in said property of plaintiff and of plaintiff's said brothers and sisters was represented by defendant, and defendant acted for plaintiff and plaintiff's said brothers and sisters in the negotiations for leasing said property, and in determining and fixing the terms, provisions, and conditions of the lease thereof; and that in so doing defendant negotiated with and through said Merrill, and co-operated with said Merrill in bringing about a meeting of the minds of said company on the one part and plaintiff and his said brothers and sisters on the other part, and in consummating said transactions between said parties; and that in all the said matters, and in the matter of the preparation and execution of the lease, defendant, for a compensation charged to plaintiff by defendant and paid to defendant by plaintiff and other parties in interest, acted as the agent and attorney at law for plaintiff and plaintiff's said brothers and sisters.

"V. That upon the consummation of said lease, and on the 20th day of October, 1920, said John H. Merrill received from said company the sum of \$20,000 as a bonus or commission paid him by said company for his services in procuring and effecting the lease of the premises and property of which said company became the lessee at or about the time last aforesaid, including the property of plaintiff and plaintiff's said brothers and sisters; and that of said amount so paid to him, said Merrill, without the knowledge of plaintiff, paid to defendant, on the 20th day of October, 1920, the sum of \$9,750 as a commission or bonus to defendant for said co-operation of defendant with said Merrill and the part which defendant

had taken in the negotiation and consummation of said lease of the interest of plaintiff and plaintiff's said brothers and sisters in said property hereinbefore described; and that said sum of \$9,750 was and is a profit derived by defendant as agent and attorney in said transaction for plaintiff and plaintiff's said brothers and sisters.

"VI. That plaintiff did not know or discover until the early part of the year 1922 that defendant had received said sum of \$9,750 or any bonus or commission, or any compensation at all for or by reason of said transaction in respect of said property other than the compensation charged by defendant to plaintiff and plaintiff's said brothers and sisters; and that, when plaintiff did learn of the payment made by said Merrill to defendant as aforesaid, plaintiff demanded of defendant one-sixth of the amount so received by defendant, but defendant has not paid, and has refused at all times to pay, plaintiff, or account to plaintiff for a one-sixth part or any part of said amount so received by defendant, and has at all times denied the right of plaintiff to any share or part thereof, and that nothing has been paid by defendant to plaintiff in the premises, and that said claim and demand of plaintiff is wholly unpaid.

"And from the above findings the court concluded:

"I. That Herbert A. Bruntsch, plaintiff above named, is entitled to recover from Dudley D. Sales, defendant above named, the sum of \$1,625, with interest thereon at the rate of 7 per cent. per annum from October 20, 1920.

"II. That Herbert A. Bruntsch, plaintiff above named, is entitled to judgment against Dudley D. Sales, defendant above named, for \$1,625, with interest thereon at the rate of 7 per cent. per annum from October 20, 1920, to date of judgment."

The appellant contends that the defendant's client was his wife, Mrs. Sales, and his obligation as an attorney was to discuss the questions of duty and responsibility with Mrs. Sales, and he also contends that Mrs. Sales as a cotenant was not bound to disclose that she was leasing her interest at a greater price than her other cotenants were getting, and that her attorney was under no greater obligation.

For some years prior to 1920 the defendant was the gratuitous agent of the respondents and their brothers and sisters to collect the rental and to pay the taxes and insurance, and thereafter to pay the balance to each of the co-owners. That agreement was oral, except as to the respondent, Herbert A. Bruntsch, and he had reduced his authorization to writing. When the transaction in dispute arose, the appellant stated to Ernest Bruntsch that there was a new lease coming up when the present lease expired. A short time after that he telephoned to Ernest's wife regarding the terms of the new lease. Later the appellant wrote out the formal lease, presented it to Ernest for his signature, and thereafter charged him \$125 as a fee. The appellant sent a statement of the same charge to

each of the Bruntsch heirs. Herbert A. Bruntsch and the appellant held a few conversations regarding the making of the lease, the terms thereof and the persons to whom the first moneys should be paid and the amount to be paid to Herbert A. Bruntsch. When the lease had been prepared, the appellant presented it to Mr. Bruntsch, and it was thereupon signed. Later a written statement of charges, including appellant's fee for services, was sent by the appellant to Mr. Bruntsch. Both parties concede that the appellant acted as attorney and business agent for his wife, Tosca Bruntsch Sales. Mr. Gootch, an attorney at law, was the resident attorney for Margaretha Bruntsch, and from time to time conferred with the appellant as her representative, and later approved the appellant's bill for expenses incurred and his fee for services rendered. As the transaction proceeded, the appellant conferred orally or otherwise with each of the Bruntsch heirs. Mr. Jesse Steinhart acted as attorney at law for the Universal Company. Mr. E. S. Meriman, a real estate broker, acted as the representative of the Cooks. Mr. Morris, a real estate broker, acted as the representative of Mr. Luchsinger. In this connection it should be noted that Mr. Luchsinger is not a party to the lease, and, so far as the record shows, a separate instrument was probably executed between the Universal Company and him.

After the lease had been executed, a controversy arose between Mr. Morris and Mr. Merrill regarding commissions. On the trial of that action Mr. Sales and Mr. Merrill were both called as witnesses. When they gave their testimony, the instant action had not even been contemplated. During the trial of the instant action parts of the testimony of Mr. Merrill, given in the trial of the Morris case, were read into this record. The same with the testimony of the appellant, Mr. Sales. We shall not attempt to segregate statements made by those witnesses on the same subject, whether made in the one trial or the other. As to what the transaction was as between Mr. Sales and Mr. Merrill, in what capacity each one acted, and as to the agreements made by them, those two men gave testimony. Speaking of Mr. Sales, Mr. Merrill testified:

"I met him at his office. I told him I had an opportunity to sell this lease to the Universal Picture Corporation, and I went to Mr. Sales and asked him if he would protect me in delivering that lease if I would divide with him. I told him I would give him \$10,000 of the bonus on the deal, and he said that he represented the Bruntsches and could protect me. Then I talked the proposition up and went about it to deliver the lease, and Mr. Sales and I acted together at that end. * * * I asked Mr. Sales for an option on the property, which he gave me and I agreed with Mr. Sales that I would pay him half of my bonus for his protection for me to deliver the property. He said he represented the heirs, and could deliver it.

3. Attorney and client ☞129(2)—Evidence held not to show that attorney's wife, part owner of property leased by attorney, was principal.

In action to recover secret profits of attorney negotiating a lease for plaintiffs of their property, claim that attorney's wife, a part owner of property, was principal *held* not sustained by evidence showing attorney and agent of lessor were only principals at beginning of deal, and that in subsequent negotiations wife was principal only in sense in which other owners were.

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"III. That by instrument dated September 1, 1920, the said land and the buildings thereon were leased by the persons named in paragraph II hereof, and by the owners of the other one-half interest in said property, to Universal Film Manufacturing Company, a New York corporation, hereinafter referred to as the 'company'.

"IV. That negotiations for the leasing of said property were carried on for about nine months immediately preceding September 1, 1920; that said negotiations on the part or for the behoof and benefit of said company were negotiated and carried on by John H. Merrill; that in said negotiations the interest in said property of plaintiff and of plaintiff's said brothers and sisters was represented by defendant, and defendant acted for plaintiff and plaintiff's said brothers and sisters in the negotiations for leasing said property, and in determining and fixing the terms, provisions, and conditions of the lease thereof; and that in so doing defendant negotiated with and through said Merrill, and co-operated with said Merrill in bringing about a meeting of the minds of said company on the one part and plaintiff and his said brothers and sisters on the other part, and in consummating said transactions between said parties; and that in all the said matters, and in the matter of the preparation and execution of the lease, defendant, for a compensation charged to plaintiff by defendant and paid to defendant by plaintiff and other parties in interest, acted as the agent and attorney at law for plaintiff and plaintiff's said brothers and sisters.

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had taken in the negotiation and consummation of said lease of the interest of plaintiff and plaintiff's said brothers and sisters in said property hereinbefore described; and that said sum of \$9,750 was and is a profit derived by defendant as agent and attorney in said transaction for plaintiff and plaintiff's said brothers and sisters.

"VI. That plaintiff did not know or discover until the early part of the year 1922 that defendant had received said sum of \$9,750 or any bonus or commission, or any compensation at all for or by reason of said transaction in respect of said property other than the compensation charged by defendant to plaintiff and plaintiff's said brothers and sisters; and that, when plaintiff did learn of the payment made by said Merrill to defendant as aforesaid, plaintiff demanded of defendant one-sixth of the amount so received by defendant, but defendant has not paid, and has refused at all times to pay, plaintiff, or account to plaintiff for a one-sixth part or any part of said amount so received by defendant, and has at all times denied the right of plaintiff to any share or part thereof, and that nothing has been paid by defendant to plaintiff in the premises, and that said claim and demand of plaintiff is wholly unpaid.

"And from the above findings the court concluded:

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The appellant contends that the defendant's client was his wife, Mrs. Sales, and his obligation as an attorney was to discuss the questions of duty and responsibility with Mrs. Sales, and he also contends that Mrs. Sales as a cotenant was not bound to disclose that she was leasing her interest at a greater price than her other cotenants were getting, and that her attorney was under no greater obligation.

For some years prior to 1920 the defendant was the gratuitous agent of the respondents and their brothers and sisters to collect the rental and to pay the taxes and insurance, and thereafter to pay the balance to each of the co-owners. That agreement was oral, except as to the respondent, Herbert A. Bruntsch, and he had reduced his authorization to writing. When the transaction in dispute arose, the appellant stated to Ernest Bruntsch that there was a new lease coming up when the present lease expired. A short time after that he telephoned to Ernest's wife regarding the terms of the new lease. Later the appellant wrote out the formal lease, presented it to Ernest for his signature, and thereafter charged him \$125 as a fee. The appellant sent a statement of the same charge to

each of the Bruntsch heirs. Herbert A. Bruntsch and the appellant held a few conversations regarding the making of the lease, the terms thereof and the persons to whom the first moneys should be paid and the amount to be paid to Herbert A. Bruntsch. When the lease had been prepared, the appellant presented it to Mr. Bruntsch, and it was thereupon signed. Later a written statement of charges, including appellant's fee for services, was sent by the appellant to Mr. Bruntsch. Both parties concede that the appellant acted as attorney and business agent for his wife, Tosca Bruntsch Sales. Mr. Gootch, an attorney at law, was the resident attorney for Margaretha Bruntsch, and from time to time conferred with the appellant as her representative, and later approved the appellant's bill for expenses incurred and his fee for services rendered. As the transaction proceeded, the appellant conferred orally or otherwise with each of the Bruntsch heirs. Mr. Jesse Steinhart acted as attorney at law for the Universal Company. Mr. E. S. Merriman, a real estate broker, acted as the representative of the Cooks. Mr. Morris, a real estate broker, acted as the representative of Mr. Luchsinger. In this connection it should be noted that Mr. Luchsinger is not a party to the lease, and, so far as the record shows, a separate instrument was probably executed between the Universal Company and him.

After the lease had been executed, a controversy arose between Mr. Morris and Mr. Merrill regarding commissions. On the trial of that action Mr. Sales and Mr. Merrill were both called as witnesses. When they gave their testimony, the instant action had not even been contemplated. During the trial of the instant action parts of the testimony of Mr. Merrill, given in the trial of the Morris case, were read into this record. The same with the testimony of the appellant, Mr. Sales. We shall not attempt to segregate statements made by those witnesses on the same subject, whether made in the one trial or the other. As to what the transaction was as between Mr. Sales and Mr. Merrill, in what capacity each one acted, and as to the agreements made by them, those two men gave testimony. Speaking of Mr. Sales, Mr. Merrill testified:

"I met him at his office. I told him I had an opportunity to sell this lease to the Universal Picture Corporation, and I went to Mr. Sales and asked him if he would protect me in delivering that lease if I would divide with him. I told him I would give him \$10,000 of the bonus on the deal, and he said that he represented the Bruntsches and could protect me. Then I talked the proposition up and went about it to deliver the lease, and Mr. Sales and I acted together at that end. * * * I asked Mr. Sales for an option on the property, which he gave me and I agreed with Mr. Sales that I would pay him half of my bonus for his protection for me to deliver the property. He said he represented the heirs, and could deliver it.

* * * I told my wife to do anything that Dudley Sales said, and she turned over to him \$10,500. * * * I requested him to take care of this end of the deal. Mr. Steinhart was the attorney of the Universal people, and there were a lot of angles that had to be straightened out, and I had Mr. Sales attend to them. Personally I was in New York, and Mr. Sales handled this end of it. (The witness referred to an option, saying that it had been returned to Mr. Sales.)

"Q. I will now ask you whose signatures appeared on that instrument? A. The signatures of the heirs—the Bruntsch heirs. I did not see them sign it. I saw Mr. Sales' signature as attorney for them. * * * The \$9,750 which was paid by my wife, pursuant to my instruction, to Mr. Sales, was given to him to be, as I understood it, Mr. Sales' own money for himself. He is not to pay my wife or me any part of it. I have no agreement that he is to repay my wife or me any part of it. That money has absolutely been paid over so far as I am concerned. I am satisfied that Mr. Sales can keep it, and he earned it in consideration for services and rendering protection accorded me in connection with this deal. * * * When it was turned over to Mr. Dudley Sales it was his money. It was considered his money, and I still consider it at the present time Mr. Dudley Sales' money. He has not promised to return any part of it to me or to my wife."

Mr. Sales testified that Mrs. Sales and Mr. Merrill never came together regarding the matter. Mr. Sales also testified:

"On two separate occasions I gave Mr. Merrill an option. * * * The offer, I believe, involved a 30-year lease. I have forgotten just exactly the rental, just exactly what the rental was, but I believe that \$2,200 per month, with \$50,000 cash deposit as security for the payment of the rental. That proposition was acceptable to all parties, and an option was given. * * * That option expired before the lease was executed. * * * I was Mr. Merrill's attorney in fact to extend his agreement with the Universal people beyond the time limit, and in that respect only, and I have already stated that I represented Mrs. Sales as her agent in the transaction, * * * and Mr. Merrill, being in the East, asked me to represent him in making the various contracts and in trying to get the different contracts together. * * * I agreed with Mr. Merrill that in consideration of one-half of the commission that he might get out of that one-half I would get one-half of that for my work in representing the interest that I did and for not permitting any one else to get this save him as my client, and that out of my half I would pay Mr. Merriman \$250. * * * In the settlement of our account in connection with this, that is, in dividing the money in the way in which it was divided, nothing was said on the subject, and there was no understanding—I considered it mine. * * * Later I think, as I said at the time, it was a mere plain agreement to divide the commission or bonus, I have forgotten just what the telegram

mentioned, bonus, but, anyway, on it was a plain simple agreement to give me one-half of all he got."

Mrs. Sales testified:

"He (my husband) came home one night and told me that a Mr. John Merrill was going to put it (lease) through and whether I would consent to give Mr. Merrill an option on my one-twelfth interest, promising in signing this option on the lease that was pending not to act through anybody else but Mr. Merrill, and that if I did that Mr. Merrill would give me one-half of his bonus, whatever it might be."

[1] Of course, there is other evidence in the record, but, if the trial court believed the facts above recited, and from its judgment we must assume that it did, then, and in that event, the trial court was justified in holding that primarily the appellant was acting sui juris and associated himself with Mr. Merrill to obtain the lease. He was not set in motion by Mrs. Sales acting as a cotenant, but he afterwards acted for her as her attorney in the same degree in which he acted as attorney for each of the Bruntsch heirs.

[2] The appellant claims that, if any one is entitled to recover, the Cooks and Mr. Luchsinger are likewise entitled to recover. The contention is without merit. There was no evidence at all that the appellant did in any respect act as attorney or agent for the Cooks or for Mr. Luchsinger.

[3] In his fifth point the appellant claims that Mrs. Sales was principal, but, as we have pointed out above, Mr. Merrill and Mr. Sales were primarily the principals. As the transaction unfolded Mr. Sales became attorney for Mrs. Sales and her brothers and sister. In that aspect of the case it may be conceded that Mrs. Sales was a principal, but she was a principal only in the sense in which all of the Bruntsch heirs were principals.

[4] In the next place the appellant asserts that there is absolutely no evidence in the record that Sales was the attorney for any of the Bruntsches other than his wife, and the finding of the court below to that effect is without any evidence to support it. Looking at the excerpts of testimony which we have quoted, it is patent that this assertion by the appellant is in direct conflict with the evidence contained in the record.

[5] Finally, it is asserted by the appellant that there is a fatal defect of parties defendant in this case because the Cooks, Mr. Luchsinger, and Mr. Merrill were not made parties. From what has been said above we think that no one of them was either a proper or necessary party.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

74 Cal. App. 231

SUN-MAID RAISIN GROWERS OF CALIFORNIA v. PAPAIZIAN. (Civ. 5221.)

(District Court of Appeal, First District, Division 2, California. Aug. 26, 1925, as Modified Sept. 14, 1925.)

1. Agriculture ⚡6—Evidence held to show contract for delivery of produce was signed under duress.

Evidence held to show that contract by which defendant agreed to deliver his raisins to a mutual association was signed under such conditions of duress and menace, as defined by Civ. Code, § 1570, as to destroy element of free and mutual consent essential thereto, and authorize rescission under section 1689.

2. Agriculture ⚡6—Mutual association of growers held responsible for acts inducing signature to contract.

Mutual association of raisin growers, as assignor of contract, requiring defendant to deliver his crop of raisins to association, which had full knowledge of unlawful acts that were practiced by some of its members, or those "jointly interested," to secure defendant's signature thereto, held responsible for such acts, in view of Civ. Code, § 1689.

3. Appeal and error ⚡931(3) — Reviewing tribunal not required to assume that trial court will make finding contrary to evidence.

Reviewing tribunal is not required to assume that trial court would have made a finding contrary to all competent evidence before it.

4. Appeal and error ⚡1071(6)—Failure of court to make finding on issues brought forward by parties, material to main issue raised by pleadings, held reversible error.

Where plaintiff in action in claim and delivery for raisins pleaded a cause of action in replevin, and defendant entered a denial and pleaded affirmatively his right to possession, failure of court to make a finding on issues brought forward by parties during course of a trial, which were material to main issue raised by written pleadings, held reversible error.

5. Evidence ⚡594—Generally, uncontradicted testimony of witness should be accepted as proof of fact.

Generally, uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted as proof of the fact.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by the Sun-Maid Raisin Growers of California against Peter Papazian. Judgment for plaintiff, and defendant appeals. Reversed.

J. K. Tuttle, of Fresno, and Edward M. Treadwell, of San Francisco (R. S. Laughlin, of San Francisco, of counsel), for appellant.

Harry M. Creech, of San Francisco, and Harris, Johnson, Wiley & Griffith, of Fresno, for respondent.

NOURSE, J. Plaintiff commenced this action in claim and delivery. The cause was tried by the court sitting without a jury, and judgment went to the plaintiff, from which the defendant has appealed on a record prepared under section 953a, Code of Civil Procedure.

The suit involves the right to the possession of about 75 tons of raisins produced on the defendant's land in the county of Fresno during the year 1923. Plaintiff's claim rests on an assignment from the Sun-Maid Raisin Growers of a written contract executed by its assignor and the defendant for the disposition of all the raisins or raisin grapes produced by the defendant for a specified period upon a certain described piece of property. The complaint is in the usual form in claim and delivery, and alleges that the value of the raisins which the defendant holds in his possession was about \$6,000. The answer is in the usual form, denying plaintiff's ownership or right to the possession of the raisins. With the issue so framed the plaintiff rested its case upon proof of the execution and assignment of the contract, and of defendant's refusal to relinquish possession of the raisins. Thereupon the defendant moved for a nonsuit upon the ground that the contract under which plaintiff claimed was in fact a contract of agency and not a contract of sale, but upon the suggestion of the trial court it was agreed that this motion should be held in abeyance until defendant's case was closed. Defendant's case consisted of proof of his rescission of the contract upon the ground that his signature thereto had been secured by menace and coercion, and that his refusal to deliver possession of the raisins under the contract was justified because the contract, having been executed through menace and coercion, was void and did not confer upon the plaintiff any right to the possession of the property. As the complaint did not plead the contract or set forth any right of the plaintiff under it, the defense of menace and coercion was not specially pleaded, and, accordingly, no finding was made thereon. However, the whole case was tried upon the theory that the two issues were before the court: First, whether the contract was one of sale or one of agency only; and second, whether the contract was void because it had been signed under menace and duress. On this appeal the main point urged by the defendant is that the evidence conclusively shows without contradiction that defendant's signature to the contract was obtained through menace and coercion, and, as we are satisfied that the judgment must be reversed for that reason, it is not necessary to consider the other grounds urged by the defendant.

The Sun-Maid Raisin Growers' Association was a mutual association organized under the laws of this state by the raisin growers of the section, having its headquarters in the coun-

ty of Fresno, for the purpose of controlling the output and marketing of raisins and raisin grapes produced in that locality. In aid of this purpose, and for the further purpose of avoiding competition in the marketing of raisins, the association publicly announced some time in the spring of 1923 that it would not operate for that season unless at least 90 per cent. of the growers of the locality joined with the association through the execution of growers' contracts similar to the one in suit. To secure these contracts a concerted "drive" was instituted by the officers of the association through the aid of committees and captains of groups of solicitors. The drive was begun about the 1st of April, 1923, and the association announced that it would end on April 20th of that year. The required number of signatures not having been secured at that time, the period of the drive was therefore extended to May 5th. In fairness to the officers of this association it should be said that, so far as this record discloses, no one of them was directly engaged in any of the unlawful acts hereinafter related, but, on the other hand, it must also be said that these unlawful acts were specifically brought to their knowledge; that they used the threat of a repetition of such acts in their campaign to "persuade" other growers to sign with the association, and that they and the association profited by these acts. All the evidence on the issue of menace and coercion stands in the record uncontradicted; some of it comes from the testimony of witnesses called by the plaintiff; but in no case did the plaintiff attempt to controvert any of this showing except through the testimony of one officer of the association, who stated that he personally had not used any threats for the purpose of securing defendant's signature. The defendant, Peter Papazian, testified that he had lived in Fresno county 15 years and in the United States about 29 years. He occupied the premises involved in the contract in suit with his wife and children during the year 1923, and upon this property raised a large quantity of raisin grapes. The so-called drive for signatures to contracts with the Growers' Association, which had commenced on April 1, 1923, reached its height about the 19th or 20th of that month. The defendant's home was burdened by a mortgage held by one of the banks of the county, and he was at that time endeavoring to get some assurance from the bank to aid him to harvest the season's crop. He soon found that it was impossible for him to get any assistance in this quarter unless he became a member of the association by signing one of the prepared contracts, which the association used for that purpose. About the 20th of April he was called to the bank by one of the officers thereof acting in the interest of the association and urged to sign the contract. Having refused to do so after

an hour's persuasion he was turned over to another to whom he also announced his intention to decline to sign the contract. Other persons whose connection with the association was more or less remote frequently urged him to sign, and called his attention to the fact that those who refused to sign were being subjected to severe penalties through the destruction of their homes and vineyards and through personal injuries inflicted by what were then termed "night riders." Some of these persons came to him at his ranch, others telephoned to him, and others sent messages through friends urging him to sign and predicting severe trouble if he refused. Finally he was told that if he refused to sign "we are going to get you," or "we will fix you." In the latter part of April he was told that numerous threats were being made against him, and that he should leave the county; that "unless you go, the people are after you, and they are going to fix you." He thereupon went to Modesto, where he remained about five days, during which time he received many telegrams and telephone calls from people in Fresno county demanding that he sign the contract. Finally he was approached by two Fresno men, who insisted that he return to Fresno and sign up. He again refused, and these same people telephoned to him again early in the evening asking him to reconsider and give them his final conclusion. He stated to them that he would not sign the contract, and late that night he received a message from one of his neighbors that his home was being wrecked. He thereupon got into communication with his wife, met her in Stockton and learned from her something regarding the methods of the campaign for signatures which was being conducted in his home county; how his neighbors had been threatened and abused and their homes attacked and their vineyards destroyed. He thereupon telegraphed to Mr. Merritt, the manager of the Raisin Growers' Association, asking him to stop the campaign of violence and damage to property conducted by the so-called "night riders," and from this officer he received the reply that no one was authorized by the association to act through coercive or violent measures. He thereupon telegraphed to the sheriff and the district attorney of the county. No reply seems to have been had from the district attorney, but to the wife of the defendant the sheriff of the county said: "Lady, we can't do anything; they only want you to sign, that's all." About two days after the communication with the manager of the association the defendant returned to his home and discovered that the work of destruction executed by those who had raided his home on the night of May 3d for the purpose of forcing him to sign the association contract, consisted of the following: The doors and windows of his home were all broken, the furniture was

smashed and the bedclothes torn and scattered about the floors of the rooms, the chairs were broken, and a new piano was cut up and destroyed, and all the canned fruit and jars of fruit or preserves were broken and destroyed. In addition to this the raiders had overturned a blacksmith shop in the rear of the house and cut down or destroyed trees on the premises. After having witnessed this destruction he again called upon his banker and was informed that his only safety was in signing the contract. He then called upon his attorney, who had been his confidential adviser for a number of years past, asking him to aid him in the protection of his property, and asking his advice as to what proceedings to take. He soon, however, learned that this attorney was actually in the employ of the Raisin Growers' Association, and the only advice he was able to get from him was that he should sign the contract. Having unsuccessfully appealed for protection to the legally constituted law officers of the county, to the manager of the association, to his confidential banker, and to his confidential attorney, and having been informed that his only assurance from further abuses and violence lay in his executing the contract, he went to his banker and signed the contract which had already been prepared for him. As indicating his reluctance to sign at the time he stated to the banker that he felt that in doing so his property was lost, and that he would give the place to him. This occurred on May 9, 1923. On the 25th of August following the defendant gave the association notice of his rescission of the contract upon the ground that it was obtained from him by coercion and threats, and at the same time demanded the return of the contract and notified the association that he would refuse to deliver raisins to the company. In this connection he testified that from the time of his signing the contract he had constantly been in fear of additional oppression on the part of the association, and that on account of this constant fear which he entertained he did not seek to cancel his contract earlier.

Much of this evidence is corroborated by the testimony of Mary Papazian, the defendant's wife, who pictured the reign of terror which was practiced upon the defendant's neighbors, and her unsuccessful efforts to obtain protection from the local authorities. The witness Sally Ship, who lived just across the road from the defendant's home, saw the damage that was done. She had been subjected to the same abuse by so-called "raiders," acting in the interest of those who insisted upon the growers signing contracts with the association, but had refused their demands and had been successful in protecting her home from their threatened lawlessness. Other neighbors of the defendant either witnessed the night of destruction or saw the damage to defendant's home imme-

diately after, and others detailed other acts of violence and lawlessness which were committed in the nighttime in the campaign to secure signatures to association contracts. These facts were constantly brought to the knowledge of the defendant by his neighbors and by those actually and actively employed by the association in securing contracts, and he was advised by those in whom he put his trust that, in order to prevent any further destruction to his property, he should sign the contract with the association.

[1, 2] It is only necessary to read the foregoing evidence to be satisfied that the contract was signed under such conditions of duress and menace as to destroy the element of free and mutual consent, which is essential to all contracts of this nature. The menace upon which the appellant relies brings the case squarely within the definition of that term found in section 1570 of the Civil Code, "of unlawful and violent injury to the person or property of any such person," while the responsibility of the respondent is covered by that portion of section 1689, Civil Code, which authorizes the rescission of a contract when the consent was obtained by duress, menace, etc., "exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party." As the evidence of menace under which the contract was signed is wholly uncontroverted, and as the respondent's assignor, being a mutual association of the raisin growers of the locality, had full knowledge of the unlawful acts which were practiced by some of its members, or at least by those "jointly interested," the responsibility of the association for these acts is definitely fixed under the Code section.

[3-5] The only answer which the respondent makes to the appellant upon this point is that this court should assume that the trial court may have drawn the inference that, though all these acts of violence and lawlessness were true, the appellant nevertheless was not really in fear when he executed the contract. In this connection, the respondent states that the trial court found that the defendant was not controlled in signing the contract by coercive acts. We have searched the findings included in the certified transcript, and fail to find that any such finding was made by the trial court. If such a finding was made, it is patent that it was wholly unsupported by the evidence. If the finding was not made, there is no rule of law which requires this court to assume that the trial court would have made a finding contrary to all the competent evidence before it. The plaintiff pleaded a cause of action in replevin. The defendant entered a denial and pleaded affirmatively his right to possession. On the trial, the plaintiff presented a contract purporting to place the right of possession in the plaintiff. That evidence was met by a showing constituting coercion. The

court should have been asked to and should have made a finding on the issues brought forward by the parties during the course of the trial which were material to the main issue raised by the written pleadings. *Wolf v. Gall*, 176 Cal. 787, 789, 790, 169 P. 1017. The trial court having failed to make a finding on that material issue, such failure constitutes reversible error. The general rule is as stated in 10 California Jurisprudence 1143, § 362, "that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted as proof of the fact." *Stewart v. Silva*, 192 Cal. 405, 221 P. 191; *Anso v. Anso* (Cal. App.) 237 P. 814.

Judgment reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

74 Cal. App. 322

BELL v. BRIGANCE. (Civ. 5181.)

(District Court of Appeal, First District, Division 2, California. Sept. 2, 1925. Rehearing Denied Oct. 1, 1925. Hearing Denied by Supreme Court Oct. 29, 1925.)

1. Taxation ☞789(3)—Tax deed to purchaser's assignee held admissible without other proof of assignment.

Tax deed to assignee of purchaser held admissible in action to quiet title without preliminary proof of assignment, in view of Pol. Code, §§ 3785b, 3786, 3787; the deed itself being conclusive evidence of collector's proceeding in determining that there had been an assignment.

2. Taxation ☞656—Statute held to contemplate that tax sale may continue from day to day, if additional time required to that fixed in statute relative to notice.

Pol. Code, § 3767, providing that tax sales shall be held not less than 21 nor more than 28 days after date of publication of notice, and section 3764, providing that sale may continue from day to day, if additional time is required, held to contemplate commencement of sale within time mentioned, and continuance from day to day until property is sold, and hence a tax deed executed after expiration of time specified is not void.

3. Taxation ☞817—Defendant's attack on validity of plaintiff's tax deed without merit, where defendant did not specifically call to attention of court what was lacking.

Objection that tax sale to plaintiff's assignor would be valid only in event sale to state would be valid, and that there was no evidence by plaintiff of deed to state or evidence that state was entitled to deed, held without merit, where plaintiff introduced in evidence certificate of redemption, tax deed, and tax receipt, and defendant failed to point out specifically any defect of proof.

4. Taxation ☞789(3)—Tax deed, in view of statute, constitutes prima facie evidence that copy of delinquent notice, as published, was mailed to taxpayer.

A tax deed, in form prescribed by Pol. Code, § 3785b, is prima facie evidence, under sections 3786, 3787, of due publication of delinquent notice provided for by sections 3764, 3767, and of mailing of copy of notice to taxpayer, as required by section 3771a.

5. Taxation ☞789(3)—Objection to tax deed as evidence because name of taxpayer was misspelled on assessment roll without merit.

In an action to quiet title, where defendant's objection to plaintiff's tax deed, because taxpayer's name was misspelled on assessment roll, held without merit, in view of fact that from examination of photographic copy of assessment roll it was impossible to say with certainty that name was misspelled.

6. Taxation ☞428—Abbreviation "\$" at head of columns in assessment roll held authorized.

Under Pol. Code, § 3884, the abbreviation "\$" at the head of columns in assessment roll held authorized.

7. Trial ☞163—Motion for nonsuit for plaintiff's failure to maintain issues or to show right in property involved improper in failing to point out specific elements of evidence plaintiff omitted to introduce.

In action to quiet title, a motion for nonsuit by defendant on ground that plaintiff had failed to maintain issues, and had failed to show any right, title, or interest in property involved, was improper, in that, when made, the attention of the court was not called to specific elements of evidence which plaintiff had omitted to introduce.

8. New trial ☞157—Party moving for new trial must take steps to present matter and secure determination thereof.

It is the duty of party moving for new trial to take steps to secure its presentation to, and determination by, court, as otherwise he will not be heard to complain that motion was not actually heard or determined.

On Petition for Rehearing.

9. Taxation ☞627—Complaint that delinquent tax list did not designate the "amount of taxes, penalties, and costs" within statute held without merit.

In an action to quiet title, defendant's complaint that delinquent tax list designated "the amount due for taxes and costs," but did not designate "the amount of taxes, penalties and costs" within Pol. Code, § 3764, as amended by St. 1913, p. 556, held without merit, where delinquent assessment roll in transcript correctly showed amount for which property was sold, including penalties and costs, notwithstanding published delinquent list made no mention of penalties.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action to quiet title by Chester A. Bell against J. W. Brigance. Judgment for plaintiff, and defendant appeals. Affirmed. See, also, 229 P. 27.

William Lewis and Guy Lewis, both of Los Angeles, for appellant.

Emmet H. Wilson, of Los Angeles, for respondent.

STURTEVANT, J. Action to quiet title. From a judgment in favor of the plaintiff the defendant has appealed under section 953a of the Code of Civil Procedure.

The respondent has interposed a motion to affirm the judgment. That motion is based on the ground that the appellant has not complied with the statutory provisions in making a record. In the view we take of the case it will not be necessary to pass on the motion.

It will be remembered that prior to 1895 it had been the law of this state that property on which state and county taxes were delinquent might be sold by the tax collector at public auction to the highest bidder, and, in default of any acceptable bids, that then, and in that event, the property might be sold to the state of California. F. P. Deering's Pol. Code (1886) §§ 3746-3819. In 1895 many changes were made in the law, and the general effect of those changes was to provide that all sales would be made to the state. Stats. 1895, c. 218. In 1913 the Legislature again took up the consideration of the subject, and made such additions and amendments as to it seemed necessary, to the end that thereafter, under certain circumstances, such properties might be sold by the tax collector at public auction to the highest bidder, and leaving the statute to stand which under other circumstances would authorize a sale to the state. The respondent claims to have purchased the property in question pursuant to the amendments of 1913.

[1] When the plaintiff brought forward the deed made by the tax collector, and offered the same in evidence the appellant objected on the ground that the deed was "incompetent, irrelevant, and immaterial, and no proper foundation laid." The objection was overruled, and the appellant presents the point at this time. The deed recites that it is made "between W. O. Welch, tax collector of the county of Los Angeles, state of California, first party, and Chester A. Bell, second party"; that the property was sold to Fred Stein, and it also recites that the tax collector "does hereby grant to the said second party, the assignee of said purchaser," etc. The appellant complains that the respondent had not previously introduced any evidence to the effect that Bell had become the assignee of Stein. The respondent contends that he was not bound to do so, and he cites sections 3785b, 3786, and 3787 of the Political Code as sustaining his position. Section 3785b authorizes the tax collector to

execute such a deed "to such purchaser, or his assigns." By direct reference sections 3786 and 3787 are made applicable to such a deed. Section 3786 provides that "such deed, duly acknowledged or proved, is primary evidence * * *" of eight different elements, enumerating them. Section 3787 provides:

"Such deed, duly acknowledged or proved, is (except as against actual fraud) conclusive evidence of the regularity of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed."

As the statute authorizes the tax collector to write the deed and to execute it to the purchaser or his assigns, it necessarily became one of his proceedings to ascertain and determine, if requested, whether Stein had conveyed to Bell, and, if so, to execute the deed to Bell. It therefore seems clear that the deed, by reason of the provisions of section 3787, became conclusive evidence of the regularity of the tax collector's proceeding in ascertaining whether there had been an assignment.

[2] The appellant next contends that the tax collector executed the deed one day after his authority had expired. In this connection the appellant calls attention to the fact that the notice of sale was published first on June 8, 1921. He then calls attention to the provisions of section 3767 of the Political Code, and asserts that the property should have been sold on a date not less than 21 nor more than 28 days from June 8, 1921, whereas it was sold on the 7th day of July, 1921; that is, the twenty-ninth day after the date of the first publication. If our statute had no other provisions on the subject except what is contained in section 3767, appellant's position might be sustained, but the statute contains other provisions. In making the changes that were made in 1913 the Legislature provided the contents of the notice of sale. Pol. Code, § 3764. The statutory form so provided recites:

"In pursuance of law, public notice is hereby given that, commencing on the — day of —, 19—, at the hour of — o'clock — M., of that day, and continuing from day to day thereafter, if additional time is required to complete the sale, in the office of the tax collector. * * *"

Reading all of the provisions of the statute together, it does not seem to be doubtful that the sale should commence within the time mentioned, not less than 21 days and not more than 28 days after the date of the first publication of the notice, but that it is within the contemplation of the statute that the sale may be continued from day to day if additional time is required.

[3] The appellant claims that there was no evidence of a deed to the state or any evidence that the state was entitled to a deed, and he makes the claim that under the pro-

visions of our statute the sale to Stein would be valid only in the event that a sale to the state would be valid if Stein or some other individual had not purchased at public auction. The appellant has not specifically called to our attention what was lacking. The respondent introduced in evidence: (1) Certificate of redemption showing a redemption by respondent of the property involved, paying all back taxes and penalties down to July 20, 1921; (2) deed from tax collector to respondent dated July 21, 1921; and (3) tax receipt issued to respondent covering taxes for first installment for the year 1922.

[4] In disposing of the last point we stated that the appellant did not point out any omission specifically. We made the statement by reason of the next point which the appellant presents, and that is that the respondent at the trial introduced no evidence showing or tending to show that there was mailed, addressed to Carrie Gollinger, the taxpayer, the notice provided for in section 3771a of the Political Code, unless the respondent's deed be considered evidence on the subject. The form of the deed is prescribed by section 3785b of the Political Code, and there is no contention but what respondent's deed conformed in every respect thereto. That section expressly provides that the provisions of sections 3786 and 3787 of the same Code are applicable to the deeds provided for in section 3785b. The fifth subdivision of section 3786 provides that such deed duly acknowledged is primary evidence that at a proper time and place the property was sold as prescribed by law and by the proper officer. It has been held that the proper time for a sale is the time stated in the notice of the delinquent sale. *Tully v. Bauer*, 52 Cal. 487, 489. But the notice of the delinquent sale, its form, and the time and manner of its publication, are provided in sections 3764-3767 of the Political Code, and by section 3771a of the same Code the tax collector is required to mail to the taxpayer, at his last known address, at least 21 days before the date of sale, a copy of the delinquent list or a notice in form as provided for in said section. When, as to notice, it was held that a tax deed was prima facie evidence of the due publication of a delinquent notice, it seems clear that it would equally be prima facie evidence that a copy of the notice as published was mailed. As the appellant introduced no evidence to the effect that the notice was not mailed, the trial court acted quite properly in holding that there was some evidence that the provisions of the statute concerning the mailing of the notice had been complied with.

[5] In the fourth division of his brief the appellant complains that the name of the taxpayer as it appeared on the assessment roll was "Gollinger," and as it appears in the plaintiff's deed it is spelled "Gallinger"; that certain columns in the assessment roll

are headed with the "\$" mark; and that such an abbreviation is not one authorized by law.

What purports to be a photographic copy of the assessment roll is contained in the transcript. The writing is very small, sometimes scratched and sometimes blurred by the photographic process, but, as we read the writing, we are unable to say that the taxpayer's name was spelled on the assessment roll with an "o" instead of an "a." The findings are in favor of the respondent. On the record before us we cannot say there is no evidence to support the implied finding that the name was correctly spelled.

[6] As to the abbreviation for the word "dollars," we think the appellant has misconstrued section 3884 of the Political Code. That section should be construed as though the words which we have inserted in brackets were expressly contained in the section. The section has the same meaning as though it were written as follows:

"In the assessment of land, advertisement and sale thereof for taxes, initial letters, abbreviations [may be used], and the figures may be used to designate the township, range, section or part thereof, and such other abbreviations [may be used] as may be approved by the state board of equalization; provided, a written or printed explanation of such abbreviations [as have been approved by that board] shall appear on each page of the assessment roll or book."

[7] The appellant complains because the trial court denied his motion for a nonsuit. The proceeding was as follows:

"Mr. Wilson: The plaintiff rests.

"Mr. Lewis: Now, the defendant moves for a nonsuit upon the ground of the entire failure of the plaintiff to maintain the issues upon his part and in his failure to show that he has any right, or interest whatever in the property involved in this action by the evidence already in.

"The Court: The motion will be denied."

At the time the above proceedings were had the plaintiff had introduced the evidence hereinabove enumerated. When he made the motion for a nonsuit he did not call to the attention of the court, and has not called to our attention, any specific elements of evidence which the plaintiff had omitted to introduce otherwise than those matters that have been considered by us in other portions of this decision.

[8] The case was tried before Judge Vicini, judge of the superior court of Amador county, acting as a judge of the superior court of Los Angeles county. After judgment had been ordered for the plaintiff, the defendant served and filed a notice of intention to move for a new trial. He also served and filed the affidavit of Mr. Lewis in support of his intended motion. Later the defendant served

notice that he would make his motion on the 20th day of November 1923. On the date last mentioned both counsel entered into a stipulation that the motion for a new trial might be submitted without argument upon the affidavit above mentioned. The record does not disclose the fact, but appellant's brief states that the motion was not passed upon, and that it was denied by operation of law. Predicating his contention on that condition of the record, the appellant claims that it was prejudicial error that his motion was not actually heard and actually determined by the trial judge. It is clear that it was the appellant's motion, and, if he had desired an actual ruling on the motion, he should have made it at such a time, and should have taken such steps as would have caused the matter to be properly presented to a judge of the superior court of the state of California, in and for Los Angeles county, and thereafter to have requested a ruling on the motion within the period provided by law. It was not the duty of the respondent to take any step looking toward the presentation or the determination of the appellant's motion.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

On Petition for Rehearing.

PER CURIAM. [9] The petition for a rehearing is denied. In his petition the appellant contends that the delinquent list designated a sum which was the "amount due for taxes and costs," but did not designate "the amount of taxes, penalties and costs." Pol. Code, § 3764, as amended by chapter 299, Stats. 1913. The point was not made in the trial court, nor was it made in the opening brief or reply brief, and is made for the first time in the petition for a rehearing. Nevertheless, we think the point is without merit. A copy of the delinquent assessment roll pertinent to the property involved is in the transcript. On its face it shows that the amount for which the property was sold included penalties and costs, and the amount of each item is separately stated. The delinquent list, as published, contained a recital explaining the meaning of figures. That explanation recites that the figures "were intended to and do represent respectively in dollars or in cents, or in dollars and cents, the amount due for taxes and costs," but that recital was not intended to state, and did not state, that the figures did not include penalties. The ambiguity, if any, was not sufficient to override the clear statement and enumeration on the face of the delinquent list. If the point had been made in the trial court, the opposing party would certainly have had the right to show that the amount stated in the published notice complied in

all respects with the call of the statute, notwithstanding any ambiguity contained in the notice.

74 Cal. App. 303

CARROLL v. CENTRAL COUNTIES GAS CO. (Civ. 2983.)

(District Court of Appeal, Third District, California. Sept. 1, 1925.)

1. Gas ⚡17 — "Ordinary care" required in maintenance of pipe lines.

A gas company is under a duty to use "ordinary care" in construction and maintenance of its pipe lines to prevent escape of gas, which means such care as a reasonably careful person, in view of dangers and likelihood of injury, would exercise to prevent injury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ordinary Care.]

2. Negligence ⚡59 — Defendant liable, though particular injury not foreseeable.

If defendant ought to have anticipated, in exercise of ordinary care, that negligent act was likely to result in injury, it is liable for injuries proximately resulting therefrom, though it could not have foreseen particular injury which did happen.

3. Gas ⚡20(4)—Negligence in maintenance of unprotected gas pipes question for jury.

It cannot be said as a matter of law that maintenance of 3-inch gas pipe line for 54 feet parallel to a bridge without support was not negligence, or that defendant could not have foreseen danger to persons using highway, or that defendant did not owe duty to carry pipes in more secure position.

4. Gas ⚡20(4)—Negligence question for jury.

Whether position in which defendant maintained gas pipes was negligence cannot be raised by demurrer, but is a question of fact to be determined by the evidence, since whether negligence can be inferred is for court, but whether negligence ought to be inferred is for jury, which rule applies, where facts are in dispute, as well as where evidence is conflicting if conflicting inferences can be reasonably drawn therefrom.

5. Gas ⚡20(4)—Proximate cause of injury to traveler held for jury.

Where car in which plaintiff was riding was deflected from its course and struck defendant's gas pipe line, causing gas to ignite and burn plaintiff, it cannot be said, as matter of law, that defendant's negligence in maintaining its pipes in open was not proximate cause of plaintiff's injury, since the original negligent act may be so continuous that the concurrent, wrongful act will be regarded not as independent, but as conjoining with original act.

6. Gas ⚡18—Negligent party cannot rely on presumption others will obey laws.

Where car in which plaintiff was riding was deflected from course and struck defendant's pipe line, causing gas to ignite and burn plaintiff, claim that defendant could not have fore-

seen act of offending automobile in violating law cannot be set up, since one who is himself negligent cannot rely on presumption that others will exercise due care and obey laws.

7. Gas — 20(4)—No necessary inference danger to be anticipated could come only from violation of law by another.

Where defendant maintained its gas pipes in open parallel to a bridge, it cannot be said as a necessary inference that the danger to be anticipated could come only from a violation of law or duty on part of another, since such danger might come from purely accidental causes.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Geneva Carroll, by her guardian ad litem, T. L. Carroll, against Central Counties Gas Company. Judgment for defendant, and plaintiff appeals. Reversed.

G. L. Aynesworth and L. N. Barber, both of Fresno, for appellant.

Power & McFadzean, of Visalia, for respondent.

FINCH, P. J. The defendant's demurrer to the complaint herein was sustained without leave to amend, and judgment was thereupon entered in favor of defendant. Plaintiff has appealed from the judgment. The third and fourth paragraphs of the complaint read as follows:

"That at all times herein mentioned defendant was and still is engaged in the production and distribution of artificial gas for illuminating, heating, and other purposes in the county of Tulare, state of California. That for the purpose of distributing said gas defendant at all times herein mentioned maintained and still maintains along and upon that certain public highway in the county of Tulare, known as the Visalia-Exeter highway, a certain pipe line in which defendant at all times maintained and still maintains such gas at a pressure of more than 100 pounds to the square inch. That at the point where the said highway crosses that certain creek or ravine known as Deep Creek a wooden bridge over said creek or ravine has been constructed, and at all times herein mentioned was and still is maintained as a part of the said public highway. That at all times herein mentioned the said bridge was and still is guarded on either side only by a light wooden railing. That at said point the said defendant laid and constructed, and at all times herein mentioned maintained and still maintains, its pipe line carelessly and negligently in the following particulars, to wit: That the said pipe line consisted and still consists of a 3-inch steel pipe inclosed within a 6-inch steel casing; that the said pipe and casing were and still are suspended over and across the bed of said Deep Creek upon two concrete piers constructed at either side of the bed of said creek and separated by a distance of 54 feet or thereabouts, without any intermediate support; that said pipe line was constructed, and was and still is maintained in a position parallel to said bridge and at a dis-

tance of approximately 5 feet to the north thereof, and 2 feet or thereabouts below the level of the floor of said bridge, and 6 feet and 4 inches or thereabouts above the bed of said creek; that defendant carelessly and negligently permitted the said casing to become broken at a point between the said piers and at all times to remain in that condition, so that it afforded no protection or support to the said pipe line.

"That on or about the 10th day of December, 1923, plaintiff was riding as a guest in a certain automobile upon and along said public highway, approaching said bridge in a westerly direction. That there is a pavement of 16 feet or thereabouts in width approximately in the center of the said highway with earthen shoulders on either side. That in approaching the said bridge the driver of the said automobile was forced to turn the right wheels of said automobile off the said pavement to avoid a collision with an approaching automobile from the opposite direction. That when he attempted to return thereto and enter upon said bridge said automobile was, without any fault of said driver, deflected from its course, so that it went through the railing and fell from the said bridge; that as a consequence of the careless and negligent construction and maintenance of said pipe line of said defendant as hereinbefore stated said automobile in so falling struck said pipe line and broke the same, permitting the gas to escape therefrom, and caused the escaping gas to become ignited, thereby seriously burning and injuring and permanently disfiguring plaintiff to her damage in the sum of \$50,000."

The demurrer is both general and special. It will be sufficient to consider the grounds of demurrer urged in respondent's brief.

[1] The defendant was under obligation to exercise ordinary care in the construction and maintenance of its pipe line to prevent the escape of gas therefrom.

"This means such care as a reasonably careful and prudent person, having in view the dangers to be avoided and the likelihood of injury therefrom, would exercise, under the circumstances, in order to prevent injury. Where death may be caused by an agency lawfully in use, ordinary care requires that every means known, or that with reasonable inquiry would be known, must be used to prevent it." *Fairbairn v. American River Electric Co.*, 170 Cal. 115, 118, 148 P. 788, 789; 179 Cal. 157, 160, 175 P. 637; 12 R. C. L. 905; 28 C. J. 591; *McWilliams v. Kentucky Heating Co.*, 166 Ky. 26, 179 S. W. 24, L. R. A. 1916A, 1224.

[2] Respondent does not contend that its obligation was other than as stated, but urges that it was not required to "anticipate the chain of events which led up to the accident." If this contention be conceded, it is not sufficient to acquit the defendant of liability.

"If the negligent act or omission is one which the company ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, then it is liable for any injury proximately resulting therefrom, although it might not have foreseen the particular injury which did happen." 12 R. C. L. 913.

[3, 4] Considering the dangerous character of the agency which was being conducted through the pipe line, it cannot be said, as a matter of law, that it was not negligence to maintain the 3-inch pipe in the position alleged, with no support, except the strength of the pipe itself, for a distance of 54 feet, or that the defendant could not reasonably have foreseen the likelihood of danger therefrom to persons lawfully using the highway. It cannot be said, as a matter of law, that the defendant did not owe it as a duty to the traveling public to carry its pipe line under the bed of the stream, or in some other secure position, rather than through the open air near the floor of the bridge. It is clear that the danger of injury to others would have been lessened by placing the pipe underground. Plaintiff alleges that it was negligence to maintain the pipe in the position stated in the complaint, and whether or not this allegation is true cannot be raised by demurrer, but is a question of fact which, if controverted, must be determined from the evidence to be produced at the trial. *Stewart v. San Joaquin L. & P. Corp.*, 44 Cal. App. 202, 186 P. 160; *McWilliams v. Kentucky Heating Co.*, supra.

"Whether negligence can be inferred from the evidence is for the determination of the court, but whether it ought to be inferred is a question for the jury." *Pacheco v. Judson Mfg. Co.*, 113 Cal. 541, 545, 45 P. 833, 834.

This rule applies where the facts are undisputed, as well as where the evidence is conflicting, if conflicting inferences can reasonably be drawn therefrom. *Jansson v. National Steamship Co.*, 189 Cal. 187, 192, 208 P. 90.

[5] Respondent contends that, if it be conceded that it was guilty of negligence in the maintenance of its pipe line, such negligence was not the proximate cause of the alleged injury, but that "the act of the automobilist who forced the car in which plaintiff was riding off the road was the proximate cause of the injury." The defendant's negligence, however, was continuous in its nature, existent at all times up to the moment of the injury. Under a state of facts not distinguishable in legal effect from those here involved, it is said:

"The independent wrongful act, to constitute the proximate cause by displacing the original primary cause, must be so disconnected in time and nature as to make it plain that the damage occasioned was in no way a natural or probable consequence of the original wrongful act or

omission. * * * The original act of negligence, the primary causation, may be in its nature so continuous that the concurrent wrongful act precipitating the disaster will in law be regarded not as independent, but as conjoining with the original act to create the disastrous result." *Merrill v. Los Angeles Gas & Elec. Co.*, 158 Cal. 499, 504, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134; *Great Western Power Co. v. Pillsbury*, 171 Cal. 69, 70, 151 P. 1136, L. R. A. 1916A, 281; *Marton v. Jones*, 44 Cal. App. 299, 301, 186 P. 410; *Keiper v. Pacific Gas & Electric Co.*, 36 Cal. App. 362, 368, 172 P. 180; *Parkin v. Grayson-Owen Co.*, 25 Cal. App. 269, 281, 143 P. 257; *O'Connell v. United Railroads*, 19 Cal. App. 36, 64, 124 P. 1022; *Lininger v. San Francisco, etc., R. R. Co.*, 18 Cal. App. 411, 420, 123 P. 235; *McWilliams v. Kentucky Heating Co.*, supra.

[6] Respondent argues that—

"The driver of the automobile which forced the machine in which plaintiff was riding off the pavement was guilty of a violation of the Motor Vehicle Act [St. 1913, p. 639]. * * * Since the act of this offending automobilist was a violation of the law and a trespass upon the rights of the plaintiff and those of her driver, the defendant could not foresee or reasonably anticipate them. * * * The legal presumption is that all men will obey the law and will refrain from trespass and injury to the property and person of their fellows."

It does not appear from the complaint whether such driver was guilty of either negligence or a violation of the law. If such facts did so appear, respondent's statement of the rule applicable thereto omits the important qualification that the person relying upon the rule must not himself be negligent. In 19 California Jurisprudence, 596, the rule is stated as follows:

"One who is himself not negligent is entitled to rely upon the presumption that others will exercise due care, so that it is not negligence to fail to anticipate danger which can come only from a violation of law or duty upon the part of another. * * * But reliance upon this presumption does not excuse one who is himself negligent."

[7] It cannot be said, as a necessary inference from the facts alleged, that the danger to be anticipated could "come only from a violation of law or duty upon the part of another," but such danger might come from a variety of purely accidental causes.

The judgment is reversed, with direction to the trial court to overrule the demurrer.

We concur: HART, J.; PLUMMER, J.

74 Cal. App. 345

PEOPLE v. HAMMER. (Cr. 1214.)

(District Court of Appeal, Second District, Division 2, California. Sept. 3, 1925.)

1. Criminal law § 763, 764(6), 778(5)—Instruction as to possibility of fabricating alibi held error.

Instruction that alibi may be and occasionally has been successfully fabricated, and that detection of its falsity may be very difficult, and temptation to resort thereto as spurious defense very great, especially in important cases, *held* error as on weight of evidence and casting burden of proof on defendant.

2. Criminal law § 1172(2)—Instruction as to possibility of fabricating alibi held not harmless, because of incomplete sentence.

Instruction that "the fact * * * that an alibi as a defense is capable of being and has been occasionally successfully fabricated; that, even when wholly false, its detection may be matter of very great difficulty; and that the temptation to resort to this as a spurious defense may be very great, especially in cases of importance," *held* not harmless because sentence was not concluded.

3. Criminal law § 1186(4)—Instruction as to possibility of fabricating alibi held not reversible error.

Instruction that alibi may be and occasionally has been successfully fabricated, and that detection of its falsity may be very difficult, and temptation to resort to it as spurious defense very great, *held* not to have resulted in miscarriage of justice within Const. art. 6, § 4½, so as to require reversal, in view of defendant's testimony as to facts inconsistent with innocence, though he denied commission of crime, and fact that witnesses who corroborated him were his children and a close friend.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Justin Hammer was convicted of rape, and appeals. *Affirmed.*

Perkins & Davis, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., and Hamish B. Edie, of Los Angeles, for the People.

WORKS, J. Defendant was charged with having committed rape upon the person of a girl under the age of 18 years; the alleged victim having been of the age of 16 at the time of the alleged offense. The jury rendered a verdict of guilty, and defendant appeals from the judgment of conviction and from an order of the trial court denying his motion for a new trial.

[1] The testimony of appellant, and of three other witnesses who corroborated him, established a perfect alibi, if the jury had elected to believe the evidence put forward by the defense upon that issue. The trial judge instructed the jury:

"The defendant could not have been in these two places at the same time; and in this contradiction of witnesses the jury have to determine for themselves where lies the truth. In so judging they will take into consideration the appearance and apparent candor and fairness of the respective witnesses; the probability of their statements; its coincidence with other facts or features of the case which they may deem established; and generally those rules of ordinary experience and general observation by which intelligent men decide as to controverted propositions of fact.

"The effect of an alibi, when established, is like that of any other conclusive fact presented in a case. Showing, as it does, that the party asserting it could not have been present at the time of the commission of the crime alleged in the indictment, and therefore did not participate in it, is, when credited, a defense of the most conclusive and satisfactory character. That is a question to be decided by the jury the same as any other question.

"The fact, however, which experience has shown, that an alibi as a defense is capable of being and has been occasionally successfully fabricated; that even when wholly false its detection may be matter of very great difficulty; and that the temptation to resort to this as a spurious defense may be very great, especially in cases of importance."

It is contended that the giving of this instruction was error, and the third and last paragraph is pointed at particularly in presenting the contention. Instructions of a character like unto this, in several instances practically identical with it, have been before the courts of review of the state many times. In the earlier cases the charge as a whole was held not to be erroneous. Later decisions characterized the matter contained in the third paragraph of the present instruction as incorrect when considered alone, but upheld the entire instruction on the ground that statements like those contained in the preceding paragraphs rendered harmless the contents of the third paragraph. The question was finally settled by *People v. Smith*, 189 Cal. 31, 207 P. 518, in which case the instruction was condemned as a whole because of the presence of the matter in the third paragraph. In passing upon the point the Supreme Court said that—

"In *People v. Roberts*, 122 Cal. 377 (65 [55] P. 137), a similar instruction was held to be reversible error, upon the grounds that they constitute [sic] a charge upon the weight of evidence, and that they cast [sic] the burden of proof upon the defendant."

This conclusion was announced by the court despite the fact that the error was harmless, for the reason that there was no evidence in the cause tending to prove an alibi, a circumstance indicating an evident desire upon the part of the court strikingly to warn against the giving of the instruction again. In fact, a similar note had been sounded in one of the cases in which it was determined

that the concluding portion of the instruction, as it was given in the present case, was rendered innocuous by matter similar to that which here preceded it. The court then said that—

"If trial courts will cease to give this particular form of instruction, the ends of justice will be equally as well subserved, and the administration of the laws less embarrassed." *People v. Lattimore*, 86 Cal. 403, 24 P. 1091.

The District Court of Appeal of the Third District has twice followed *People v. Smith*, supra. In the first of the two cases it was said:

"If the jurors are to 'be satisfied that a fabricated defense is not being imposed upon' them, the burden is cast upon the defendant to satisfy them that such defense is not fabricated; that is, that it is true. The instruction not only casts an unwarranted burden upon the defendant, but casts suspicion upon his defense and the evidence produced in support thereof. It is essentially an argument against the defendant, legitimate if made by the district attorney, but an invasion of the province of the jury when made by the court. The giving of the instruction has been condoned in a number of cases where the rights of the defendants did not appear to have been prejudiced thereby. Where a defendant presents substantial proof of an alibi, the jury should be left free to pass upon the weight thereof, under the rules of evidence applicable to other questions of fact; and, if unsubstantial proof is produced, the jury may be trusted to reject it. The instruction should never be given." *People v. Girotti*, 227 P. 936.

The second case decided by the court of the Third District and above alluded to is *People v. Nichols*, 230 P. 997. The trial court here erred in reading the questioned instruction to the jury.

[2] It is to be noted that the third paragraph of the instruction is incomplete in form. The sentence which is begun in it is not concluded. We think, however, that the fact does not render the instruction harmless. Enough was given to make the instruction erroneous, as the jury must have gathered sufficient from it to create the impression conveyed by the completed instruction which was condemned in the cases above cited.

Appellant makes other points, but the only one which is argued is that in several instances the trial judge unduly limited the cross-examination of the complaining witness. It is so apparent to us that there is no merit in the contention that we dismiss the point without further remark.

[3] As required by section 4½ of article 6 of the Constitution, we have examined the entire cause, including the evidence, in order to ascertain whether the error of the trial court in giving the instruction upon the law of alibi has resulted in a miscarriage of justice. After the examination, we have con-

cluded that justice has not miscarried, and that, therefore, the error of the court does not require a reversal. Appellant took the stand as a witness in his own behalf. He denied the commission of the crime with which he was charged, but he testified to other matters which convince us of his guilt. Some weeks after the date of the alleged crime, as testified by the father of the complaining witness, and as admitted by appellant, the former called upon appellant, charged him with the crime, and asked what he proposed to "do about" the occurrence. Appellant admits that he then expressed a willingness to marry the girl. Why this result did not follow it is not material to state. Two witnesses, one a probation officer, the other a policewoman, testified that after appellant's arrest and incarceration he again expressed a desire to wed his victim, and he admitted the truth of this testimony on the witness stand. The evidence shows without dispute that the complaining witness was pregnant at the time of the interview between her father and appellant. Appellant testified that he did not know of this state of affairs until the time of his preliminary examination, when it was disclosed by the testimony against him. He admitted, however, that his conversation with the probation officer occurred after the preliminary examination. We quote from the record premising the remark, in order that the excerpt may be thoroughly understood, that the probation officer had been asked on cross-examination whether appellant had not said that he wanted to marry the girl in order to get out of jail:

"Q. Did you tell the probation officer at that time, the lady that was just on the stand, that you were ready and willing to marry the girl? A. Yes, I told her I didn't want to marry the girl on account of my getting out of trouble, out of jail, or anything of that kind, but I would marry her anyway.

"Q. Notwithstanding that you had never had any sexual intercourse with her, and you knew at that time she was pregnant? A. I didn't know anything about that.

"Q. At the time the probation officer talked to you, you didn't know anything about that? A. I didn't know that before the preliminary examination.

"Q. Didn't the probation officer talk to you after the hearing? A. Maybe it was. I don't remember.

"Q. Didn't the probation officer talk to you after the hearing? A. Yes, it was after the hearing. That is right.

Q. You told her at that time you were willing to marry the girl provided you could obtain the consent of her parents? A. Yes."

To our minds the testimony of appellant is utterly inconsistent with the idea of his innocence. We cannot believe, paying due regard to the feelings and motives which impel human conduct, that appellant could have been so chivalric as to propose and urge

a marriage under the conditions admitted by him to exist. He swears he did not violate the prosecuting witness. She had, then, charged him falsely with one of the most serious offenses in the catalogue of crime. Under his claim of innocence she was pregnant with the child of some other man. We cannot believe that under such circumstances he would have been eager to make her the wife of his bosom, especially as his offer did not come "on account of my getting out of trouble, out of jail, or anything of that kind." Our only recourse, then, is to believe that he did violate the complaining witness. This conclusion, of course, forces the view that the defense of alibi was fabricated. That result, under all the circumstances of the case, is perhaps not strange. The witnesses who corroborated appellant upon the issue were his son, his daughter, and a friend who was constantly at his home. While we may not condone, in any case, the production of fabricated evidence, we nevertheless cannot greatly wonder at such a response as was here made to a cry of distress from father and friend. Such instances of a beclouding of the wellsprings of justice are not altogether rare.

Judgment and order affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

74 Cal. App. 239

WILLIAM SIMPSON CONST. CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 5090.)

(District Court of Appeal, Second District, Division 1, California. Aug. 26, 1925. Rehearing Denied Sept. 22, 1925. Hearing Denied by Supreme Court Oct. 22, 1925.)

1. Evidence ⇨570—Power of Industrial Accident Commission to reject testimony of experts is same as that of court or jury in court.

Power of Industrial Accident Commission to reject testimony of experts is same as that of court or jury in court.

2. Evidence ⇨574—When expert evidence is conclusive on question in issue stated.

Whenever the subject under consideration is one within the knowledge of experts only, such as medical doctors, and is not within the common knowledge of laymen, the expert evidence is conclusive on question in issue, even though it is contradicted by nonexpert witnesses, and this rule applies to proceedings before Industrial Accident Commission.

3. Evidence ⇨571(9)—Uncontradicted testimony of medical experts held binding on Industrial Accident Commission.

Uncontradicted testimony of medical experts as to deceased's physical condition at time of autopsy, and whether any one of those condi-

tions was sufficient to produce death, held binding on Industrial Accident Commission, and precluded it from rejecting it.

4. Evidence ⇨571(9) — Industrial Accident Commission held not bound by opinion of medical experts as to proximate cause of death.

Industrial Accident Commission held not bound by opinion of medical experts that the proximate cause of the death of deceased falling from a scaffold was a stroke of apoplexy.

5. Master and servant ⇨403—Compensation claimant has burden of proving injury arose out of employment.

Claimant under Workmen's Compensation Act has burden of proving that injury arose out of, as well as in the course of, that employment.

6. Master and servant ⇨403—Fact of injury in employment does not raise presumption it arises out of employment.

Fact that injury occurs in course of employment does not afford predicate for presumption that it arises out of or because of that employment.

7. Master and servant ⇨405(4) — Evidence held insufficient to show death was due to fall from scaffold.

Evidence held to require setting aside of award of Industrial Commission as insufficient to support finding death of workman falling from scaffold was due to fall, uninfluenced and uninduced by stroke of apoplexy.

Proceeding under the Workmen's Compensation Act for compensation for death of Gus Tiefenbach, employee, by Carrie I. Tiefenbach and another, by her guardian ad litem and trustee, claimants, opposed by the William Simpson Construction Company, employer, and the General Accident, Fire & Life Assurance Corporation, insurance carrier. The Industrial Accident Commission awarded compensation, and the employer and insurance carrier bring certiorari. Award annulled.

George W. Seith, of Los Angeles, for petitioners.

Warren H. Pillsbury, of Los Angeles, for respondent Industrial Accident Commission.

CURTIS, J. Petition to review an award made by the Industrial Accident Commission against petitioners in favor of Carrie I. and Dorothy I. Tiefenbach on account of the death of Gus Tiefenbach, caused by injuries sustained by him while in the employ of the petitioner, the William Simpson Construction Company. The evidence before the Commission showed substantially the following state of facts: The deceased, Tiefenbach, was in the employ of said construction company as a carpenter. On July 31, 1924, while in such employment and while working on a scaffold about 12 feet from the ground, he fell therefrom to the ground. He died about 1½ hours thereafter. The next day

an autopsy was performed upon his body, and the doctors performing the autopsy found an extensive subdural hemorrhage covering the base and lateral surfaces of the brain, and a basal fracture running across the base of the middle fossa of the skull. There appears to be no doubt that this subdural hemorrhage was due to the basal fracture of the skull, and that this fracture was occasioned by the fall of deceased from the scaffold to the ground. This fracture, with the consequent subdural hemorrhage, the doctors testified, was sufficient to cause death. The doctors further found a pontine hemorrhage in the brain of the deceased, which they testified was caused by a stroke of apoplexy, and they gave as their opinion that the stroke preceded and was the cause of the fall, and was therefore the proximate cause of the death of decedent. There was nothing in the physical appearance or condition of either the pontine hemorrhage, or the fracture of the skull and the subdural hemorrhage caused thereby, to indicate which of the two occurred first in point of time. The only reason assigned by the medical experts, the two doctors who were present at the autopsy, one of whom performed the same, for their statement that the apoplectic stroke preceded the fall, was that the pontine hemorrhage was not traumatic; that is, it was not due to any wound or injury, but was dependent upon, or was the result of, a diseased condition of the deceased. The Commission disregarded the opinion of the medical experts, and found that the fracture of the skull caused by the fall and subdural hemorrhage therefrom were the proximate cause of Tiefenbach's death, and made an award in favor of his dependents.

[1] Petitioners contend that the Commission was without authority to reject the uncontradicted testimony of the medical experts that the apoplectic stroke preceded the fall and was therefore the proximate cause of decedent's death, and render an award based upon a finding that death was due to a cause other than that given therefor by the medical experts. The power of the Commission to reject such evidence is the same as that of a court or jury in an action before a court of justice. In *Corpus Juris* the power of the court or jury to reject the testimony of experts is stated as follows:

"The weight to be given to opinion evidence in any case, whether the statement is of the inference or conclusion of an observer or the judgment of an expert, is, within the bounds of reason, entirely a question for the determination of the jury or of the court, when trying a question of fact, taking into consideration the intelligence, learning, and experience of the witness, and the degree of attention which he gave to the matter. The judgments of experts or the inferences of skilled witnesses, even when unanimous and uncontroverted, are not necessarily conclusive on the jury, but may be disregarded by it or by the court trying an issue of fact,

unless the subject is one for experts or skilled witnesses alone, and the jury cannot properly be assumed to have, or be able to form, correct opinions of their own, under which circumstances the unanimous evidence of properly qualified witnesses has been regarded by some courts as conclusive." 22 Corp. Jur. pp. 728 to 730.

Assuming that the law is correctly stated in this quotation from *Corpus Juris*, it will be noted that the court or jury may reject the testimony of experts, even though uncontradicted, except where "the subject is one for experts or skilled witnesses alone, and the jury cannot properly be assumed to have, or be able to form, correct opinions of their own under which circumstances the unanimous evidence of properly qualified witnesses has been regarded by some courts as conclusive."

In this state it has frequently been held that the proper or usual practice and treatment by a physician or surgeon in the examination and treatment of a wound or injury is a question for experts, and can only be established by their testimony. *Perkins v. Trueblood*, 180 Cal. 437, 443, 181 P. 642; *Houghton v. Dickson*, 29 Cal. App. 321, 324, 155 P. 128; *Dameron v. Ansbro*, 39 Cal. App. 289, 300, 178 P. 874; *Pearson v. Crabtree* (Cal. App.) 232 P. 715.

[2] The rule to be drawn from these decisions, as we understand them, appears to be that whenever the subject under consideration is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue. It follows that in such cases neither the court nor the jury can disregard such evidence of experts, but, on the other hand, they are bound by such evidence, even if it is contradicted by nonexpert witnesses. The same rule would, of course, apply to a proceeding before the Industrial Accident Commission. Under this rule, the Commission, in the present proceeding, could not reject the evidence of the medical experts when testifying upon any subject peculiarly within their own knowledge. The same rule would apply as to opinions of the medical experts upon a subject solely within their professional knowledge, and not within the knowledge of the ordinary individual.

[3] In this proceeding the evidence of the medical experts as to the condition of the deceased's skull at the time of the autopsy, and the presence therein of the fracture, and the two hemorrhages, the extent and character of these hemorrhages, and their origin and cause, and their probable effect upon the deceased, and whether they, or either of them, was sufficient to produce death, dealt entirely with matters with which only medical men are familiar, and concerning which they alone could give any intelligent information to the Commission. This evidence,

being uncontradicted, was binding upon the Commission, and, according to the above rule, the latter could not reject the same and act upon their own knowledge or conclusions.

[4] We seriously question, however, whether this rule can be extended to include the opinion of the medical men that the stroke of apoplexy preceded, and was the cause of the fall, under the facts in evidence before the Commission. As already stated, no one saw the deceased immediately preceding or at the time of the fall. There was nothing in the appearance or condition of either the pontine hemorrhage, or the hemorrhage caused by the injury, to indicate which one occurred first in point of time. The doctors testified that either one was sufficient to cause death. The only reason assigned by them for their opinion that the fall was preceded by the stroke of apoplexy was that the pontine hemorrhage was not traumatic; that is, it was not caused by any injury sustained by the deceased. The evidence shows that the deceased lived an hour and one-half after the fall, and there was absolutely nothing to show that the pontine hemorrhage could not have occurred immediately following the fall or during the hour during which the deceased lived after receiving the blow from the fall. One of the medical men, Dr. Brown, in a letter written to the petitioner, the General Accident, Fire & Life Assurance Corporation, and which was before the Commission, refers to the "history of the case" as showing that the deceased "was working on a scaffold on the outside of a building, when without any provocation he fell to the ground some distance below. The man in falling was said to have made no effort to catch or protect himself." No such evidence was produced before the Commission. On the other hand, there was no evidence that any one witnessed the fall of the deceased from the scaffold. The superintendent of the construction company testified that shortly before the fall, probably 15 or 20 minutes, his attention was attracted to the deceased as "acting rather strange at that time." Deceased was then working on the balcony of the church, up about 14 feet from the floor, and the superintendent had him changed to the scaffold on which he was working at the time of the fall. But there was no evidence to show that this conduct of deceased was in any way attributable to, or had any connection whatever with, the stroke of apoplexy subsequently sustained by him, and neither of the medical witnesses bases his inference as to the proximate cause of decedent's death upon this testimony of the superintendent. Under these circumstances, the opinion of the doctors that the stroke of apoplexy occurred prior to the fall was, in our opinion, mere conjecture on their part and not based upon any evidence warranting such a conclusion. A somewhat similar situation was before the court in East-

man Co. v. Industrial Accident Commission, 186 Cal. 587, 591, 200 P. 17, 19, and in disposing of the question the court said:

"The evidence of the physicians is no doubt conclusive of the fact that Ellsworth had a diseased heart. Their opinions that he did or did not die from this affliction are of little value, for they are agreed that there was nothing divulged by the autopsy to indicate that death was from heart failure, and they are agreed that the injuries received from his being run over by the truck were such as would cause instant death."

Our conclusion, therefore, is that the Commission was not bound by the opinion of the medical experts that the proximate cause of the death of the deceased was the stroke of apoplexy.

[5-7] It does not follow, however, from this conclusion that the award made by the Commission can or should be sustained by this court. While there was no evidence in the case which would justify the opinion of the doctors that the pontine hemorrhage preceded the fall, we are further of the opinion that there was no evidence before the Commission which would justify it in finding that the death of the deceased was due to the fall and not induced by the apoplectic stroke. With the opinions of the experts that the proximate cause of decedent's death was the stroke of apoplexy eliminated, the evidence before the Commission was that there were found within the skull of the deceased, the next day after his death, two hemorrhages, either one of which was capable of causing death—one was due to natural causes, and death therefrom would not entitle the dependents of the deceased to any award of compensation; the other was due to an injury received under circumstances which would entitle said dependents to an award of compensation, if death ensued therefrom. There was absolutely no evidence from any source to indicate that the death of the deceased was due to the latter injury. Such evidence, in our opinion, would not support an award in favor of said dependents. In the first place, the burden of proof is upon the applicant to prove that the injury received was one which would sustain an award. "It must be conceded that the burden is upon the applicant for compensation to show that the injury arose out of as well as in the course of the employment; and there is no presumption, as contended by respondents, that because an injury occurs in the course of the employment it arises out of or because of that employment." Eastman Co. v. Industrial Accident Commission, supra.

In the second place, if this evidence before the Commission was insufficient to justify the expert witnesses in concluding that apoplexy was the proximate cause of his death, we think for like reasons that it is insufficient to justify a conclusion on the part of the Commission that death was due to the

fall, uninfluenced and uninduced by the stroke of apoplexy. With the evidence in such a state, any opinion as to the proximate cause of the death of deceased was a mere surmise and conjecture and not based upon any foundation sufficient to support a finding of fact. As was said in *Re Sander-son's Case*, 224 Mass. 558, 563, 113 N. E. 355, 357:

"It is plain that if the hemorrhage was due to natural causes, and was not produced by the fall, it could not be found to be an injury arising out of the employment. It is plain that the inference drawn by the Industrial Accident Board from the evidence, that the hemorrhage followed the injury and resulted therefrom, is based merely upon surmise, speculation and conjecture, and does not rest upon a foundation of proof by a preponderance of the evidence. It may be the dependent is correct in her contention that the death of the employee was due to a fall from the wagon, but other theories and conjectures are quite as probable"—citing cases.

From these considerations, we think it must necessarily follow that the evidence was not sufficient to support the award, and therefore that it must be and it is hereby annulled.

I concur: CONREY, P. J.

74 Cal. App. 273

BENSON v. OLENDER et al. (Civ. 5373.)

(District Court of Appeal, First District, Division 1, California. Aug. 28, 1925.)

1. Appeal and error $\hookrightarrow$ 619—Want of diligence of appellant in taking necessary steps to secure filing of transcript empowers trial court to terminate proceedings.

It is the duty of appellant, as moving party, to take necessary steps to secure filing of transcript, and for want of diligence therein it is within the power of the trial court to terminate the proceedings.

2. Appeal and error $\hookrightarrow$ 627(1)—Provisions of statute as to time for filing transcript are directory.

While the giving of notice to prepare transcript within time provided by Code Civ. Proc. § 953a is mandatory, the provisions thereof and of section 953c, as to the time for filing the transcript, are directory.

3. Appeal and error $\hookrightarrow$ 627(2)—Dismissal of appeal for delay in filing transcript is based on want of diligence in prosecuting appeal, and not on lack of jurisdiction.

Though the appellate court may dismiss an appeal for delay in filing transcript within Code Civ. Proc. §§ 953a, 953c, such dismissal will be for want of diligence in prosecuting the appeal, and not for lack of jurisdiction of the appeal.

4. Appeal and error $\hookrightarrow$ 628(2)—Motion to dismiss appeal not granted where reporter was at fault.

Where notice to prepare transcript was given in form and within time provided by Code Civ. Proc. § 953a, and it appeared that the delay in filing it, within sections 953a, 953c, was due to the fault of the reporter, and that the transcript duly certified was filed in the appellate court, motion to dismiss the appeal because of delay in filing transcript will be denied.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by B. M. Benson against Julius Olender and another. Judgment for plaintiff, and defendants appeal. On plaintiff's motion to dismiss appeal. Motion denied.

Lewis H. Smith, of Fresno, for appellants.

Glen M. De Vore, of Fresno, for respondent.

CASHIN, J. An appeal was taken according to the method prescribed by section 953a of the Code of Civil Procedure from a judgment in favor of respondent, who moved to dismiss on the ground that more than 40 days had elapsed since the filing of the notice of appeal, and that the transcript on appeal had not, as provided by statute, been filed in this court. Respondent's motion was duly served and filed on July 23, 1925. Thereafter, on July 25, 1925, the transcript prepared by the phonographic reporter was filed in the office of the county clerk of the county of Fresno, the clerk's transcript having been prepared and certified by him on June 18, 1925; and upon notice to respondent the reporter's transcript was, by the judge of the superior court before whom the action was tried, certified as provided by said section of the Code, and both transcripts were, by the county clerk of said county, filed in this court on August 3, 1925.

It appears from the record that judgment was entered in the action on April 2, 1925; that a notice of intention to move for a new trial was served and filed by appellant, which motion was thereafter, on June 2, 1925, presented and denied; that on June 9, 1925, notice to prepare the transcripts mentioned was filed with the clerk, and that on June 13, 1925, was filed a notice of appeal from the judgment. All the proceedings had to perfect the appeal and for the preparation of the transcripts were within the time and in accordance with the provisions of the statute with the exception that no undertaking, as provided by section 953b of the Code of Civil Procedure, was filed with the clerk.

It appears from the affidavit of the reporter that an order was given for the preparation of the transcript, and that arrangements satisfactory to him were made for his compensation, but that subsequently he under-

stood that the transcript would not be required. This affidavit contradicts, in certain particulars, an affidavit previously made by him, wherein he states that no order was given and no arrangements made for the preparation of the transcript. His last affidavit, however, is supported by that of one of the attorneys for the appellant, from which it appears that arrangements satisfactory to the reporter had been made, and that the delay in preparing the transcript was due to his performance of duties in connection with the business of the court other than the preparation of the transcript in the instant case.

[1-4] It is the duty of the appellant, as the moving party, to take the necessary steps to secure the filing of the transcript, and for a want of diligence therein it is within the power of the trial court to terminate the proceedings, and while the giving of the notice to prepare the transcript within the time provided by section 953a, Code of Civil Procedure, is mandatory (*Des Granges v. Des Granges*, 175 Cal. 67-71, 165 P. 13), the provisions thereof and of section 953c, Code of Civil Procedure, as to the time for filing the transcript, are directory, and though the appellate court may dismiss the appeal for delay in such filing, such dismissal will be for want of diligence in prosecuting the appeal and not for lack of jurisdiction of the appeal. *Smith v. Jaccard*, 20 Cal. App. 280, 128 P. 1023, 1026; *Mason v. Straube* (Cal. App.) 228 P. 872; *Fisher v. Oliver*, 174 Cal. 782, 164 P. 800.

Where, as in the instant case, the notice to prepare the transcript was given in form and within the time as provided by statute, and it fairly appears, as here, that the delay was due to the fault of the reporter, that neither appellant nor his counsel were wanting in due diligence, and that the transcript, duly certified, has been filed in this court, a case is presented where the rule in the cases last herein cited should be applied, and the motion to dismiss the appeal denied.

It is so ordered.

We concur: TYLER, P. J.; KNIGHT, J.

197 Cal. 269

HICKS et ux. v. WILSON et al. (S. F. 10667.)

(Supreme Court of California. Oct. 14, 1925.)

1. Brokers ⇨8(3)—Evidence held not to establish employment of broker by plaintiff as agent.

Evidence that plaintiffs desiring to purchase a home were shown defendant's home by a broker, who, in defendant's presence, stated a price which plaintiffs accepted, did not establish an employment of broker as plaintiff's agent.

2. Brokers ⇨96—Evidence of seller's statement held to warrant purchaser in paying purchase price to broker.

Evidence that defendant told plaintiff, who desired to buy his home and had been shown it by a broker, to do business with broker, warranted plaintiff in believing that he could complete transaction through broker and pay him purchase price; it being immaterial that broker's actual authority, unknown to plaintiff, did not extend to receiving purchase price.

3. Brokers ⇨96—Broker held to have authority to receive purchase money, where vendor permits belief that he had such "ostensible authority."

Where vendor allowed purchaser to believe that broker had "ostensible authority," defined in Civ. Code, § 2317, as that which principal intentionally or by want of ordinary care allows a third party to believe agent possesses, to receive purchase money, the rule that broker has only authority to procure a purchaser, not to accept purchase money, does not apply.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ostensible Authority.]

4. Brokers ⇨91—Agreement by broker to raise balance of purchase money for purchaser held not to constitute him agent of purchaser in whole transaction.

Agreement by a broker to raise balance necessary for purchase of a home did not constitute him agent of purchaser in whole transaction, since such service was distinct from that rendered seller in sale of property.

5. Appeal and error ⇨1011(1)—Court will not interfere with finding, where evidence in conflict.

Court is not justified in interfering with a finding of trial court, where evidence is in conflict on point.

6. Brokers ⇨96—Evidence held to estop vendor in denying broker's authority to represent him.

Where evidence showed that vendor held out broker as his agent and authorized purchaser to do business with him, the vendor is estopped to deny that broker had authority to represent him in transaction including acceptance of purchase money.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Caniss, Judge.

Action for money had and received by George W. Hicks and wife against George Osborne Wilson and another. From a judgment for defendants, plaintiffs appeal. Reversed.

W. F. Sullivan and Edward J. Smith, both of San Francisco, and Albert L. Johnson, of Modesto, for appellants.

Knight, Boland, Hutchinson & Christin, of San Francisco, for respondents.

WASTE, J. Plaintiffs, husband and wife, brought an action to recover \$3,000, alleged to be due for money paid to defendant Cokely, a realtor, as agent for defendant Wilson, on account of the purchase of real property, Wilson, the owner of the property, having refused to execute the deed. Wilson offered the sum of \$600 to plaintiffs, and, on their refusal to accept the tender, he placed the money in bank and gave proper notice of the deposit. It was shown at the trial that the plaintiffs paid Cokely \$3,000 toward the purchase price of the property without the knowledge of Wilson. Cokely paid Wilson \$500 and misappropriated the balance. The trial court found that the plaintiffs employed Cokely to procure for them a residence property, and that, in the dealings between plaintiffs and Cokely, the latter was acting for and on behalf of plaintiffs as their agent, and not as the agent of defendant Wilson. As a conclusion of law, it in effect, held that Cokely had no authority to bind the owner, or right to accept money paid by plaintiffs to conclude the sale. It therefore entered judgment for plaintiffs for the sum of \$500, the amount actually received by Wilson. Because of the tender and deposit, defendant was awarded his costs. Plaintiffs appealed.

The cause was transferred by this court to the District Court of Appeal, First Appellate District, Division One, for hearing and determination, where the judgment of the lower court was reversed. In the course of the opinion the court cited the decision of the District Court of Appeal of the Second Appellate District, Division One, in *Gold v. Phelan*, 58 Cal. App. 471, 208 P. 1001, as laying down the rule defining the authority of a broker in transactions involving the sale of real estate. In the petition to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, the respondent most earnestly contended that the decision in the case was contrary to the rule approved in *Gold v. Phelan*, supra, and, if allowed to stand, would create great confusion and uncertainty in all real estate transactions where the parties dealt through real estate brokers. The petition was granted, and the cause was brought here in order that this court might finally pass upon the questions presented by the appeal.

After a reargument of the case and a care-

ful consideration of all the points involved, we are of the opinion that the facts in the present case differentiate it from those considered in *Gold v. Phelan*, supra, and that the opinion of the District Court of Appeal does no violence to the law of the earlier decision. Neither are we apprehensive that the dire results forecast by the respondent will follow if the present opinion is allowed to stand. We therefore adopt as our opinion the following portion of the opinion of the District Court of Appeal, written by Mr. Presiding Justice Tyler, and concurred in by Associate Justices St. Sure and Knight:

"It is manifest that the gist of the trial court's findings is based upon the theory that in the dealings between plaintiffs and Cokely, relative to the purchase of the Wilson property, Cokely was acting for and on behalf of the plaintiffs as their agent and not as the agent of Wilson. It is the plaintiffs' contention in support of their appeal that the findings of the trial court tending to establish this fact are not supported by the evidence. In this we think the appellants are correct.

[1] "The case presents a situation where one of two innocent persons must suffer through the acts of a third person. An examination of the record shows that there is no evidence of any employment by plaintiffs of Cokely to procure for them a residence in Palo Alto. All that the evidence does show in this regard is that the plaintiffs, desiring to purchase a home in that place, called upon Cokely, a real estate broker residing there and having an office in San Francisco, and stated their wants, and asked him if he had anything in mind that he thought would suit them. He immediately made an appointment with them to take them around and show them various properties. Pursuant to this appointment, the plaintiffs on November 2, 1920, were taken by Cokely to the residence of defendant Wilson. Being satisfied after inspection that the property met their requirements, they inquired the price. Cokely immediately, in the presence of Wilson, replied '\$6,750 cash,' and the plaintiffs at once signified their willingness to purchase at that figure. There is nothing in this evidence which tends to establish an employment of Cokely by plaintiffs as their agent to procure property for them. To hold otherwise would be to say that, whenever a person desiring to buy real estate enters the office of a realty broker to make inquiry concerning the same, and the broker submits property to him, an agency is created, giving rise to an obligation on the part of such person to compensate their broker for services performed under such employment.

[2] "Other evidence upon the subject of agency shows that immediately following the conclusion of plaintiffs to take the property at the price demanded Mr. Hicks asked Wilson how he should do business with him, to which question Wilson replied: 'Do business with Mr. Cokely.' This is testified to by both Mr. Hicks and his wife, and is not denied by Wilson. Thereafter Hicks met Cokely for the purpose of completing the transaction. He informed him that he was only able to pay in cash the sum of \$4,000, whereupon Cokely stated that, if Hicks would pay to him such amount, he would procure the balance of \$2,750 necessary to make up the en-

tire purchase price by means of a mortgage upon the property itself, after which the deed from Wilson would be delivered. Accordingly, Hicks within a few days paid over to Cokely several sums of money amounting in the aggregate to \$3,000, only \$500 of which were paid over by Cokely to Wilson, Cokely apparently embezzling the remainder. It is upon these undisputed facts that the trial court found that the \$3,000 was not paid to Cokely as the agent of Wilson.

"At the time of the meeting between the plaintiffs, Wilson and Cokely on November 2, when the oral agreement for the sale of the property was made, there existed no written contract between Wilson and Cokely, but on the following day Wilson executed a written authorization to Cokely by which the latter was appointed his exclusive agent during a period of 90 days for the sale thereof at the above-mentioned price, and by its express terms Cokely was authorized to accept a deposit, the purchaser to be allowed 30 days to examine title, and Wilson agreed thereunder to pay the sum of \$900 as compensation for Cokely's services. It will be observed that, at the time when Hicks asked Wilson how he should do business with him, and the latter replied, 'Do business with Mr. Cokely,' Cokely had already completed the usual services required of a real estate broker (i. e., he had procured a buyer on terms satisfactory to the seller, and who was ready to enter into a binding contract to purchase the property), so that it is evident that the query addressed by Hicks to Wilson could only refer to the steps to be subsequently taken to consummate the sale, and that Hicks was warranted in concluding from the reply made by Wilson that he could complete the transaction through the intermediary of Cokely. Hicks was a retired officer of the United States army, and prior to this transaction he had never had any dealings in real estate transfers, and he had a right to rely on the statement made to him. And it is immaterial that the actual authority given to Cokely by Wilson on the following day, and of which Hicks was ignorant, did not extend to receiving payment of the purchase price other than a deposit on account thereof. Just what amount of the purchase price might be considered a deposit is a question we are not called upon to consider.

[3, 4] "It is of course elementary that the authority of a real estate broker is only to produce a purchaser who is willing to contract with the seller upon the terms prescribed, and that such a broker has no authority to accept money offered by the purchaser to conclude the sale; and, when the purchaser pays money into the hands of the broker, in such a case the broker holds it as the agent of the purchaser and not of the seller, and any misappropriation thereof is the loss of the former and not the latter. *Gold v. Phelan*, 58 Cal. App. 471, 208 P. 1001. It is equally well settled, however, that a principal is bound, not only by the acts which he has actually authorized an agent to perform, but also by those which he has allowed third persons to believe him to be authorized to do. Ostensible authority is defined by section 2317 of the Civil Code to be 'such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.' By expressly authorizing the plaintiffs to do business with the agent, they were justified in believing that he had authority to receive the price. It is also apparent from the evidence that Cokely

himself, in all that he did, regarded himself as Wilson's agent, and looked to Wilson for his entire compensation. The amount of his compensation provided by the contract was \$900, which, it will be observed, is about 15 per cent. on the amount of the purchase price—three times the usual commission. Mr. Wilson testified that he protested to Cokely that the commission was excessive, and that the latter in reply stated 'he was doing more than just selling the property; he was arranging for them to raise the cash, and that he was giving them the use of his garage for an indefinite period; and he made the point that as the result of the services he was giving to Hicks and the giving of the garage he was entitled to more than the (usual) commission.'

"It is, of course, true that, in undertaking to procure the balance of \$2,750 by means of a mortgage to be executed upon the property by the purchasers, Cokely contemplated performing a service for the purchasers for which he would have been entitled to be compensated by them; but this service was quite distinct from the steps necessary to be taken by the seller and buyers of the property, namely, an investigation into the seller's title, the delivery of the deed, and payment of the purchase price. It is argued by respondent that the fact that Cokely agreed with Hicks to procure this necessary balance in the manner stated indicates that Cokely was acting as the agent of Hicks and not of Wilson throughout the whole transaction; but we think it quite clear that no such inference can be drawn. It is common knowledge that real estate brokers make a practice of procuring necessary funds to complete a purchase of property in the sale of which they are interested, and that they receive and are entitled to receive compensation from the buyer for such service; but, as pointed out above, such service is quite distinct from those rendered to the seller in the sale of his property. It is perfectly apparent that in the other steps in the transaction, had subsequent to the agreement of sale, the plaintiffs dealt with Cokely as the agent of the owner under the ostensible authority conferred upon him at the time of the making of such agreement.

"We conclude, therefore, that the finding of the trial court that the payment by plaintiffs of the \$3,000 to Cokely was not paid to him as the agent of Wilson is not supported by, but is contrary to, the evidence.

[5, 6] "There is also abundant evidence in the record that Wilson was apprised of the fact that the plaintiffs were making payments on account of the purchase price to Cokely, and by failing to object thereto ratified that course of dealing; but, as the evidence upon this point is somewhat contradictory, we are not justified in interfering with the trial court's conclusion in regard thereto. It is sufficient that Wilson, by holding out Cokely as his agent for the consummation of the sale, and by expressly authorizing plaintiffs to do business with him, is estopped to deny that he had authority to represent him as agent in all steps necessary to be taken in that matter, including the receipt of the portion of the purchase price in question. Of course, we do not mean to be understood as holding that authority is apparent in contemplation of law, simply because one may conclude it to exist without sufficient facts to warrant such conclusion; but here,

the direction by the owner himself being in positive terms to do business with the agent, we think the language was broad enough, considering all the facts and circumstances of the case above narrated, to justify the purchaser in concluding that such agent was clothed with full power to complete the transaction in every particular."

For the reasons given, the judgment is reversed.

We concur: LAWLOR, J., Acting C. J.; RICHARDS, J.; LENNON, J.; SEAWELL, J.; SHENK, J.; HOUSER, Justice pro tem.

74 Cal. App. 231

PEOPLE v. GONZALES. (Cr. 1211.)

(District Court of Appeal, Second District, Division 2, California. Sept. 3, 1925.)

1. Criminal law ⚡517(4)—Evidence of corpus delicti held insufficient as predicate for admission of purported confession.

In a prosecution against an alleged alien for carrying a firearm capable of being concealed on his person, in violation of Firearms Act June 13, 1923, § 2, evidence as to fact of accused's foreign birth and nonnaturalization held insufficient as predicate for admission of purported confession of existence of such fact.

2. Criminal law ⚡535(2)—Independent evidence to confession need not satisfy minds of jury beyond reasonable doubt.

In prosecution of an alleged alien for carrying a firearm capable of being concealed upon his person, in violation of Firearms Act June 13, 1923, § 2, requested instruction that the confession or admission of accused of his guilt would not be sufficient in law to warrant finding of guilty, without independent evidence satisfying minds of jury beyond reasonable doubt that accused was, at time of offense, a foreign-born unnaturalized person and carried such firearm, held properly refused as erroneous.

3. Criminal law ⚡517(4)—Preliminary proof of substantial character is sufficient to predicate admission of confession.

Preliminary proof of substantial character, tending to establish corpus delicti, is sufficient to predicate admission of confession.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Sylvester Gonzales was convicted of violating the Firearms Act, and he appeals. Reversed.

Arthur H. Blanchard, of Santa Paula, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and John L. Flynn, of Los Angeles, for the People.

CRAIG, J. The defendant was charged by information with having violated the so-called Firearms Act of June 13, 1923 (St. 1923, p. 696), which reads as follows:

"Sec. 2. On and after the date upon which this act takes effect, no unnaturalized foreign-born person * * * shall own or have in his possession or under his custody or control any pistol, revolver or other firearm capable of being concealed upon the person. * * *"

[1] A jury having found the defendant guilty as charged, a motion for new trial was denied, and this is an appeal from the judgment and order denying said motion. It is contended in appellant's behalf that there was no evidence, other than a purported confession which was introduced over his objection, that he was an unnaturalized foreign-born person, and that the trial court erred in permitting the introduction of such confession without requiring the prosecution to establish the corpus delicti. It is insisted on behalf of the people that the evidence sufficiently showed the defendant's birth and the fact that he was not naturalized in this country, before testimony as to any alleged confession was offered.

There is no contention that the appellant was not armed, as alleged, at the time of his arrest. The only evidence which in any way tended to show that he was an unnaturalized foreign-born person consisted of the testimony of various witnesses that appellant spoke the Mexican or Spanish language, and that he could not speak English, and that of his daughter, 22 years of age, who said she was born in Mexico, that she came to this country with her father and mother when she was about 5 years old, and had lived here with her father since that time. She also testified that her father had never attended school in the United States, and that he was unable to read the English language, that his hair was black and his complexion the same as her own. However, there is not the slightest intimation by any witness that the appellant was not born in the United States; nor is there any fact upon which to base a presumption that he was foreign born.

The precise point raised in this case was decided by the Supreme Court recently in *People v. Quarez*, 238 P. 363, wherein it was said:

"The corpus delicti of the offense defined in section 2 consists, as we have shown, of two elements—the second being the foreign nativity and nonnaturalization of the appellant. The rule is well settled, and the authorities numerous in this state, that the extrajudicial statements, admissions, or confession of a defendant cannot be used to establish any necessary element of the corpus delicti of the crime charged. The corpus delicti must be established by independent evidence before the extrajudicial statements, admissions, or confession of a defendant are admissible."

Authorities holding that the corpus delicti may be established by circumstantial evi-

dence are cited in support of the argument for respondent, but we fail to find anywhere in the record proof of facts or circumstances worthy of consideration in this respect. The fact that appellant brought his daughter from Mexico, and that he had remained in the United States for a period of about 17 years, but was yet unable to speak English, was all that she pretended to know about his origin. Nor is it attempted to be explained on behalf of the respondent how his appearance or ignorance of our language, or even the fact that he had been in Mexico, could be said to prove that he was not born here. Hence an essential element of the offense was not shown, and testimony as to asserted admissions was therefore not admissible.

[2, 3] The trial court refused to give an instruction requested by appellant that—

"Without independent evidence which satisfies the mind of the jury beyond a reasonable doubt that the defendant was at the time and place alleged in the information then and there a foreign-born, unnaturalized person, and in his possession a firearm capable of being concealed upon the person at the time alleged in the information, the confession or admission of the defendant of his guilt would not be sufficient in law to warrant the jury in finding the defendant guilty."

This instruction does not contain a correct statement of the law and was therefore properly refused. The proof of the corpus delicti, which must be produced before admissions or confessions of the defendant may be allowed to be put in evidence, need not be sufficient to satisfy the minds of the jurors beyond a reasonable doubt of the corpus delicti. It is sufficient if the preliminary proof be of a substantial character tending to establish the corpus delicti. *People v. Ward*, 145 Cal. 736, 79 P. 448; *People v. Jenkins* (Cal. App.) 228 P. 405; *People v. Besold*, 154 Cal. 363, 97 P. 871; *People v. Ellena* (Cal. App.) 228 P. 389; *People v. Quarez*, supra. Such substantial evidence may be corroborated and strengthened by admissions and confessions of the defendant, and the proof beyond a reasonable doubt required by the law thus supplied. It may be added that the defendant was not prejudiced by the failure of the trial court to instruct upon the point suggested by the request.

There being no evidence offered, independent of an alleged admission of appellant that he was foreign born, the judgment and order appealed from must be reversed, and it is so ordered.

We concur: FINLAYSON, P. J.; WORKS, J.

74 Cal. App. 359

(240 P.)

GOULD v. LONG. (Civ. 4501.)

(District Court of Appeal, Second District, Division 2, California. Sept. 10, 1925.)

- 1. Husband and wife ⇨264—Evidence held unequivocally to show that certain moneys sought to be recovered by plaintiff were her separate property.**

Evidence held unequivocally to show that certain moneys sought to be recovered by plaintiff were her separate property and not community property.

- 2. Husband and wife ⇨128—Husband may not claim interest in alimony or maintenance allowed wife in divorce action against him.**

Husband may not claim interest in alimony or maintenance allowed wife in divorce action against him.

- 3. Appeal and error ⇨1170(7)—Exclusion of deposition, if erroneous, held not prejudicial.**

Exclusion of deposition, if erroneous, held not prejudicial within Const. art. 6, § 4½, where the testimony in such deposition was mostly corroborative of the testimony given by witness upon the trial.

- 4. Appeal and error ⇨203(4) — Ruling rejecting testimony in deposition by which it was sought to impeach witness held proper.**

A ruling rejecting testimony in deposition by which it was sought to impeach witness held proper, under Code Civ. Proc. § 2052, where it did not appear that the witness was shown the testimony offered to impeach her, nor that a proper foundation was laid for the introduction of the deposition.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by Eleanor A. Gould against Bertha G. Long. Judgment for plaintiff, and defendant appeals. Affirmed.

Griffith Jones and John J. Craig, both of Los Angeles, for appellant.

James P. Clark, of Los Angeles, for respondent.

CRAIG, J. On the 5th day of January, 1922, respondent commenced this action against the appellant for the sum of \$1,301.58, alleging that the latter had within two years next preceding said date received the same for and on account of moneys had and received for the use and benefit of the plaintiff, which the defendant had agreed to repay upon demand, that on or about October 14, 1921, the plaintiff demanded repayment of the same, but that the defendant had failed and refused to pay said sum or any part thereof, and that the whole amount was then due and owing. It was also alleged "that said moneys were the sole and separate property of plaintiff."

Appellant answered, denying that she had received, or was indebted to the plaintiff,

"whether in the sum of \$1,300, or in any other sum, or at all; admits and alleges, however, that she did, within the year 1921, receive the sum of \$1,290 from the plaintiff for the sole purpose of acting as custodian of said moneys." It was further denied that demand had been made, or that any sum of money remained due, owing, or unpaid, but, on the contrary, appellant alleged that she had repaid all of the moneys so admitted to have been received by her from the plaintiff, and that "she has not sufficient or any information or belief concerning to whom said moneys belonged to enable her to answer said allegation, and, basing her denial upon said grounds, denies that said moneys or any part of said moneys were the sole or separate property of the plaintiff."

The cause was tried in the superior court without a jury, and findings of fact were filed and judgment entered for the plaintiff in accordance with all of the allegations of said complaint. This is an appeal from the judgment, and as grounds for reversal it is asserted that the trial court erred in the following respects: (1) That it confined the defendant's proof to the questions of demand and payment, and rejected the defendant's offered evidence tending to show that said money was not the plaintiff's sole and separate property; (2) that the deposition of the plaintiff, taken previously to the trial, was excluded; and (3) that the finding that the money was plaintiff's separate property was not supported by the evidence, and would have been otherwise had said deposition been admitted.

It appears that, at the time, the instant case was commenced the plaintiff, respondent here, had been divorced from her husband, Charles T. Gould; that prior to her marriage respondent had about \$1,000, \$800 of which she used in the purchase of real property; that during the pendency of the divorce action she was allowed by the court \$40 per month, and the use of a house on said premises, from which she collected rents amounting at times to \$100 per month; and that she earned other moneys. Concerning the source of her money, it appears that the \$1,301.50 claimed was made up of the following items: \$600, which belonged to Mrs. Gould before her marriage, \$690 alimony, and \$11.58 interest on the deposit of the other sums. This was established by the testimony of the respondent and an employee of the Security Trust & Savings Bank. The bank employee said that the account was in the name of Bertha G. Long, and was withdrawn by one check, and the account closed October 13, 1921. Respondent also testified that appellant promised to repay her at any time, and that a check was made out and signed by appel-

lant, and pinned in the deposit book; that the latter retained the book and check; that the money was thereafter demanded, but that appellant refused to return any part thereof, and that in fact none was ever repaid. Appellant's testimony was to the effect that she had received the \$1,290, but that she had given respondent a check therefor, which was returned, and that she (appellant) destroyed the same.

Respondent was called to testify in rebuttal, and during her cross-examination, counsel for appellant read many questions and answers from a deposition given by respondent before the trial, and asked her if she did not so testify, to which she replied in the affirmative. Objection being interposed to further examination of that nature, said counsel stated that respondent had made an affidavit in the divorce action that she had no means, and that he desired to impeach her testimony by showing that the same was contradictory to statements contained in both her affidavit and deposition. The trial court said:

"It would not be competent in this case. Objection sustained. I am going to narrow the issues; you admit getting the \$1,290. The question is now to dispose of the issues that no demand has ever been made, or that she has paid the money back."

Thereupon counsel for appellant read further from said deposition, which respondent testified was correct, and the entire deposition was then offered in evidence, but upon objection it was denied admission.

Appellant here insists that the evidence would not have been sufficient without the deposition to support a finding that the moneys in suit were the sole and separate property of respondent, and that, had the same been admitted, it would have required a finding that said moneys were community property of respondent and Charles T. Gould; that the trial court therefore erred in sustaining objections as above indicated.

[1, 2] We think the testimony offered upon the trial unequivocally established the fact that all the moneys in question were the separate property of respondent. It is uncontradicted that a portion of the money intrusted to appellant had been in respondent's possession prior to her marriage with Gould, and that the balance consisted of amounts received under an order of court in her suit against him for divorce. None of her testimony in this respect was denied, and the mere assertion that a husband may claim no interest in alimony or maintenance allowed the wife in a divorce action against him is too obvious to require citation of authority. Furthermore, said deposition is embodied in the record before us, and it appears that respondent's testimony therein was mostly corroborative of that which she

gave upon the trial. She also testified in her deposition, "It was my separate property."

[3] It is therefore apparent that, had the trial court erred in sustaining objections thereto, the exclusion of the deposition in no way prejudiced the appellant's rights. For this reason alone a reversal would not be justified. Const., art. 6, § 4½.

[4] However, section 2052 of the Code of Civil Procedure provides that a witness may be impeached only by statements inconsistent with his present testimony, and that, "if the statements be in writing, they must be shown to the witness before any question is put to him concerning them." It does not appear that the witness was shown the testimony by which it was sought to impeach her, nor that in that respect a proper foundation for the introduction of her deposition was laid, although the court called attention to that requirement. We think, therefore, that the ruling of the superior court in rejecting it was proper. *Froeming v. Stockton Elec. R. Co.*, 171 Cal. 401, 153 P. 712, Ann. Cas. 1918B, 408.

The judgment is affirmed.

We concur: FINLAYSON, P. J.;
WORKS, J.

74 Cal. App. 350

**O'CONNELL v. SUPERIOR COURT, IN AND
FOR CITY AND COUNTY OF SAN
FRANCISCO et al. (Civ. 5374.)**

(District Court of Appeal, First District, Division 1, California. Sept. 4, 1925.)

1. Divorce ⚭157—Court of equity may refuse to enter final decree where offense was condoned after entry of interlocutory decree.

Courts of equity possess power to refuse to enter final decree of divorce where, subsequently to entry of interlocutory decree, the offense for which divorce was granted has been condoned.

2. Mandamus ⚭168(2)—Presumed that inference of condonation, drawn from findings will support order denying final decree of divorce notwithstanding no finding of ultimate fact of condonation.

Where finding of court relative to condonation subsequent to entry of interlocutory decree of divorce was not finding of ultimate fact of condonation, but such ultimate fact might fairly and reasonably be inferred from the facts found, it will be presumed that inference drawn therefrom was one that would support order denying motion for final decree.

3. Action ⚭1—Court having jurisdiction has no discretion to refuse relief for which there is legal right.

Where there is legal right to relief under certain facts, and existence of such facts is not

questioned, court having jurisdiction has no discretion to refuse relief.

4. *Mandamus* ⇨172—Judgment denying final decree of divorce cannot be reviewed on application for writ of mandate where interlocutory decree was set aside by judgment not shown to be invalid.

Where interlocutory decree of divorce, which is foundation for relief sought, was set aside by judgment not shown to be invalid, and trial court in proceeding in which it had jurisdiction has from evidence before it made findings supporting, on additional grounds, its judgment denying final decree, such judgment cannot be reviewed on application for writ of mandate.

Application by Daniel O'Connell for writ of mandate to be directed to the Superior Court in and for the City and County of San Francisco, Hon. Walton J. Wood, Judge, directing the entry of a final decree of divorce. Writ denied.

Daniel O'Connell and Charles M. Frey, of San Francisco, for petitioner.

Herbert W. Erskine and Keyes & Erskine, all of San Francisco, for respondents.

CASHIN, J. A petition for writ of mandate to the superior court in and for the city and county of San Francisco, directing the entry of a final decree of divorce.

An interlocutory decree of divorce was by said court on June 2, 1924, granted to petitioner, he being the defendant and cross-complainant in an action for divorce brought by his wife, Anna M. O'Connell, who failed to appear at the trial. The decree was based upon findings of fact constituting extreme cruelty, and thereby certain real property described therein was adjudged to be the separate property of petitioner. No appeal was taken therefrom, and thereafter on July 10, 1925, petitioner upon due notice presented in the superior court his motion for the entry of a final decree of divorce in accordance with the interlocutory decree mentioned. The motion was opposed by cross-defendant, Anna M. O'Connell, and, as recited in the order of the court made thereon, evidence was adduced at the hearing by both parties on which the court found that the parties since the entry of the interlocutory decree had cohabited as husband and wife, and were at the time of the hearing living in the same dwelling; that at the time of the entry of said decree the parties had become reconciled and were then living together as husband and wife, and had so lived continuously till the 25th day of May, 1925; that an action had been commenced by said Anna M. O'Connell against petitioner in the superior court for a decree of that court setting aside the interlocutory decree on the ground that petitioner had by his acts prevented his wife from appearing in court and presenting her defense to petitioner's

cross-complaint upon which the interlocutory decree was made and entered; that the action had been tried, and that the court had made and filed its findings of fact and conclusions of law therein, and that the parties had on May 18, 1925, agreed in writing to vacate and set aside the interlocutory decree of divorce, and thereupon made and entered on July 25, 1925, its order denying petitioner's motion. It further appears—the fact not being disputed by petitioner—that a decree of the court based upon the findings and conclusions of law in the action to set aside the decree of divorce was filed on the same day, adjudging that the interlocutory decree mentioned be set aside.

It is urged by petitioner that, notwithstanding the findings by the court of cohabitation and reconciliation, there was no finding of a condonation by him of the offense charged in his cross-complaint, and that without such finding the trial court was not justified in denying the motion for the entry of a final decree of divorce.

[1, 2] Courts of equity in this state possess the power to refuse to enter a final decree of divorce where subsequently to the entry of the interlocutory decree the offense has been condoned (Olson v. Superior Court, 175 Cal. 250, 165 P. 706, 1 A. L. R. 1589), and while in the instant case the finding of the court in that connection was not of the ultimate fact of condonation, it appears that such ultimate fact might fairly and reasonably be inferred from the facts found, and it will be presumed that the inference drawn therefrom was one that will support the order of the court (Gould v. Eaton, 111 Cal. 639, 44 P. 319, 52 Am. St. Rep. 201; De Haven v. Berendes, 135 Cal. 178, 180, 67 P. 786; Cooley v. Brunswick Drug Co., 30 Cal. App. 58, 157 P. 13).

[3, 4] Where there is a legal right to relief under certain facts, and the existence of such facts is not questioned, a court having jurisdiction has no discretion to refuse the relief (Cal., etc., Lumber Co. v. Sup. Ct., 13 Cal. App. 65, 108 P. 882); but where it appears, as here, that an interlocutory decree of divorce, which is the foundation for the relief sought, has been set aside by a judgment not shown to be invalid, and the trial court, in a proceeding in which it had jurisdiction, has from evidence before it made findings supporting on additional grounds its judgment denying relief, such judgment cannot be reviewed on an application for a writ of mandate (People v. Sup. Ct., 114 Cal. 466, 46 P. 383; Gay v. Torrance, 143 Cal. 169, 76 P. 973; Lapique v. Superior Court, 24 Cal. App. 313, 141 P. 223; American Well & Prospecting Co. v. Superior Court, 19 Cal. App. 497, 126 P. 497).

The petition for a writ of mandate is denied.

We concur: TYLER, P. J.; KNIGHT, J.

74 Cal. App. 353

PEOPLE v. MILLS. (Cr. 877.)

(District Court of Appeal, Third District, California. Sept. 5, 1925. Hearing Denied by Supreme Court Nov. 2, 1925.)

1. Physicians and surgeons ⇐6(1)—Unlicensed chiropractor subject to prosecution under Medical Practice Act.

A party practicing as a chiropractor without license, as required by section 15 of Chiropractic Act, may be prosecuted in superior court for violation of section 17 of Medical Practice Act, as amended by St. 1917, p. 114, § 11, for practicing medicine without license, since section 18 of Chiropractic Act provides that it shall not be construed as a repeal of medical act except as to persons licensed thereunder.

2. Physicians and surgeons ⇐5(4)—License under either Medical or Chiropractic Act defense to prosecution under Medical Act.

In prosecution under Medical Practice Act, § 17, as amended by St. 1917, p. 114, § 11, for practicing chiropractic without a license, it is a complete defense to show a license from either chiropractic or medical board, since Chiropractic Act, § 18, by express terms does not effect section 17 of Medical Practice Act, as amended, which continues to apply to all unlicensed persons.

3. Criminal law ⇐1209—Medical Act not invalidated by Chiropractic Act, where latter permits unlicensed chiropractors to be prosecuted under both acts.

Chiropractic Act, providing punishment for persons practicing chiropractic without a license, but permitting unlicensed chiropractors to be prosecuted under Medical Practice Act, § 17, as amended by St. 1917, p. 114, § 11, for practicing medicine without a license, does not make latter act void as subjecting a party to different degrees of punishment in different courts for same offense.

4. Criminal law ⇐1206(1)—Conviction for practicing chiropractic under Medical Practice Act not improper, though lesser penalty under Chiropractic Act for same offense.

Conviction of party practicing chiropractic under Medical Practice Act, § 17, as amended by St. 1917, p. 114, § 11, providing penalty for practicing medicine without a license, is not improper, because section 15 of Chiropractic Act provided a lesser penalty for same offense, since fact that defendant has violated both acts does not relieve him from prosecution under Medical Practice Act, where, under section 18 of Chiropractic Act, its provisions are not repealed.

Appeal from Superior Court, Tehama County; J. B. Landis, Judge.

Allen Mills was convicted of violating the Medical Practice Act, and he appeals. Affirmed.

L. W. Hughes, of Corning, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was convicted upon an information charging that—

"The said Allen Mills, on, or about the 16th day of March, A. D., 1925, at and in the county of Tehama, and state of California, and prior to the filing of this information did then and there willfully and unlawfully practice and attempt to practice, and did advertise and hold himself out as practicing, a system and mode of treating the sick and afflicted in this state, without having at the time of so doing, a valid unrevoked certificate, as provided by the state Medical Practice Act." St. 1913, p. 722.

From such conviction the defendant appeals.

Section 17 of the Medical Practice Act, as amended in 1917 (St. 1917, p. 114, § 11), reads as follows:

"Any person who shall practice or attempt to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this state, or who shall diagnose, treat, operate for, or prescribe for, any disease, injury, deformity, or other mental or physical condition of any person without having at the time of so doing a valid unrevoked certificate as provided in this act, or who shall in any sign or in any advertisement use the word 'doctor,' the letters or prefix 'Dr.,' the letters 'M. D.,' or any other term or letters indicating or implying that he is a doctor, physician, surgeon or practitioner, under the terms of this or any other act, or that he is entitled to practice hereunder, or under any other law without having at the time of so doing a valid unrevoked certificate as provided in this act shall be guilty of a misdemeanor and upon conviction thereof shall be punished as designated in this act."

The testimony tended to show that the defendant was practicing a system of curing and healing the sick according to the method and procedure or system known as and followed by chiropractors. The instructions of the court were to the effect that, if the defendant did not have either a license to practice medicine or a license provided by the Initiative Chiropractic Act, adopted in 1922 (St. 1923, p. lxxxviii) then, and in that case, if the jury believed from the evidence beyond a reasonable doubt that the defendant was practicing the aforesaid method of healing and curing the sick, the defendant should be found guilty.

Section 15 of the Chiropractic Act reads as follows:

"Any person who shall practice or attempt to practice chiropractic, or any person who shall buy, sell or fraudulently obtain a license to practice chiropractic, whether recorded or not, or who shall use the title 'chiropractor' or 'D. C.,' or any word or title to induce, or tending to induce belief that he is engaged in the practice of chiropractic, without first complying with the provisions of this act; or any licensee under this act who uses the word 'doctor' or the prefix 'Dr.' without the word 'chiropractor,' or 'D. C.' immediately following his name, or the use of the letters 'M. D.' or the words 'doctor of medicine,' or the term 'surgeon,' or the term 'physician,' or the word 'osteopath,' or the let-

ters 'D. O.' or any other letters, prefixes or suffixes, the use of which would indicate that he or she was practicing a profession for which he held no license from the state of California, or any person who shall violate any of the provisions of this act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars and not more than two hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than ninety days, or both."

[1] It is contended that the defendant, not having a license from the chiropractic board, should have been prosecuted under this section, and that, as prosecution under this section could only be had in the justice's court, the superior court had no jurisdiction of this case. In determining whether this contention is sound, consideration must be given to section 18 of the Chiropractic Act, which reads as follows:

"Nothing herein shall be construed as repealing the 'medical practice act' of June 2, 1913, or any subsequent amendments thereof, except in so far as that act or said amendments may conflict with the provisions of this act as applied to persons licensed under this act, to which extent any and all acts or parts of acts in conflict herewith are hereby repealed."

It will be observed from a reading of this section that from the fact that the defendant did not have a license from the chiropractic board the Chiropractic Act adopted in 1922 has no application to this case. By the provisions of section 18, as above set forth, no part of the Medical Practice Act is repealed, save and except as to those portions which are in conflict with the Chiropractic Act, when applied to persons holding a license issued by the chiropractic board.

It is also contended that, as the defendant had no license from the chiropractic board, the defendant might have been prosecuted in separate courts for the same act, one under the terms of section 15 of the Chiropractic Act and another prosecution under the terms and conditions of section 17 of the Medical Practice Act, as amended. It is also contended that one holding a certificate to practice medicine under the Medical Practice Act would be subject to prosecution for an attempt to follow the system of curing used by chiropractors without having a license from the chiropractic board, which would result in the following situation: A medical practitioner holding a medical license would be subject only to a maximum penalty under section 15 of the Chiropractic Act of a fine of \$200, or by imprisonment in the county jail for not to exceed 90 days; whereas, the defendant, having no medical certificate and attempting to cure by the same system without having a certificate from the board of chiropractors, might be punished under section 17, as amended in 1917, and section 24 of the Medical Practice Act, as added by St. 1917, p. 115, § 13, by a fine not exceeding \$600, or by a term

of imprisonment in the county jail not to exceed 180 days, etc., and that therefore the sections are discriminatory.

We do not need to determine the correctness of this contention, because, if such is the effect of the Chiropractic Act, it would only result in the holding that section 15 of the Chiropractic Act is invalid, in that it is made applicable to one class of persons and not to another.

[2] Under the two acts a complete defense to a charge of curing without a license is the introduction and showing by the defendant that he holds a license from either board. Prior to the adoption of the initiative act relating to chiropractors in 1922, it was unlawful to practice that system of curing without having obtained a certificate from the state medical board of examiners. That situation, however, has now been corrected, so that, if a defendant charged under section 17 of the Medical Practice Act, if it be found that he is following the system used by chiropractors, then his complete defense is the showing that he holds a certificate from the chiropractic board. In other words, section 17 of the Medical Practice Act is allowed to remain in full force and effect by the initiative measure known as the Chiropractic Act; to apply with full force and effect as fully and completely as it did prior to 1922 by the express terms of section 18 of the Chiropractic Act, to all unlicensed persons.

[3] Is there any merit in the contention that the defendant is subject to different degrees of punishments in different courts, by reason of the difference in the terms of the two acts referred to herein? We think not. In the case of *In re Mulholland, etc.*, 97 Cal. 527, 32 P. 568, Justice Paterson of the Supreme Court of this state held:

"The fact that criminals are subjected to different degrees of punishment for the same offense in different courts does not affect the validity of the law," citing as authority *Srinegrou v. State*, 1 Chand. (Wis.) 51.

This case is referred to and the reasoning therein approved in the case of *In re Kennerly*, 190 Cal. 774, 214 P. 857.

In the case of *People ex rel. Olsen v. Sheriff of Erie County*, 174 App. Div. 281, 160 N. Y. S. 427, the court held:

"A statute is not invalid, because for the same act a defendant may be liable for one penalty if prosecuted under one section, and another and different penalty if prosecuted under another section."

[4] In that case, which related to the unlawful catching of fish, different sections provided different penalties, and the ruling was had as before stated. If this is true as to different sections of the same act, it would seem for a much stronger reason, to wit, absence of contrary intentions of the Legislature, if the different penalties provided ap-

pear in different acts. Again, we do not very well see any good reasoning in the contention that the defendant has been improperly convicted under an act which applies to him, to wit, one not holding any license, simply because he might have also been prosecuted in another court, or, in the justice's court, for the same act and a lesser possible penalty imposed. The fact that the defendant has violated both acts does not relieve him from prosecution under the Medical Practice Act, unless its provisions are repealed by the Chiropractic Act, which, by the very terms of section 18 we have found that the Chiropractic Act does not do. The rule of law which we have before stated, followed in the Mulholland Case, is also set forth as the law in 16 C. J. p. 1353, and 8 Cal. Jur. p. 650.

The defendant in this case was sentenced to pay a fine of \$200, or, in default thereof, serve out the sentence in the county jail at the rate of \$3 per day, and from the foregoing statement we find no reason for disturbing the judgment. The order denying the defendant's motion for a new trial and the judgment referred to herein are affirmed.

We concur: FINCH, P. J.; HART, J.

74 Cal. App. 254

BILLINGS et ux. v. FARM DEVELOPMENT CO. et al. (Civ. 5170.)

(District Court of Appeal, First District, Division 2, California. Aug. 27, 1925. Hearing Denied by Supreme Court Oct. 26, 1925.)

1. Damages §153—Complaint must allege damage in definite amount.

Complaint, in action for damages, must allege damage in definite amount as required by Code Civ. Proc. § 426.

2. Fraud §25—Damage essential element of cause of action.

Complaint charging fraud without damage fails to state cause of action, because fraud without damage is not actionable.

3. Mortgages §369(3)—Mere inadequacy of price at foreclosure sale is insufficient in equity to set sale aside.

Mere inadequacy of the price bid at a foreclosure sale under a deed of trust is not sufficient in equity to set it aside as for fraud, unless purchaser has been guilty of some deceit, or has taken some undue advantage resulting in gross inadequacy and consequent injury to owner of the premises.

4. Fraud §41—Complaint held insufficient to support judgment for fraud in foreclosure sale.

As to coplaintiff, complaint held insufficient to support judgment for damages for fraud in foreclosure sale under deed of trust.

5. Evidence §441(1)—Parol evidence of oral contract, without consideration, held inadmissible to vary written contract.

Testimony attempting to vary written contract by parol evidence of oral contract, which was without consideration, held inadmissible.

6. Bills and notes §140—Makers' failure to pay all installments in lump sum, in consideration of promise to do which period of grace was granted, made all installments immediately due.

Where payee of note payable in monthly installments waived such payments during a certain period in consideration of makers' promise to pay the total amount in a lump sum at the end of the agreed period, on makers' failure to pay at the expiration of such time, all installments became due immediately.

7. Pleading §36(2)—Plaintiffs bound by their pleading with reference to amount due on note.

Plaintiffs held bound by their pleading with reference to amount claimed to be due on note.

8. Appeal and error §878(1)—Plaintiffs, not appealing from finding, are bound by it.

Plaintiffs, not appealing from finding, are bound by it.

9. Mortgages §369(7)—Evidence held to show that mortgagors were in default.

Evidence held to entitle defendants as beneficiaries under deed of trust to a finding plaintiffs as mortgagors were in default in the payments on the note which the deed of trust secured.

10. Fraud §28—Mere declaration of default of mortgagors held no fraud.

Mere declaration by beneficiaries under deed of trust of default of the mortgagors, declared in order to bring about a foreclosure sale, held no fraud against mortgagors, where they defaulted in fact.

11. Mortgages §362—Beneficiary in deed of trust may purchase at foreclosure sale.

Beneficiary in deed of trust may purchase property at foreclosure sale.

12. Fraud §28—Beneficiary's conveyance to third party of property purchased at foreclosure sale could not affect validity of original sale.

Beneficiary's conveyance to third party of property purchased at foreclosure sale under deed of trust could not affect validity of original sale, if the facts at and prior to the sale were not fraudulent.

13. Fraud §28—Failure of beneficiary under deed of trust to give to mortgagors notice of sale held not actionable.

Failure of beneficiary under deed of trust to give to mortgagors personal notice of sale held not actionable, since such notice is not necessary.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Suit by David Billings and wife against the Farm Development Company, a corpora-

tion, and others. Judgment for plaintiffs, and defendants appeal. Reversed.

H. M. Anthony, of San Francisco, for appellants.

A. D. Schaffer and Anthony Podesta, both of San Francisco, for respondents.

NOURSE, J. Plaintiffs commenced this action as one in equity to set aside a sale and the subsequent conveyances of certain real property in San Joaquin county; the sale having been made to foreclose a deed of trust executed by them as security for their promissory note in the sum of \$1,290. Plaintiffs had judgment against all the defendants except Bates, who was held to be an innocent purchaser for value. The other defendants have appealed from the judgment upon the judgment roll and a bill of exceptions.

The complaint was filed on February 20, 1920. At a trial had on April 9, 1921, judgment was rendered in favor of all the defendants. On June 24, 1921, a new trial was granted on motion of the plaintiffs as to all the defendants except Bates. As to him the judgment became final, holding that he was an innocent purchaser of the land in suit, and denying plaintiffs the right to have the sale and the subsequent conveyance set aside. On March 8, 1922, the cause came before the court, sitting without a jury, for a second trial as to the remaining defendants. At that time these defendants moved that no testimony be received on the complaint on the ground that the action having been brought to set aside the trust sale and the subsequent conveyances and for possession of the realty, the final judgment in favor of Bates disposed of all the issues raised by the pleadings and left plaintiffs the single remedy of damages for fraud. This motion was denied and the cause was tried by the court, resulting in a judgment against the defendants, other than Bates, in the sum of \$1,855; \$1,355 being the difference between the value of the property and the amount the plaintiffs still owed under their deed of trust, and \$500 being awarded as punitive damages.

On May 10, 1915, the plaintiffs executed their promissory note in favor of the defendant Farm Development Company, a corporation, for \$1,290, payable in equal monthly installments of \$15 on the 10th day of each month with interest at 6 per cent. per annum, payable quarterly. This note was secured by their trust deed in which W. F. Postel and Robert W. Dennis were made trustees, and will be referred to herein as the "Billings" note. On December 22, 1917, the defendants Farm Development Company and W. L. Hogan executed their joint and several note in favor of W. F. Postel in the sum of \$200, bearing interest at the rate of 5 per cent. per month, compounded monthly. This will be referred to herein as the "Hogan" note. On November 22, 1918, the payee of

this note sold it to A. D. Schaffer, an attorney at law, who, however, took the note in the name of one Casey, who, it is claimed, held it for the benefit of the plaintiff D. W. Billings. This note was at all times secured by the pledge of the Billings note and the trust deed of May, 1915. The explanation of this singular transaction is twofold. The plaintiff D. W. Billings had recently been declared a bankrupt, and, having made a deed of gift of the property in suit to his wife, he was advised by his attorneys that it was necessary to further conceal his assets from his creditors by having the Hogan note in a fictitious name. Secondly, he was being continually pressed by Hogan for payment on his own note, and he found it necessary to conceal his ownership of the Hogan note to avoid a set-off against his own, and this enabled him to collect 5 per cent. interest monthly, compounded against his own simple 6 per cent. per annum interest. During all this time the plaintiffs were very irregular in their payments upon the original obligation and from March, 1918, to October, 1919, made no payments at all upon the principal, but paid the interest only. During all this time frequent and repeated demands were made upon them for payment and in each case they led the defendant to believe that satisfactory adjustments were soon to be made.

About a month prior to October 28, 1919, after frequent but futile attempts to discover the mysterious Casey, who was the legal owner of the Hogan note, the defendant W. L. Hogan learned from Schaffer that he held the note for the benefit of plaintiff D. W. Billings and that Casey was merely a figure-head. The defendant W. L. Hogan then informed Schaffer that he had been endeavoring to find the holder of the note in order to pay it, and demanded that Schaffer give him a statement of the amount due. About a month later, and on October 28, 1919, these parties met again for the purpose of making a settlement, and Schaffer then informed this defendant that D. W. Billings had applied from the Hogan note all moneys which became due on the Billings note since March, 1919, amounting to \$120 principal and \$29 interest. This was the first information given Hogan that Billings actually owned his note and that payments had been applied by him upon the other obligation. In order to settle his note and to secure possession of the deed of trust which had been pledged with Postel, Hogan was compelled by Schaffer to give him two receipts, one for \$120, and another for \$29.11, as payments on principal and interest on the Billings note, and also to pay to Schaffer the sum of \$218.64, which was represented to be the full amount due on this note. The receipts which Hogan gave to Schaffer at this time were, however, on account of principal and on account of interest, and at the same time Hogan insisted that

the plaintiffs were still in default in their payments upon the trust deed. A few days after this settlement Schaffer informed Hogan that he had made a mistake in estimating the interest on the \$200 note and demanded an additional payment of \$62.72. Hogan refused to pay this amount and then Schaffer directed him to apply it on subsequent payments as they became due under the Billings deed of trust. Hogan denied the claim that anything was due from him after the settlement, and on November 25, 1919, declared the plaintiffs in default. The defendant L. J. Hogan, who was the wife of W. L. Hogan, was then substituted as trustee under the deed for the purpose of making a sale. All the required steps, including the publication of notice of sale, were duly taken, and the property was on December 27, 1919, sold to W. L. Hogan for the sum of \$501, and he immediately thereafter sold the property to the defendant Bates.

[1-3] The complaint was framed on the theory that the sale had been fraudulent and the plaintiffs prayed for an order setting aside the conveyances, for possession of the property, and for general relief. In the first trial the court found adversely to the plaintiffs, in so far as the defendant Bates was concerned, and, this judgment having become final, there was a conclusive determination that the defendants were not entitled to the specific relief for which they prayed. When the second trial began, all that was left to the plaintiffs was therefore a simple action for damages for fraud and deceit. Looking at the complaint in this light, it falls far short of being a model pleading, because in an action for damages the complaint must allege damage in a definite amount. *Munson v. Fishburn*, 183 Cal. 206, 220, 190 P. 808; 8 Cal. Jur. p. 882. In fact this is required by section 426, Code of Civil Procedure. There are no allegations of damage and no specific prayer for damages. It is axiomatic that fraud without damage is not actionable, and a complaint charging fraud without damage fails to state a cause of action. Here one of the charges of fraud is the substitution of L. J. Hogan as a trustee, and it is claimed that this substitution was a part of a plot and a conspiracy to cheat and defraud the plaintiffs, but it does not appear that the original trustee, or some other substituted trustee, would not have been compelled to do or would not have done the same acts performed by L. J. Hogan. There is no specific allegation of injury from the substitution and nothing from which injury might be inferred. The mere inadequacy of the price bid at the foreclosure sale does not constitute fraud, unless the purchaser has been guilty of some deceit, or has taken some undue advantage "resulting in such gross inadequacy and consequent injury to the owner of the property." *Odell v. Cox*, 151 Cal. 70, 90 P. 194; *Sargent*

v. Shumaker, 193 Cal. 122, 129, 223 P. 464; *Jones v. Sierra Verdugo Water Co.*, 63 Cal. App. 254, 263, 218 P. 454. The other acts which are set forth in the complaint as constituting a part of this conspiracy to defraud the plaintiffs are the declaration of plaintiffs' default, publication of notice of sale, the sale for an inadequate price, and the subsequent conveyance to Bates. But none of these acts is alleged to have been wrongful, except the declaration of plaintiff's default, and it does not appear from the complaint how or in what manner any of them were not authorized by the contract between the parties, or to what extent any of them damaged the plaintiffs.

[4] So far as the plaintiff D. W. Billings is concerned, it appears from the complaint that on June 18, 1917, he had conveyed to his wife and coplaintiff all his right and interest in the property. The right to the return of the property having been foreclosed by the judgment in favor of Bates, his measure of damages for the alleged fraud was quite different from that of his coplaintiff in this connection. In addition to this the complaint is silent in the pleading of any facts justifying an award of punitive damages. As to the plaintiff D. W. Billings, particularly, it is apparent that this award is not justified by the pleadings or the evidence, and that, as to the judgment for general damages, it is far in excess of any actual damage which he suffered. We are satisfied that the complaint does not state sufficient facts to support the judgment for damages for fraud and deceit in behalf of plaintiff D. W. Billings and that the defendants' objection to the offer of evidence upon that ground should have been sustained as to that plaintiff at least.

On the facts of the case the outstanding question before the trial court was whether the plaintiffs were in default at the time of the sale. Though the defendants expressly raised the issue in their answer, the trial court did not expressly find on it. Inferentially the court held adversely to this defense, as otherwise it would not have held that the defendants were guilty of fraud in making the sale. Assuming the court to have so held, the conclusion cannot be supported without the aid of finding No. 8, wherein the court found that prior to March 10, 1918, D. W. Billings and W. L. Hogan had orally agreed to waive payments on the principal from March 10, 1918, to March 10, 1919. By deducting these 12 installments, amounting to \$180, the plaintiffs have contended that when the default was declared there was but \$18.30 due on the note. The error of the finding is twofold: It is wholly beyond the issues, and it is unsupported by the evidence. The complaint does not contain a word regarding any waiver of payments other than the acceptance of interest and principal on some other than the 10th day of each month.

There is no suggestion that any new arrangement was made for the 12 months between March, 1918, and March, 1919. To the contrary the complaint alleges that all payments of principal and interest were made as required by the note and trust deed, and, particularly, that during the years 1918 and 1919 the plaintiffs "made the required monthly payments on said note and trust deed as follows." It then specifies particular days in the months running from May, 1918, to February, 1919, when these regular monthly payments were made. Though the plaintiffs were compelled to admit by their own testimony that these allegations were false, we point to them merely to show that the defendants were not apprised by the pleadings of any intention to claim an oral modification of the contract and that this matter was not in issue.

[5] Aside from the matter of pleading, all the evidence upon which this finding is based is found in the testimony of plaintiff D. W. Billings. We quote from the transcript:

"A. I told Hogan I would continue to keep up my interest monthly, and that I would later on wind up the whole business in a lump sum. I would not pay him any more on the principal for the time being. He told me it was all right. I took him at his word.

"Q. He said it was all right? A. Yes, sir.

"Q. That is the conversation as you remember it? A. Yes; as I remember it, yes.

"Q. That occurred at the time you made your last payment prior to the year's grace? A. Yes.

"Mr. Anthony: I move this be stricken out on the ground that there is no consideration at all shown for any such statement, and it is incompetent, irrelevant, and immaterial on the question. I think all that reference to a year's grace should be stricken out.

"Mr. Schaffer: We will be able to show the consideration.

"The Court: Motion denied on that statement."

The same witness testified that he met W. L. Hogan in the month of June, 1918, and paid him the June interest only. Again we quote:

"A. I told Hogan I was on the way to give him his interest, for the month. He says, 'All right.' He says, 'I will take it.' We went across the street to a cigar store, and I paid him the interest, and I had an old receipt from him, and he wrote on the bottom of the receipt, 'Received the interest,' and we shook for a cigar.

"Q. Have any other conversation with him at that time? A. Then he asked me if I could pay him \$125 or \$150 he would give me 10 per cent. discount on it. I told him then I didn't have anything to pay him; when I did pay him I would wind the whole thing up for a lump sum on the whole thing."

[6] No other testimony on this subject was offered. No testimony of any kind was offered to show that the purported "grace" was

for one year or for anything more than "the time being." No evidence purporting to show a consideration for this oral agreement was presented and it will be noted that the trial court did not find that any consideration passed. The testimony was inadmissible, of course, as it was an attempt to vary a written contract by parol evidence of an oral contract which was without consideration. Plaintiffs' only answer to this is that they then agreed to make the interest payments monthly, though the contract called for quarterly payments. But the complaint alleged it was not denied, and the evidence, without conflict, showed that the payments had been made monthly ever since the execution of the note. But, aside from all this, the testimony does not support the finding (as the plaintiffs interpret that finding) that this oral agreement carried forward the due date of all these installments for a period of 12 months. As detailed by this witness, this was merely a conditional agreement that, if the monthly payments were waived for the "time being," Billings would pay them all in a lump sum. This he admits he did not do, and, accordingly, at the end of the so-called period of grace, the whole sum of \$180 became immediately due.

If a finding has been made on the issue of default as raised by the answer, the evidence would have required one favorable to the defendants. This is compelled by a mere mathematical calculation. The complaint alleged, and the trial court found, that, when the Hogan note came into the possession of Billings and his associates, there was due thereon the sum of \$219.98. It was shown by plaintiffs that from March 1, 1919, to October 1, 1919, they credited the defendants with monthly payments on their own note varying from \$18.55 to \$18.38, principal and interest. When settlement was made on October 29, 1919, Hogan paid Schaffer \$218.64 in full payment. Deducting these monthly payments and compounding the interest on the balance monthly, it is found that there was then due on the note only \$198.16, or \$20.48 less than Hogan paid. All this is done without regard to the \$180 which became due March 10, 1919, if we grant plaintiffs' claim for the year's grace, or which became due monthly after March 10, 1918, if the year's grace is not allowed. The note was taken by Billings on November 22, 1918. If the oral waiver, or grace, was invalid, 8 monthly installments on the Billings note were then due, and should have been credited to defendants. In fact, the complaint alleged and the court found that these credits began on November 22, 1918, but all the computations credit the defendants from March, 1919, and following. It is evident that if the credits had been given as alleged, or if the true amounts due the defendants had been allowed, there would have been little or nothing due Billings on

the Hogan note, and that when he paid Schaffer \$218.64 on October 29, 1919, he greatly overpaid what was due.

[7-9] The plaintiffs seek to justify this transaction by computations which are erroneous from the beginning. In fact, their whole case is based on bad arithmetic. It will be recalled that the court found that there was \$219.98 due on this usurious note when Billings and his associates bought it on November 22, 1918. In their computations to show a balance due them after the settlement with Hogan on October 29, 1919, the plaintiffs list the amount due on November 22, 1918, as \$269.98, or just \$50 more than the amount fixed in their complaint and in the finding. They now complain of this finding and insist that it is not supported by the evidence. But they are certainly bound by their pleading, and, as they have not appealed, they are also bound by the finding. This is the real basis of their error in computation on the Hogan note, but they have added to this error by computing the compound interest twice a month and in this way have been able to show that defendants were still in arrears when the settlement was made. As the evidence indisputably demonstrates that Hogan overpaid on his note, and that the plaintiffs were then and for more than a year prior thereto had been in default, the defendants were entitled to a finding to that effect.

[10-12] This brings us to a consideration of the specific assignments of fraud found in the complaint. (1) The declaration of plaintiffs' default. As the facts clearly demonstrate that they were in default and that they ignored the frequent demands for payment there was no fraud on defendants' part in merely declaring the default in order to bring about a foreclosure sale. (2 and 3) The publication of notice of sale and the sale to the beneficiary. The publication was in strict accord with the statute and the contract and the beneficiary was a lawful purchaser under the contract. There was no fraud in either of these acts. (4) The sale for an inadequate price. The beneficiary as the only bidder at the sale was not bound to bid more than he was willing to pay. Mere inadequacy of price is insufficient in equity to set aside a sale unless accompanied by acts of fraud. *Odell v. Cox*, 151 Cal. 70, 90 P. 194; *Sargent v. Shumaker*, 193 Cal. 122, 129, 223 P. 464. (5) The sale to a third party. Though this was manifestly done to hamper the plaintiffs in their attack upon the sale, it cannot enter into the question of the validity of the original sale. If the facts at and prior to the sale were not fraudulent, the plaintiffs cannot complain about the purchaser's subsequent conveyance of the property. (6) The substitution of trustees. The contract authorized the substitution at the request of the beneficiary and there is neither allega-

tion nor proof that the substitution was fraudulent, or that it caused plaintiffs any damage. These are all the acts pleaded as contributory to the "conspiracy" to defraud the plaintiffs. Suggestions are made in the plaintiffs' brief that Hogan led them to believe that their payments on the original note were complete and that they were not in default. The matter was not pleaded and all the evidence is without conflict to the contrary.

[13] It is also argued that the plaintiffs should have been given personal notice of the sale. But, such notice was not necessary and the failure to give it is not actionable. *Sargent v. Shumaker*, 193 Cal. 122, 130, 223 P. 464; *Baldwin v. Brown*, 193 Cal. 345, 353, 224 P. 462.

Judgment reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

197 Cal. 276

In re McCURDY'S ESTATE. (L. A. 8445.)

(Supreme Court of California. Oct. 14, 1925.
Rehearing Denied Nov. 12, 1925.)

1. Wills ⚡440, 441—Will given effect in accordance with testator's intention.

Will must be given effect in accordance with testator's intention, as found from its language, aided by such extrinsic facts as may be admissible for that purpose.

2. Wills ⚡448—Will given Interpretation making it operative rather than inoperative; Interpretation disposing of property preferred.

A will must be given interpretation which will make it operative rather than inoperative, and an interpretation by which it disposes of the property dealt with is to be preferred to one which creates an intestacy.

3. Wills ⚡689—Codicil in will held to manifest intention by testatrix to give niece a life estate and to reserve to her testamentary control of the remainder.

Where testatrix's will manifested an intention to make her niece the sole devisee and legatee of her estate, codicil revoking such devise and bequeathing property in trust for the niece, and authorizing niece to dispose of remainder, and permitting trustee to apply the principal of the trust for the benefit of the niece, *held* to manifest an intention to give the niece a life estate and to reserve unto her testamentary control of the remainder if she choose to exercise her right, which right could only accrue on condition that she survived testatrix.

4. Wills ⚡694—Interest of heir at law as remainderman not defeated, where devisee's power of appointment in will never came into existence.

Under codicil in will by which testatrix gave her niece a life estate and reserved unto her testamentary control of the remainder if she chose to exercise it, and in default thereof to her heirs at law, and niece having predeceased testatrix, and having no lineal descendants, devise to her lapsed, and power of appointment never came into existence, in view of Civ. Code, §§ 1310, 1344, thereby not defeating interest of niece's heir at law as remainderman.

5. Executors and administrators ⚡314(12)—Implied finding of probate court that testatrix did not intend to incorporate her niece's will into her own will cannot be disturbed.

On appeal from decree directing distribution of testatrix's estate, implied finding of probate court that testatrix did not intend to incorporate her niece's will, or any part thereof, in her own will, cannot be disturbed.

6. Wills ⚡98—Evidence held not to show that testatrix intended to incorporate her niece's will into her own will.

Evidence *held* not to show that testatrix intended to incorporate her niece's will, or any part thereof, into her own will.

7. Wills ⚡692, 693(5)—Will held not to manifest testatrix's intention that her estate should be distributed by trustee in same manner as niece should devise her own estate.

Will by which testatrix devised all her estate, both real and personal, to her niece, in trust, with power to dispose of remainder if she chose to exercise it, *held* not to manifest intention that it was testatrix's purpose that her estate should be distributed by trustee in same manner and proportion as niece should devise her own estate.

8. Wills ⚡694—Interest of remainderman not defeated because whole trust scheme was dissipated on death of testatrix.

Under will by which testatrix devised all her property, real and personal, to her niece, in trust, with power to dispose of remainder if she chose to exercise it, and in default thereof to her heirs at law, that whole trust scheme was dissipated on death of niece prior to testatrix *held* not to defeat interest of niece's heir at law as remainderman, in view of Civ. Code, §§ 741, 742.

9. Stipulations ⚡21—Exclusion of stipulation not erroneous, where it would not have been of any assistance to court in determining issues properly before it.

In proceedings for distribution of testatrix's estate, exclusion of stipulation constituting a statement of the facts *held* not erroneous, where there was nothing in stipulation that was not before the court, or would have been of any assistance to it in determining issues properly before it.

10. Executors and administrators — 314 (7) — Illness of testatrix when executing codicil held immaterial, in absence of claim of incompetency or testamentary incapacity.

In proceeding for distribution of estate of testatrix, that testatrix was ill and in hospital at time she executed codicil bequeathing all her property in trust to her niece, and that her illness grew progressively worse until her death, *held* immaterial, in absence of a claim of incompetency or testamentary incapacity.

In Bank.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

In the matter of the estate of Gertrude G. McCurdy, deceased. From a decree directing distribution to Nannie Louise Hart Van Sauter and another, Elizabeth C. Ames and others appeal. Affirmed.

Pillsbury, Madison & Sutro, of San Francisco, for appellants.

Heaney, Price & Postel, of Santa Barbara, for respondents.

SEAWELL, J. Gertrude G. McCurdy and Louise E. Hart were aunt and niece, respectively. Both were spinsters and for a number of years immediately prior to the death of the niece, which occurred August 2, 1921, had made their homes together at the city of Santa Barbara, this state. At the time of her demise the niece was about 51 years of age. The aunt died March 15, 1922, at the age of about 72 years, having survived the niece by about 7 months. It was stipulated at the hearing in the court below that at the time of the death of said Louise E. Hart she was unmarried and left neither issue nor mother nor father surviving, but that she did leave surviving her Nannie Louise Hart Van Sauter, a sister of her deceased father, and Gertrude G. McCurdy, a sister of her deceased mother; further, that Nannie Louise Hart Van Sauter survived Gertrude G. McCurdy.

As to Gertrude G. McCurdy, it was stipulated that at the time of her death she left neither issue, nor husband, nor father, nor mother surviving; that the brothers and sisters of her father and mother had predeceased her; and that all of the children of said brothers and sisters had also predeceased said Gertrude G. McCurdy. Then follows a long list of children of the children of deceased brothers and sisters of the father and mother of said Gertrude G. McCurdy, within which the appellants are included. Thus it will be observed that the degree of relationship that existed between Gertrude G. McCurdy, deceased, and the contending heirs, was somewhat remote.

By her will, executed October 14, 1915, Gertrude G. McCurdy devised and bequeathed all of her property, both real and personal, to her niece, Louise E. Hart, naming therein certain

persons to whom she requested her said niece to give something by way of a remembrance if the request should meet the approval of said niece, and if it did not meet with her approval she was not required to regard it. No bonds were required of the niece as executrix, and she given full power to sell and dispose of all property belonging to the estate without applying to the court for leave to do so, and if said niece should not wish to act as executrix she was given the power to nominate some one to act in her place and stead with like powers as were conferred upon her.

On August 30, 1920, Gertrude G. McCurdy executed a codicil to her said will last above mentioned by which she republished said will and testament except in so far as the same was changed or modified by said codicil. That portion of said will by which she gave, devised, and bequeathed all of her property, real and personal, to her niece, Louise E. Hart, was by said codicil revoked, and in lieu thereof she gave, devised, and bequeathed all of her said property to the First National Bank of Santa Barbara, to be held by it in trust, nevertheless, upon the following express trust and conditions:

"To hold and manage the same, receiving the net income therefrom and after the payment of all taxes, assessments, costs, charges and expenses incurred in the care, administration and protection of the trust estate and the protection of this trust and its defense against legal or equitable attack by any person, both during and after probate proceedings of my estate, to pay the net income received and derived from said trust estate to the said Louise E. Hart for and during her natural life. Upon and on the demise of the said Louise E. Hart, this trust shall cease and terminate and the entire corpus and unexpended income shall be paid over and distributed by said trustee in the manner and in the proportions as the said Louise E. Hart shall by her last will and testament provide, and in default thereof to her heirs at law."

"Second: If in the absolute and uncontrolled discretion of said trustee the net income from the trust estate should not be sufficient to provide for the reasonable needs and comforts of said Louise E. Hart, during any period or periods of her illness or other want or necessity, said trustee may, and it is hereby authorized and empowered, but it shall in no event be required so to do, and as often as it shall deem necessary, pay to or use, apply or expend for the use and benefit of said Louise E. Hart such portions of the principal of the trust estate, up to and including the whole thereof as said trustee, in its absolute discretion, may determine to be adequate to provide for said Louise E. Hart during such period or periods."

The same request made in the will as to the mementos was repeated in the codicil, with the further provision that the First National Bank of Santa Barbara be requested and authorized to make the selection of said mementos with the approval of said Louise E. Hart.

On March 16, 1921, Louise E. Hart made the following olographic will:

"March 16, 1921.

"After all my just & Lawful debts are paid, I, Louise E. Hart (spinster) of the City of Santa Barbara, California, do hereby Will and Bequeath to my aunt Gertrude G. McCurdy, any and all of my property & Possessions.

"Any other Relatives, or any other claimants, whomsoever to my Will, to be given only the sum of One Dollar (\$1.00), if claim is made.

"Except Five Hundred Dollars (\$500.00) left to my chinese cook, Gin Kee, for his faithfulness & Care during my long illness.

Harry Ross, Attorney-at-law, of the City of Santa Barbara, California, to act as my executor, without bond.

"I revoke all other wills heretofore made by me, No other Will or Claimant to Will, to be given recognition by law."

The foregoing includes all of the provisions of each of the respective wills which at all bear upon the questions presented upon the appeal. No question of a want of testamentary capacity on the part of either testatrix or undue influence is raised. The construction to be placed upon the wills and the effectiveness of each considered with reference to the order of the deaths of the respective testatrices are the outstanding points in the case. The appraised value of the aunt's estate was about \$60,000, and that of the niece was about \$23,000.

[1, 2] The niece having predeceased the aunt, her estate was in the course of administration in the probate court when the aunt died. In due course the niece's estate was distributed to the First National Bank of Santa Barbara, as the executor of the estate of said Gertrude G. McCurdy, deceased. The probate court, in the estate of the aunt, Gertrude G. McCurdy, found that the will of Louise E. Hart was inoperative and ineffectual to dispose of any portion of the trust estate created by the last will and testament of Gertrude G. McCurdy, and further found that the only heir at law of said Louise E. Hart left surviving was Nannie Louise Hart Van Sauter, a sister of the deceased father of said Louise E. Hart. Distribution was thereupon made of the entire estate of the said Gertrude G. McCurdy to Nannie Louise Hart Van Sauter. The heirs at law of the said Gertrude G. McCurdy, deceased, have appealed from said order of distribution. In considering the effect of the will of Gertrude G. McCurdy it is necessary to bear in mind certain well-established rules of construction. A succinct restatement of the rule is found in the Estate of Phelps, 182 Cal. 752, 190 P. 17. It is there said:

"The will must be given effect in accordance with the intention of the testator, as found from the language of the will, * * * aided by such extrinsic facts as may be admissible for that purpose. A will must be given an interpretation which will make it operative, rather

than one which will render it inoperative, and an interpretation by which it disposes of the property dealt with is to be preferred to one which creates an intestacy."

[3, 4] We think the language of the will of 1915 and the codicil of 1920 leaves little room for doubt as to what the intention of Gertrude G. McCurdy was as to the final disposition of her estate. By the will it was her clear intention to make her niece the sole devisee and legatee of her estate. In fact, that is what she did in unmistakable language. In the event that she, in the order of time, should predecease the niece and the latter should die intestate, all of the property bequeathed by the aunt to the niece would, under the law of succession, pass to the heirs of said niece. If, however, the niece should elect to make a will, the estate that came to her from the aunt would pass to the persons whom the niece preferred. Failing to evidence a contrary desire the aunt's estate would go to the niece's heirs. Such was the effect of the will. The codicil was intended to give the niece a life estate and reserve unto the niece testamentary control of the remainder if she chose to exercise her right. The right to exercise testamentary control over the aunt's estate could only accrue upon condition that the niece should survive the aunt.

The intention of the testatrix is not only clearly expressed by the language of both will and codicil, but is materially supported by extrinsic facts and circumstances. The aunt's reasons for establishing a testamentary trust in August, 1920, about one year before the niece's death, are not stated in express terms. It will be noted, however, that the niece in providing a legacy of \$500 for a Chinese servant in the household gave as her reason for so doing that said legacy was given as a reward for his faithfulness and care of her during her long illness. By the testamentary trust created by the codicil the aunt made provision for the niece's needs during any period or periods of illness, as the necessities of the situation, in the judgment of the trustee, might require. It may reasonably be inferred that one of the considerations that moved the aunt to latterly create a trust by codicil was to relieve her niece of the burdens of business cares that would have been cast upon her in the management of an estate of considerable magnitude. It will be noted that she gave her the whole income of her estate and made, or attempted to make, provision for the use of any part of, or the consumption of the entire corpus of the estate, if the income should for any reason, in the judgment of the trustee, be insufficient to comfortably maintain said niece. Further, she adopted a clause intending thereby to confer upon her the power of appointment, the power of directing to whom the remainder should pass, and, if the power should not be exercised by said niece, the estate was not to revert

to the aunt's heirs, but it was to vest in the heirs of the niece, just as it would have done had the aunt predeceased the niece under the will and before the annexation of the codicil.

Counsel have devoted much time to a discussion of the proper construction to be placed upon the following clause of the codicil:

"Upon and on the demise of the said Louise E. Hart, this trust shall cease and terminate and the entire corpus and unexpended income shall be paid over and distributed by said trustee in the manner and in the proportions as the said Louise E. Hart shall by her last Will and Testament provide, and in default thereof to her heirs at law."

The trust plan could become effective only upon the death of the aunt and the income could be paid to the niece only after an estate came into being which must depend upon the death of the testatrix. The language is open to the construction placed upon it by respondent and the execution of the trust would compel such a construction.

[5] The estate devised or bequeathed by the aunt to the niece, the latter having predeceased her testatrix and there being no lineal descendants of the niece—which is a necessary condition to bring the case within the provisions of section 1310, Civil Code—any devise or legacy made to the niece lapsed. The power of appointment given to the niece fell with the life estate which preceded it. That power did not and could not come into existence until the death of said aunt, and, as the only person who could have exercised the power was dead before that time, the power itself never came into existence. It is as if no such power had been created by the will of the aunt. *Curley v. Lynch*, 206 Mass. 289, 92 N. E. 429; *In re Moore's Estate* (Sur.) 162 N. Y. S. 213; *Farwell on Powers*, § 226; *Sugden on Powers* (8th Ed.) 460; *In re Piffard's Estate*, 111 N. Y. 410, 18 N. E. 718, 2 L. R. A. 193; *Condit v. De Hart*, 62 N. J. Law, 78, 40 A. 776; *In re Fowles' Will*, 222 N. Y. 222, 118 N. E. 611, Ann. Cas. 1918D. 834; 31 Cyc. 1053. This being so, the right of the respondent to take as a remainderman cannot be questioned. Section 1344, Civil Code, provides as follows:

"The death of a devisee or legatee of a limited interest before the testator's death does not defeat the interests of persons in remainder, who survive the testator."

The language found in the *Estate of Gregory*, 12 Cal. App. 309, 107 P. 566, a case not unlike the one before us, is apposite to the situation. It is there said:

"The fact that the wife never lived to become the beneficiary of the trust created in her favor is no reason for holding that the subsequent provision of the will directing the disposition of the fund should be defeated."

[6, 7] The physical facts of the case are that the aunt was 21 years the senior of the niece. If the former anticipated surviving the latter, and as the provisions of the will would indicate, there would have been no reason for the aunt to incorporate any part of the niece's will into her will. No specific reference whatsoever is made by the aunt to any will that may be made by the niece and there is no general language which would have justified the probate court in holding that the aunt intended to incorporate the niece's will, or any part thereof, into her own will. The rule of incorporation by reference has no room for play in this case as the evidence does not tend to establish that the aunt had any such purpose. The implied finding of the court is to the contrary and its finding in this respect cannot be disturbed. The aunt was dealing solely with her own estate, and there is nothing in the will of either the aunt or the niece or the circumstances attending the execution of either of said instruments to indicate that the aunt and niece intended to make conjoint or mutual wills, or that either was acting with a knowledge as to what disposition the other should make of her estate. Relatively, in point of time, the wills were made far apart with different persons named as executors. One was drawn with all the formalities of testamentary prerequisites and witnessed, while the other is olographic. There are no expressions in either that would suggest concert of action or incorporation by reference. *Estate of Plumel*, 151 Cal. 77, 90 P. 192, 121 Am. St. Rep. 100.

[8] The contention of appellants that it was the purpose of the aunt that her estate should be distributed by the trustee in the same manner and proportions as the niece should devise her own estate is not sustained by the context of the aunt's will. It is fairly apparent from the language of the codicil that it was the intention of the aunt that the niece, in disposing of the aunt's estate, should have knowledge of that fact; knowledge that it was the aunt's estate and not her own, merely. It was not, we think, the intention and desire of the aunt that the niece should dispose of a valuable estate without knowledge of the magnitude of her testamentary act. Doubtless the aunt expected the niece to survive her and such a contingency would have given to the niece all the light necessary to guide her in her testamentary right. At the time the aunt died she was about 72 years of age and in all probability infirm with the weight of her years. Her death occurred about 18 months following the day she executed the codicil. The niece predeceased her by about 7 months, and during this intervening period of time she could have, provided she had the testamentary capacity and the inclination, made a subsequent will. This she did not do. It may be that after the niece's death she became indifferent as to the devolu-

tion of her estate, or that she was satisfied for reasons of her own to have her estate descend to her niece's heirs, a contingency she had provided for. It would seem that each of the testatrices preferred the heirs of the other to her own.

We are not concerned with the question whether or not powers of appointment are valid in this state (21 Cal. Jur. 426), since the repeal by the Legislature in 1874 of the title in the Civil Code relating to powers (Code Amendments 1873-74, p. 223), inasmuch as the power created in the instant case failed upon the death of the donee, as above pointed out, and there was no one remaining to exercise it. It is as if no such power was created by the codicil.

[9] It is the claim of appellant that the whole trust scheme of the codicil was invalid and must fail. As a matter of fact, the whole trust scheme was dissipated upon the death of the owner of the equitable life estate, to wit, Louise E. Hart, the niece of the testatrix. But such a contingency could not defeat the interest of the remainderman. Sections 741, 742, Civ. Code, *supra*. The trustee had no opportunity to exercise the discretion reposed by the testatrix in it. However this may be, the discretionary power reposed in the trustee is clearly severable from other parts of the trust instrument which are undoubtedly valid. The discretionary powers are contained within a separate paragraph and follow the imperative duties cast upon the trustee to pay to the beneficiary the entire income from a \$60,000 estate. Ordinarily, one would suppose that the income from such an estate, clear and free from indebtedness, would be sufficient to maintain one person. The testatrix, however, in her anxiety for the welfare and comfort of her niece and to insure her against the hazards of misfortune, after having made it the imperative duty to pay to the beneficiary a certain, fixed amount, reposed in the trustee a discretion as to what greater amount should be expended for the niece, if, in its judgment, her comfort should require the expenditure of any sum beyond the amount which would seem to be ordinarily sufficient for her needs. Resting its contention upon the Estate of Sanford, 136 Cal. 97, 68 P. 494, appellants argue that the whole trust scheme must fail because of the discretion alternatively placed in the power of the trustee. There are authorities in this state and elsewhere which would seem to uphold the trust provisions contained in the testatrix's codicil. This is a question, however, not necessary for decision inasmuch as the subject-matter contained in the discretionary provisions is not inextricably interwoven or interrelated with other provisions of the trust instrument which are clearly valid. *Sacramento Bank v. Montgomery*, 146 Cal.

745, 81 P. 138; *Estate of Fair*, 136 Cal. 79, 68 P. 306.

[10] A brief statement of facts was agreed upon by counsel in the case with the right of objection reserved. Appellants offered the stipulation in evidence and respondents made appropriate objections thereto. The stipulation was excluded by the court. There is nothing in the stipulation of facts of a material character that was not before the court. We cannot see that it would have been of any assistance to the court in determining the issues properly before it. The fact that the aunt was ill and in a hospital at the time she executed the codicil, to wit, August 20, 1920, and that her illness grew progressively worse until her death, March 15, 1922, was not material, in the absence of a claim of incompetency or testamentary incapacity, which claim was not made upon the trial of the case. No claim was made that she was by fraud or trick deprived of an opportunity to have executed a subsequent will if she had so desired.

The decree appealed from is affirmed.

We concur: LAWLOR, J., Acting C. J.; RICHARDS, J.; WASTE, J.; LENNON, J.; SHENK, J.; HOUSER, Justice pro tem.

74 Cal. App. 178

PEOPLE v. FOLLETTE. (Cr. 1095.)

(District Court of Appeal, Second District, Division 1, California. Aug. 24, 1925. Hearing Denied by Supreme Court Oct. 22, 1925.)

1. Indictment and information $\S$ 15(5)—Second indictment held not invalid.

Where accused was indicted for perjury, was arraigned thereon and pleaded not guilty, and action was set for trial, second indictment, returned by grand jury without order of re-submission and without hearing further and additional testimony to that presented at original hearing held not invalid.

2. Indictment and information $\S$ 15(4)—After demurrer sustained to original indictment, second or amended indictment not filed or presented without court order.

In view of Pen. Code, $\S$ 1008, neither can district attorney file nor grand jury present amended or second indictment, where a demurrer has been sustained to original, without obtaining court order either permitting indictment to be amended or submitting case to same or another grand jury.

3. Indictment and information $\S$ 15(5)—Generally, grand jury need not hear additional testimony to return second indictment.

Generally, when second indictment is returned by same grand jury which found original one, it may rely on evidence given on hearing, which resulted in return of the original indictment, and need not hear additional testimony.

4. Perjury ⚡19(3)—Indictment held good as against general and special demurrers.

Indictment for perjury, containing large portion of testimony given by defendant as witness before grand jury in an investigation of attempt to bribe deputy sheriff, *held* good as against general and special demurrers, each particular in which violation of defendant's oath was charged not being required, under Pen. Code, § 954, to be pleaded in a separate count.

5. Perjury ⚡34(4)—Evidence held to sustain conviction.

In prosecution for perjury in connection with grand jury's investigation of alleged bribery of deputy sheriff, evidence of two witnesses and handwriting expert that accused was person who left money at drug store being inconsistent with accused's sworn testimony before grand jury that he did not do so, *held* sufficient to support verdict of conviction.

6. Perjury ⚡29(2)—If evidence sustained one or more assignments, other charges need not be proved.

While indictment may embrace two or more assignments of perjury, if evidence sustained one or more of assignments, it is not necessary for prosecution to prove all charges.

7. Perjury ⚡33(1) — Circumstantial evidence alone not sufficient to support charge.

Positive evidence is absolutely necessary to support charge of perjury, and circumstantial evidence alone is never sufficient.

8. Criminal law ⚡494—No distinction made between expert testimony and other evidence as to its weight or preference.

In perjury prosecution, testimony of handwriting expert and other witnesses that accused left money at drug store *held* positive evidence; there being no distinction between expert testimony and other evidence as to its weight or preference.

9. Perjury ⚡34(4) — Corroboration of witnesses held sufficient.

In prosecution for perjury, testimony of drug store attendants and handwriting expert establishing falsity of accused's statements before grand jury that he did not leave package containing money at drug store *held* sufficiently corroborated by other testimony to meet requirements of Pen. Code, § 1103a.

10. Perjury ⚡34(4)—Corroboration of testimony in perjury prosecution held same as that required to corroborate testimony of accomplice.

Corroboration required under Pen. Code, § 1103a, providing that perjury must be proved by testimony of two witnesses or of one witness and corroborating circumstances, is same as that required under section 1111, regarding testimony of an accomplice.

11. Criminal law ⚡876½—Verdict treated as general verdict finding defendant guilty of crime for which he was tried.

Where after accused pleaded to indictment and before trial second indictment was returned, and where not only court and prosecution

but accused treated indictments, after order of consolidation, as one indictment, verdict may be treated as general verdict finding defendant guilty as charged under actions as consolidated.

12. Criminal law ⚡876½—Failure of jury to render verdict on first indictment held not an acquittal of assignments of perjury therein.

Where after plea to first indictment of perjury, second indictment was returned and order of consolidation of actions was made, failure of jury to render verdict on first indictment *held* not an acquittal of assignments of perjury contained in second indictment, which were also charged in first, since defendant was not acquitted of assignments of perjury in first indictment by failure to render verdict on charges therein.

13. Criminal law ⚡1134(2)—Court not precluded from considering evidence applicable to first indictment in determining its sufficiency to support verdict.

Where, after plea to first indictment, second indictment was returned and actions consolidated, since appellant was not acquitted of assignments of perjury in first indictment by failure of jury to render verdict on charges therein, appellate court was not precluded from considering evidence applicable to assignments of perjury set forth therein in determining whether evidence was sufficient to support verdict of guilty on second indictment.

14. Criminal law ⚡371(12)—Admitting testimony as to alleged conspiracy involving forger held without error.

Where defendant was charged with perjury in testimony given before grand jury which was investigating alleged bribery of deputy sheriff, it was not error to permit testimony as to alleged conspiracy between defendant and another which involved forging and uttering of bail bonds, and which tended to show motive of defendant for assisting the other by supplying money with which to bribe officer, as against objection that such testimony tended to prove another offense of which defendant had been acquitted.

15. Criminal law ⚡369(2) — Generally, evidence showing accused guilty of other crimes held inadmissible, but exception thereto is where evidence directly proves crime charged.

It is general rule that evidence showing accused guilty of crimes other than for which he is on trial is inadmissible against him, but exception to rule is that where evidence to which objection has been made, although it shows defendant guilty of other crimes, tends directly to prove crime for which he is being tried.

16. Criminal law ⚡369(1)—Verdict of acquittal held not to render evidence of other crimes inadmissible.

Verdict of acquittal does not render evidence of other crimes, although they were made subject to prior indictments and defendant had been tried thereon and acquitted of them, inadmissible in subsequent action against defendant on another and different charge.

17. Criminal law ⚡374—Refusal to admit record of former actions to show defendant's acquittal held without error.

In prosecution for perjury, where only objection to evidence relative to forging of bail bonds by defendant and another was that it was inadmissible as showing defendant guilty of crime other than one for which he was being tried, and record of defendant's acquittal of such crime was offered only to prove estoppel and thereby prevent prosecution from proving defendant's connection with such bonds, for which purpose it was inadmissible, error cannot be predicated on refusal to admit record on ground that it would have tended to weaken case of state by showing that defendant had been acquitted of such charge.

18. Witnesses ⚡380(5)—Not permissible for party calling witness to prove his previous statements, which, if sworn to at trial, would make out his case.

Where witness called by party has failed to testify to all that party desired, but has not given testimony against him, it is not permissible for party calling him to prove that he had previously made statements which, if sworn to at trial, would make out his case.

19. Witnesses ⚡389—Permitting prosecution to prove statements of witness before grand jury held erroneous.

In prosecution for perjury it was error to permit prosecution to prove statements of its witness before grand jury as to what defendant had told him, in view of fact that witness did not deny having such conversation, but testified he did not remember it.

20. Criminal law ⚡829(12)—Refusal of defendant's instructions on corroborating evidence held without error.

In prosecution for perjury, where jury were repeatedly instructed that defendant could be convicted only if alleged false statements were proved beyond reasonable doubt by testimony of two witnesses or one witness and corroborating circumstances, and "corroborate" and "corroboration" were properly defined, there was no error in refusing defendant's instruction on corroborating evidence.

21. Criminal law ⚡823(2)—Instruction assuming fact of offense held not misleading in view of other instructions.

In prosecution for perjury, instruction on necessity and effect of corroboration, if subject to criticism as assuming that defendant made false statements charged, held not prejudicial in view of other instructions clearly removing any tendency of such instruction to mislead jury.

22. Perjury ⚡37(4)—Instruction on corroborating evidence held not misleading.

In prosecution for perjury, where court instructed that defendant could not be convicted unless statements charged to be false were proved beyond reasonable doubt by two witnesses, or by one witness and corroborating circumstances, instruction that to corroborate means to strengthen, to make more certain, and to add weight or credibility to a thing, and evidence which did any of those things was evi-

dence which corroborated, and corroborating evidence held not to be misleading.

23. Criminal law ⚡823(4)—Instruction in language of Code held without error.

In perjury prosecution, instruction in language of Pen. Code, § 125, that an unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false, held not error, in view of further instruction that false testimony must be corrupt and willful, and ignorance of true facts, inadvertence, or mistake are not substitutes for willfulness or corruptness.

24. Perjury ⚡37(1)—Refusal of confusing instructions held without error.

In prosecution for perjury there was no error in refusing defendant's instruction that a magistrate, in proving bail bonds, has legal right to assume that persons qualifying thereon are in truth and fact the persons whom they purport and claim to be when they appear before him to justify, such instruction being confusing and not a correct statement of law.

25. Bail ⚡49—Duty of magistrate in accepting bail stated.

It is duty of magistrate in accepting bail, to the very limit of his knowledge and in the exercise of greatest care, to see that bond he accepts is legal in form, that sureties are persons they purport to be, and that they are able to respond to full extent of penalty.

26. Bail ⚡47—Refusal of instruction that any committing magistrate may accept bail held without error.

In prosecution for perjury, there was no error, in view of Pen. Code, §§ 1277, 1280, 1281, in refusing defendant's instruction that any committing magistrate may accept bail or approve bail bonds whether the person admitted to bail was so admitted by such committing magistrate or any other.

27. Criminal law ⚡1170½(5)—Error in permitting prosecution to cross-examine its witness by reading his testimony before grand jury held not to require reversal.

In prosecution for perjury, error in permitting prosecution to cross-examine its witness by reading to him portions of his testimony before grand jury held not to justify the appellate court in reversing conviction where there still remained testimony sufficient to sustain conviction.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Channing Follette was convicted of perjury, and he appeals. Affirmed.

Hearing denied by Supreme Court; Lennon, J., dissenting.

Robert M. Clarke, Paul W. Schenck, H. L. Giesler, and Leon R. Yankwich, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman and Erwin W. Widney, Deputy Attys. Gen., for the People.

CURTIS, J. An indictment against the appellant was returned by the grand jury of the county of Los Angeles charging him with the crime of perjury. Certain testimony was set out in said indictment which it was alleged therein was given by the appellant while testifying as a witness before said grand jury, and it was charged in said indictment that said testimony was false and untrue, and that appellant at the time he gave the same knew it to be false and untrue. Only a small portion of the testimony of appellant, given at the time he was before the grand jury, was set forth in this indictment. The appellant was arraigned upon said indictment and pleaded not guilty to the charge therein contained, and the action was set for trial. Thereafter and some two weeks before the day of trial the same grand jury without calling any additional witnesses or without taking any further testimony whatever and without any leave or order of court either permitting any amendment to said indictment or directing the filing of a new indictment, or directing the case to be resubmitted to the same or another grand jury, returned a second indictment against appellant, again charging him with the crime of perjury. In this new indictment, not only was the testimony which was contained in the original indictment and which was therein made the basis of the charge of perjury against the defendant, set forth, but other and further testimony, alleged therein to have been given by appellant while testifying as such witness before said grand jury, was set out in said new indictment, and the whole thereof was in said new indictment charged to be false and untrue, and to have been made by appellant with knowledge of its falsity and untruthfulness. A motion was made to set aside this new indictment upon all the statutory grounds. This motion was denied.

[1] The first point made by appellant for a reversal of the judgment herein is based upon the refusal of the court to grant his said motion to set aside said second indictment. The principal ground urged by appellant in support of said motion, and the only one which we will consider upon this appeal, was that said second indictment was not legally found by the grand jury for the reasons: First, that said grand jury was without jurisdiction or power to consider the matter without an order of resubmission; and secondly, that said grand jury was without authority to find said new indictment without hearing further and additional testimony to that presented to them at the original hearing.

As to the power of the grand jury to return a second indictment against a defendant for the same offense charged in the first, the rule is stated in *Corpus Juris* as follows:

"It is generally held that a grand jury may find a valid indictment notwithstanding another indictment is pending against accused for the same offense, and the pendency of the other

indictment, where there has been no conviction or jeopardy thereon, is not ground for a plea either in abatement or in bar of the second indictment, * * * although as a rule accused can be tried or put in jeopardy only on one. It has been so held, even though defendant has been arraigned and a plea of not guilty entered on the first indictment." 31 C. J. p. 598.

[2] Numerous authorities are cited by the author of the above work in support of this rule, and they appear generally to sustain the text. Appellant has called our attention to a number of cases decided by the Supreme and appellate courts of this state which hold in effect that neither can the district attorney file nor the grand jury present an amended or second indictment where a demurrer has been sustained to the original indictment without obtaining an order of court either permitting the indictment to be amended or submitting the case to the same or another grand jury. This is in accord with section 1008 of the Penal Code, and is undoubtedly the rule enunciated in the following cases: *Ex parte Williams*, 116 Cal. 512, 48 P. 499; *Copeland v. Superior Court*, 62 Cal. App. 316, 217 P. 573; *Ex parte Hayter*, 16 Cal. App. 211, 116 P. 370. These cases are not decisive of the point now under consideration, for the reason that no demurrer was sustained to the original indictment returned herein against the defendant, but the district attorney, for reasons best known to himself, had the grand jury return a second indictment while the original indictment was in full force and after the defendant had entered his plea thereto.

The case of *Thompson v. United States*, 202 F. 401, 120 C. C. A. 575, 47 L. R. A. (N. S.) 206, is a case very similar to the present action. This case arose in this state, but was brought in the federal courts, and the decision rendered by the Circuit Court of Appeals was made in reference to the practice established by our Penal Code in criminal actions. In that action a second indictment had been returned against the defendant, in which he was accused of the identical crime embraced in the first indictment after he had entered his plea and the case had been set for trial. It does not appear that the court made any order permitting the district attorney to amend the indictment or directing the case to be resubmitted to the grand jury. The court said, at page 403 (120 C. C. A. 577):

"The contention is that under the law of California, which it is said became the rule of practice for the federal courts in that state, a grand jury which has once indicted a defendant is disqualified to bring in a second indictment against him charging him with the same offense. * * * Counsel for plaintiff in error cite three decisions: *People v. Hanstead*, 135 Cal. 149, 67 P. 763; *People v. Bright*, 157 Cal. 663, 109 P. 33; *People v. Landis*, 139 Cal. 426, 73 P. 153. * * * It is to be observed that all of the decisions of the Supreme Court of California above cited were rendered prior to the

change in section 1008 of the Penal Code, which was made in 1905. * * * The section as amended substitutes for the last clause the following: 'Directs the case to be submitted to the same or another grand jury'—thereby declaring the law of the state to be that a grand jury which had once found an indictment against a defendant was not disqualified to find a second indictment against him upon the same facts, a wise provision of law, and we may well wonder why it should ever have been held otherwise, as no substantial reason is apparent why a grand jury, after having once found an indictment which is discovered to be defective in form, may not, upon the information which it has acquired, and with the same conviction, based upon that information, that the defendant should be brought to trial, present a second indictment for the same offense."

It may be true, as suggested by appellant, that the point made in that action in support of the motion to quash the indictment was that "a grand jury which has once indicted a defendant is disqualified to bring a second indictment against him, charging him with the same offense," but the court, in deciding said motion adversely to the accused, must necessarily have held that the grand jury had a right to return the second indictment without any order of court directing a resubmission of the case, for the reason we think the record plainly shows that no such order was made by the trial court.

In *Kalloch v. Superior Court*, 56 Cal. 229, the defendant was prosecuted by information. After an order made setting aside the first information, a second information for the same offense was filed by the district attorney, without any order by the court directing the filing of the same. Prior to the making of said order of dismissal, however, a second complaint had been filed against the defendant, charging him with the same crime set out in the first information. The defendant moved to set aside the second information, and his motion was denied. The defendant then instituted a proceeding to prohibit the superior court from proceeding with the trial of the defendant on the ground that all proceedings under the second information were absolutely void and the court was without jurisdiction of the defendant. In denying this petition, the Supreme Court, on page 236, disposes of this question as follows:

"But was it a material fact in the case, that the second prosecution was commenced before the first was ended? Suppose the prosecution had been by indictment, would the pendency of the indictment affect the right of the prosecution to present another for the same offense? This question is answered in the negative by a multitude of authorities, a few of which we will notice. In the case of *Dutton v. The State*, 5 Ind. 534, it was held, that 'another indictment pending for the same offense constitutes no ground of abatement. This, in criminal prosecutions, seems to be the settled rule.' 1 Chitty's Crim. L. 447. In the case of the *Commonwealth v. Murphy*, 11 Cush.

(Mass.) 472, the court says, that 'the pendency of one indictment is no ground for plea in abatement to another indictment in the same court for the same cause.' In the case of *Miazza v. The State*, 36 Miss. 616, the court decided, that 'the motion in arrest of judgment, on the ground that other indictments of similar import were then pending in the same court against the same defendant, was properly overruled.' In *United States v. Herbert*, 5 Cranch, C. C. 87, Chief Justice Cranch said, that 'the pendency of another indictment against the defendant for the same offense is no ground for arresting the judgment.' The last authority to which we will refer on this subject is Wharton's *Criminal Pleading and Practice*, § 452, where the author says: 'It has been ruled that, though the defendant has pleaded to a former indictment for the same offense, the fact of the former indictment being still pending is no bar to a trial on the second.' It is true, that all the foregoing cases refer to indictments, but the rule is equally applicable to an information, as the latter is simply designed to serve the purpose and take the place of the former. Each is but an accusation, in legal form, of the offense with which the prisoner stands charged, and for which he is to be placed upon trial. We can, therefore, see nothing in the provisions of the Penal Code, or in the general principles of law, applicable to proceedings in criminal cases, which in any manner affect the regularity and validity of the second information, on the ground above stated."

In *People v. Ammerman*, 118 Cal. 23, 50 P. 15, the court had under consideration section 1008 of the Penal Code. In that case the information had been filed charging the defendant with the crime of robbery. The defendant pleaded not guilty to the charge, and his case was set for trial. After the jury had been sworn to try the case, the district attorney discovered that the information was fatally defective in that it failed to allege the ownership of the property stolen. Thereupon, and upon his motion, the court dismissed the information and discharged the defendant, without making any order that a new information be filed. The district attorney, nevertheless, thereafter filed a new information charging the defendant with the same crime which had been attempted to be charged in the original information. It was claimed by the appellant therein that under section 1008 of the Penal Code the prosecution was barred because of the failure of the court to direct the filing of a new information. The Supreme Court, however, held that section 1008 was applicable only when a demurrer had been filed to the information and had been allowed by the court. The court on page 28 (50 P. 16), disposed of appellant's contention as follows:

"The question does not, in my opinion, necessarily arise, for the reason that no demurrer to the information appears to have been filed. It is by the terms of the statute in the case of demurrer allowed that the judgment becomes a bar unless the court directs a new information

to be filed. The section does not apply to a case where no demurrer is interposed, or, if interposed, is disallowed. This clearly appears from preceding and subsequent sections of the same chapter."

We can conceive of no reason why any different rule should prevail in the case where the accused is being prosecuted by an indictment instead of by an information. There are a few cases in other jurisdictions holding a contrary doctrine, but these cases we think are exceptions to the general rule which permits the return of a second indictment without any order of court directing the case to be resubmitted.

Important changes have been made in recent years in the criminal procedure of our state, the evident purpose of which was to remove the restrictions which were formerly placed upon prosecuting officers in instituting and conducting criminal proceedings. In 1905 (St. 1905, p. 773), section 1008 was amended so as to permit a resubmission of the case to the same grand jury in the event of a demurrer thereto being sustained, and, in 1911 (St. 1911, p. 436), this section was further amended so as to permit an indictment or information to be amended by the district attorney without leave, before the defendant pleads, and by leave of court thereafter. The strict rules prevailing prior to these amendments often hampered prosecuting officers in their attempts to enforce the law, and resulted in many miscarriages of justice. In view of the more liberal rules now prevailing in the institution and conduct of criminal proceedings and after a consideration of the above authorities, we are of the opinion that there is nothing in the law of this state which affects the regularity or validity of the second indictment presented against the defendant.

[3] Neither do we think the court erred in denying appellant's motion to set aside the said indictment on the ground that the grand jury failed to take further evidence before returning the same. The general rule appears to be that when the second indictment is returned by the same grand jury which found the original one, the grand jury may rely upon the evidence given on the hearing, which resulted in the return of the original indictment, and need not hear any additional testimony. 31 C. J. p. 600; *People v. Baff*, 99 Misc. Rep. 684, 166 N. Y. S. 136; *Whiting v. State*, 48 Ohio St. 220, 27 N. E. 96. There are a few cases holding a contrary doctrine. Among these latter cases is that of *State v. Ivey*, 100 N. C. 539, 5 S. E. 407, and cited and relied upon by appellant. Regarding this case the court, in *People v. Baff*, supra, says:

"To sustain the point made in the first motion, counsel rely on the case of *State v. Ivey*, 100 N. C. 539, 5 S. E. 407, which supports their contention. I am, however, not inclined to follow that decision, for the reason that it is too

technical. It seems to me that it would be an idle ceremony for the same grand jury to rehear the same witnesses, where it is of opinion that sufficient evidence was taken in the first proceeding to meet the objections which resulted in a demurrer being allowed to a defective indictment."

To the same general effect is the case of *Whiting v. State*, supra.

[4] Appellant interposed a general and special demurrer to the second indictment, which was overruled by the court. Appellant assigns this action of the court as reversible error. The principal contention of appellant in support of his demurrer is that more than one offense was charged in the indictment. The indictment in question consisted of one count, and covered nearly 50 typewritten pages of the clerk's transcript. It contained a large portion, although by no means all, of the testimony given by the appellant while testifying as a witness before the grand jury in an investigation then being made by said grand jury of an attempt to bribe a deputy sheriff of said county. The testimony charged to be perjurious was all given in one proceeding before the grand jury. Appellant contends that, under the practice followed by the district attorney in this action, it is impossible for the appellant, or for that matter for the court, to know of what particular false statement defendant was found guilty; that while all the jurors may have believed that he falsified in some material portion of his testimony, they might wholly disagree as to the particular portion thereof which was false and untrue. Appellant further claims that each violation of his oath, if material, constituted a separate and distinct offense, and, under section 954 of the Penal Code, should be pleaded in separate counts. No authorities have been called to our attention which support this contention of appellant. On the other hand, there appears to be quite an agreement among text-writers and in the adjudicated cases that it is proper to include in an indictment all the material testimony which it is claimed is false. "An indictment or information charging perjury may join, in one count, all the particulars in which the accused is alleged to have testified falsely, although the assignments are in relation to separate and distinct false statements, where all the statements assigned as false were made under oath and in one proceeding." *Wharton's Criminal Procedure*, vol. 2 (3d Ed.) § 1069. "An indictment for perjury may embrace in a single count all the particulars in which the defendant is alleged to have sworn falsely." 30 Cyc. of Law and Procedure, p. 1439; *Cover v. Commonwealth* (Pa.) 8 A. 196; *Commonwealth v. Johns*, 72 Mass. (6 Gray) 274; *State v. Bishop*, 1 D. Chip. (Vt.) 120; *State v. Bordeaux*, 93 N. C. 560; *State v. Taylor*, 202 Mo. 1, 100 S. W. 41; *State v. Joiner*, 128 La. 876, 55 So. 560. The court, in *State v. Taylor*, supra, said:

"Some of the assignments of perjury were more clearly established than others, but there was ample testimony to establish the guilt of the defendant on a number of assignments, and on matters which were material to the issue on the trial of Kelleher, and where this is the case, it is proper to join the various assignments of perjury in one count where they all relate to the same transaction, and, if the evidence sustains one or more of the assignments, it is not necessary that the state should prove all of the charges."

[5] It is next the contention of appellant that the evidence is not sufficient to sustain the verdict. A consideration of this claim on the part of appellant will necessitate a statement of some of the facts as shown by the testimony. The verdict being against the defendant, it will be only necessary for us, in stating the facts, to mention those which tend to sustain the verdict. The appellant at the time of his indictment was, and for some two years prior thereto had been, one of the six justices of the peace of the township of Los Angeles. On March 5, 1923, T. J. Gilbert and Sam Johnson, after a preliminary examination, were held to answer for the crime of grand larceny; their bail was fixed at \$10,000 each, and, being unable to give the same, they were committed to the sheriff of the county of Los Angeles by Justice of the Peace W. S. Baird, before whom said preliminary examination had been held. While in jail these prisoners made the acquaintance of one Carl V. Lindquist, who was a fellow prisoner with them in the county jail of said county. Lindquist had become acquainted with appellant some time during the preceding December. On April 17, 1923, Lindquist was released from jail. On the same day he visited appellant at his office and, according to his testimony, he arranged with appellant for the release of Gilbert and Johnson from said county jail, for the sum of \$1,400, which amount was paid to appellant by Lindquist and Mrs. Gilbert, wife of T. J. Gilbert. On the evening of the day Lindquist was released he appeared at the county jail with two orders, signed by appellant, directing the release of Gilbert and Johnson. On May 1st Gilbert's case was called in the superior court, and upon his failure to appear his bond was forfeited. It was found on investigation that there was no bond on file for either Gilbert or Johnson. Later appellant produced two bonds which he had either at his residence or private law office, and which purported to have been given for the release of Gilbert and Johnson. These bonds bore the names of A. E. Stensbad and T. E. Little, but it later developed that the names of these purported sureties had been forged to the said bonds. Thereupon Lindquist was arrested and charged with the crime of forgery in signing the names of Stensbad and Little to said bonds. While under arrest he attempted to arrange with Deputy Sheriff Reimer, who was investigat-

ing said charge of forgery, to "fix" the case for the sum of \$700, which he agreed to pay Reimer. Reimer pretended to fall in with the plan, and some days thereafter, the exact date being May 17, 1923, Mrs. Lindquist, wife of Carl V. Lindquist, delivered said sum of \$700 to the said Reimer. This money was traced back through Mrs. Lindquist to an attorney named Edgar B. Hervey, who obtained it at a drug store at the corner of Fifth and Broadway in the city of Los Angeles. Just before he had delivered it to Mrs. Lindquist, Hervey had been told by appellant to call at the drug store and ask for a package which had been left there to be delivered to George Allen or Ruth Allen. Upon doing so he was handed a package, which proved to be a loaf of bread wrapped in a towel, and in one end of the loaf of bread were seven \$100 bills. These bills Hervey took from the package and delivered to Mrs. Lindquist.

Before a session of the grand jury, held during the latter part of May, 1923, for the purpose of investigating a charge of attempted bribery by Lindquist of said deputy sheriff, the appellant testified, among other things, that on the day the package was delivered to Hervey at the drug store and some hours earlier in the day, probably about 11 o'clock of said day, Hervey came to appellant while the latter was holding court and said that he had a chance to get Mr. Lindquist out on bail if they could raise \$700. The transcript of the testimony taken on said hearing then continues as follows:

"I (appellant) asked him how he was to raise the \$700. He told me Lindquist had said if he would come to me I knew where he could get the money. Now, Mr. Lindquist had told me, when he first got in this trouble, that if there was an opportunity for him to get out on bail, that he had a friend, whose name I don't know just now, but I can get it—I have a note that I made. As I recall, it was Mr. Rollins, who lives in an apartment house down here—he gave me the number; I don't know which apartment house it was. At the time he gave me the telephone number, and I called up the number, and it was the Pendleton or the Pelton Apartments, and I talked with this man—asked him if he knew Mr. Lindquist; that Mr. Lindquist wished to get \$700, if he could, for the purpose of getting his bail produced; and that if he would communicate with Mr. Hervey about the matter, that Mr. Hervey was his attorney and would arrange it. I gave him Mr. Hervey's address, and told him what his phone number was; I am quite sure that that conversation occurred—well, I know it occurred in the morning, because it was after I went to lunch that I got a call back. He wanted to know who I was—very suspicious, apparently. Well, I told him who I was; I had no reason to hide it. I told him I was Channing Follette; that I had known Mr. Lindquist; that this Mr. Lindquist was in trouble, and I didn't believe he was involved in any dishonesty connected with the transaction. He said, 'All right; I will see what I can do, and I will communicate with Mr. Hervey.' I said, 'See Hervey about it and

(240 P.)

come right down here to the courthouse.' I didn't make any bones about it, and had no reason to. I then heard from this man; it must have been about 12:30 or a quarter to 1 or 1 o'clock. It was either the day or the day before that Mr. Hervey was involved in some trouble. I didn't know anything about Mr. Hervey getting in trouble until after he was involved; I think the next day or two days after. I received a call that an effort had been made to reach Mr. Hervey, and that Mr. Hervey was not available, and the money, for the reason he didn't want to be known in the matter, and he felt his safety and protection required it—this same man that I talked to.

* * *

"Q. That is where you got the \$700? A. I didn't get the \$700; Mr. Rollins was Mr. Lindquist's friend, and he agreed to produce the money; Mr. Rollins said he would check this money for Mr. Hervey—he didn't say 'Mr. Hervey,' but he said he would check the money at the drug store, and if Mr. Hervey would call for the money at the drug store—no, if Mr. Hervey would call and get the check in a telephone booth at the Angelus Hotel, that he could then go and get the money, and Mr. Rollins would not be known—didn't want to be known in the transaction—he would consider himself better off. It looked pretty funny to me, that here is a man going to produce \$700, and going in this foolish surreptitious manner to get the money to Mr. Lindquist or Mr. Hervey. He said, 'I don't want to be known; I don't want to be mixed up with Lindquist's affair. I am ready to produce the money, but I don't care to be mixed up in it.'

"Q. That is, Mr. Rollins? A. Yes. I said, 'Well, all right.' And I called up Mr. Hervey on the telephone. I didn't get him right away but apparently when he came in from lunch he called me, or I called him, I don't remember which may have answered or called. I told him about this, where he could get the money. I asked him if he knew anything about Rollins, if Lindquist had talked to him about Rollins, or anything about it; and I told him just what he told me. He said, 'Well, that is all right'; he would get the money. * * * and Mr. Hervey was to go there at a certain time; that is, the money would not be available until a certain time that day—I forget just when it was, but I think around 1 or 1:30—and I went about my business, forgetting about it until I got another telephone call, saying that the money was left in a check room at a drug store, from this same fellow Rollins, whom I had no doubt is available. I have his phone number and all that. Mr. Rollins told me that they didn't give him a check; that one had to call for the money in person. He didn't know who was going to call for it, so he left it for a Mr. or Miss Allen; and that if Mr. Hervey, he didn't say 'Mr. Hervey,' he said if we would go and get the money there, to simply call for a package for that party, and it would be available. I couldn't get Mr. Hervey then, as he had gone out, and I went down to the hotel where I thought Mr. Hervey would be to get the check to get the money, and delivered the message I had received.

"Q. You had told him previously, had you, that you had told Mr. Hervey to go down there to get it? A. I delivered the message I received, that if he would go down there he would get it.

"Q. What was it to be in? A. He said it would be in a package. I then told Mr. Hervey he would have to call for it in person, without a check; that he would simply have to go and ask for this package.

"Q. This was a package of bills, was it, or currency? A. I presume so, he didn't say what form it would be in, but it would be in a package, he said—I don't know.

"Q. You don't know whether it was silver or currency? A. I really don't know; but I don't imagine they would have that much silver; that would be a pretty heavy package. It may have been, though, I don't know; but it was the money, no doubt; and I don't imagine he would leave a check.

"Q. What size was the package? A. I don't know what size the package was. A package of bills would be, I imagine, about that size (indicating), but I don't know; I never saw the package. I didn't go down there and get it, and I didn't talk with him further about it. It may have been silver; I don't know.

"Q. Let's check back a minute: Hervey had gone down here to the hotel, and you had phoned to him at his office and found he had left, and then you went to Hervey? A. I tried to get the message to Mr. Hervey over the telephone that no check—that there wouldn't be anybody there for a check at all; that he would have to go and call for the package in person; and he apparently went and did so. Now, it is just dime novel foolishness that, as I reflect on it, has got my goat.

"Q. Let's see; Hervey, you found him at this hotel; which hotel was it? A. Mr. Hervey was waiting at the hotel.

"Q. Which hotel was it? A. The Angelus Hotel.

"Q. This was about what time of the day? A. Well; it must have been about 1:30.

"Q. What did you say to Hervey then? A. I said I had gotten a phone message that there would not be any check for him; that he would have to go in person and get a package, and ask for a package for Mr. Allen. I had told him that; I remember that very definitely, and whether or not he got it, I don't know. I asked Mr. Hervey if he wouldn't let me know if he got it all right, and let me know what the darned thing was all about, or something of that sort. The mystery of this business of chasing around hotels and things with packages didn't appeal to me very much; but I couldn't see anything wrong in it.

"Q. You didn't see the package? A. No.

"Q. Where did Rollins tell you he had placed the money? A. He told me it was in a drug store, an Owl drug store on Broadway.

"Q. Whereabout in the drug store? A. In a check room in a drug store on Broadway.

"Q. In a check room? A. Yes; he said it was checked—I don't know as he said a check room, but he said it was checked up in an Owl drug store on Broadway. * * *

"Q. Isn't it true that you described to Hervey the character of the package? A. No; I didn't. I didn't know the character of the package; I haven't seen the package to this day, and I couldn't tell you whether it was currency or cash, or what it was. * * *

"Q. And you positively say that you didn't leave that package there? A. Absolutely yes; I did not.

"Mr. Stafford: And you never saw the ticket, or anything at all? A. No, sir.

"Q. I ask you to examine this ticket, and examine the handwriting, 'George Allen or Ruth Allen': Is that your handwriting (showing check to witness)? A. No, sir.

"Q. You never saw this ticket before? A. Never saw it in my life. * * * A. I just called Mr. Rollins once, but he called me twice.

"Q. And he stopped at this apartment house, the one of two names? A. They told me over the phone it went in through an exchange, and they gave me the name of the apartment house.

"Q. And they knew who he was, did they; no trouble about finding him, or who he was? A. I had no trouble at all; they just connected me right away.

"Q. And the house was one of two, you thought? A. The Pendleton or Pelton Apartments."

This testimony, together with numerous repetitions and reiterations of the same, was set out in the indictment. In substance the testimony of appellant before the grand jury might be briefly summarized as follows: That Lindquist, after he had gotten into this trouble regarding the forged bail bonds of Gilbert and Johnson, had told appellant that if there was an opportunity for him to get bail, that he, Lindquist, had a friend whose name was Rollins who would assist him in raising the money necessary to pay for a bail bond; that Rollins lived either at the Pendleton or the Pelton Apartments, and that Lindquist then gave to appellant Rollins' telephone number at these apartments, which appellant then wrote down on one of his cards; that thereafter Hervey came to appellant and told him that Lindquist had a chance to get out on bail if he could raise \$700; thereupon appellant rang up Rollins at the Pendleton or Pelton Apartments and told him that Lindquist wished to get \$700 with which to get bail, and that if Rollins would communicate with Mr. Hervey, Lindquist's attorney, the latter would arrange it, and that appellant then gave to Rollins Hervey's address; that Rollins said, "All right, I'll see what I can do and I will communicate with Mr. Hervey;" that this conversation occurred sometime before noon, and about 12:30 or a quarter to 1 o'clock, Rollins rang up appellant and told him that he, Rollins, did not want to be known in the matter, but that he would check the money at the drug store, and that a check for the same could be found in a telephone booth at the Angelus Hotel; that thereupon appellant called up Hervey by telephone, or Hervey called up appellant, the latter was not certain, but in this telephone conversation appellant told Hervey where and how he could get the money, but that it would not be available until around 1 or 1:30 o'clock; that later Rollins again called up appellant and told him that the money would be left at the drug store at the corner of Fifth and Broadway, but that there would not be any check for it, but that it would be

delivered when asked for in the name of Mr. or Miss Allen; that appellant, on receiving this second message, endeavored to telephone Hervey, but not being able to reach him by phone, he went to the Angelus Hotel, where he found Hervey and communicated to him the contents of Rollins' second message; that appellant did not place the money in the drug store, and that he did not write "George Allen or Ruth Allen" on the card or check which was left with the package containing the money, and that he never saw this card or check before it was shown him at the time he testified before the grand jury, and that he had never seen the money which was delivered to Hervey at the drug store.

At the trial it was shown that there was no apartment house in the city of Los Angeles by the name of Pendleton, but there was one by the name of Pelton Apartments, and that Gilbert, Johnson, and Lindquist resided there during a part of the months of April and May, 1923, when they were not public charges at the county jail. Lindquist testified that he did not know of any person by the name of Rollins; that he never had any conversation with appellant in which the name of Rollins was mentioned; that he never gave appellant any telephone number at which any person by the name of Rollins could be reached, and that he did not know at any time during the months of April and May, 1923, the telephone number of the Pelton Apartments so that he could repeat it without referring to a telephone book, and that the defendant did not in his presence write the name of Rollins with the telephone number on a card; that he knew Gilbert and Johnson, and that he knew Gilbert went at times by the name of Gates, but never knew him by any other name; and that he never knew him by the name of Rollins.

The Pelton Apartments were owned and conducted by two brothers, C. R. Brown and R. B. Brown, during the months of April and May, 1923, and for a long time prior and subsequent thereto. These men testified that no person by the name of Rollins was stopping at said apartment house during the months of April and May, 1923, or at any other time; that they knew Gilbert by the name of Gates, but never knew him by the name of Rollins; that Gates, or Gilbert, registered at the Pelton Apartments on April 18th and left on the night of May 2, 1923, and that they had never seen him at the apartment house since that date. Olive McPherson and Lucille E. Fennell, two telephone operators who had charge of the switchboard at the Pelton Apartments, testified that they knew of no such person as Rollins being at the Pelton Apartments during the months of April or May, 1923. Neither of these witnesses had any recollection of any call being received at the Pelton Apartments for a man by the name of Rollins during the month of May,

1923. Miss Fennell testified that she knew and remembered Gilbert under the name of Gates, but did not know him by any other name. Mr. John S. Cooper, the attorney of Gilbert, testified that Gilbert resided at the Pelton Apartments prior to and on and about May 1, 1923, but that he had not seen him nor heard from him since said last-named date. In addition to these witnesses, B. F. Anderson, an investigator of the district attorney's office, testified that he visited the Pelton Apartments the last part of April or the first part of May, 1923, in search of Gilbert, and that he was not able to find him there, although he went to the room formerly occupied by Gilbert and his wife and searched for him in other parts of the house.

The witness Hervey testified, as did also the appellant, that appellant met Hervey at the Angelus Hotel and told him that he could get the money by calling at the drug store at Fifth and Broadway and asking for a package left there for "George Allen or Ruth Allen." Hervey went direct from appellant to the drug store, only one city block distant, and secured the money by asking for a package according to the instructions given him by appellant. The two attendants at the drug store testified that this package had been left there less than an hour before it was delivered to Hervey by a person described as a man of medium build, and that at the time he left the package he wrote in their presence on a card or check, "George Allen or Ruth Allen." One of these attendants testified that the person leaving the package at the drug store was a man just about the size of appellant. This card or check was produced at the trial, and a witness by the name of Milton Carlson, who qualified as an expert on handwriting, testified that the handwriting upon the card or check was the handwriting of appellant.

[6] The indictment, as we have already observed, contains a large number of assignments of perjury. It may be that the evidence is not sufficient to sustain all of such assignments, but the rule is well settled that, while the indictment may embrace two, or more, or many assignments of perjury, if the evidence sustains one or more of the assignments it is not necessary for the prosecution to prove all of the charges. *State v. Taylor*, supra. It will not be necessary, therefore, to examine the evidence with a view of ascertaining whether it is sufficient to sustain all of the assignments of perjury set forth in the indictment. Some of these assignments may possibly be upon immaterial matters. Others were upon collateral issues to the real subject under investigation by the grand jury at the time appellant testified before that body. It will be remembered that the grand jury had under investigation the attempted bribery of Deputy Sheriff Reimer. The money which was to be used to bribe this officer

was the \$700 which Hervey procured at the drug store at the corner of Fifth and Broadway. In determining, therefore, who were the guilty parties in this crime, if any had been committed, it became of vital importance to determine the identity of the person leaving at the drug store the package containing the \$700. Hervey testified that he went to the drug store and procured the money under the direction of appellant. It therefore became material for the grand jury to know whether or not the appellant himself had left the money at the drug store for Hervey. As for the appellant, this was the crux of his whole testimony before the grand jury. It was charged in the information that appellant's testimony, denying that he had been at the drug store and there left the package containing the money, was false and untrue, and, as this is the most serious and vital assignment of perjury against the appellant contained in the whole indictment, we will examine the evidence offered by the prosecution with a view of ascertaining whether the same supports this assignment. If the evidence supports this assignment, then it will be unnecessary to consider the testimony in the light of the remaining assignments. On the other hand, if the evidence fails to support this assignment, then, as we view the case, a verdict of conviction upon any other assignment would be based upon mere collateral, if not immaterial, matters.

In proof of the falsity of the testimony of appellant that he did not leave the money at the drug store for Hervey, the two attendants at the drug store with whom the money was left testified at the trial that the person who left the package containing the money was a man of "medium build," and that he wrote "George Allen or Ruth Allen" on the check left with the package. The witness Carlson testified that the writing on the card was that of appellant. This testimony in any ordinary action, if believed by the jury, would be sufficient to prove that appellant was the person who left the money at the drug store. But in prosecutions for perjury, the falsity of the statement claimed to be perjurious must be proven by two witnesses or the testimony of one witness and corroborating circumstances. Pen. Code, § 1103a. Was the testimony, therefore, of the drug store attendants and that of Carlson, the handwriting expert, if legally corroborated, sufficient to support the verdict finding the defendant guilty of perjury?

[7] Under the decisions of the appellate courts of this state, positive evidence is absolutely necessary to support a charge of perjury, and circumstantial evidence alone is never sufficient. *People v. Wells*, 103 Cal. 631, 37 P. 529; *People v. Burcham* (Cal. App.) 232 P. 149. Yet this does not mean that there must be the positive and direct evidence of a witness who has testified to the falsity of the

testimony given by the accused. It does not mean, in order to sustain the verdict in this case, based upon the assignment under consideration, that at least one witness must testify that he actually saw and identified the appellant as the person who did leave the money at the drug store, but such conviction must stand if there is any testimony showing a contrary state of facts from that sworn to by appellant before the grand jury and incompatible with his evidence there given, provided the same is legally corroborated.

In *People v. Porter*, 104 Cal. 415, 38 P. 88, the Supreme Court, in considering the sufficiency of the evidence in that action to support a verdict of conviction for perjury, states the rule as follows:

"It is contemplated by the statute that there must be the testimony of one witness to facts that are absolutely incompatible with the innocence of the accused before a conviction is justified by the law."

In *People v. Chadwick*, 4 Cal. App. 63, 87 P. 384, the court says:

"'Direct evidence' is declared in section 1831 of the Code of Civil Procedure to be 'that which proves the fact in dispute directly without an inference or presumption and which in itself, if true, conclusively establishes that fact.' Upon a trial for perjury, direct evidence * * * includes any positive testimony of a contrary state of facts from that sworn to by him at the former trial, or which is absolutely incompatible with his evidence or physically inconsistent with the facts so testified to by him."

And in *People v. Casanova*, 54 Cal. App. 439, 202 P. 45, the same rule is expressed by the court and in the following language:

"That there was such legal evidence, sufficient to meet the requirements of the statute, we have no doubt. The statute respecting the quantum of evidence necessary in perjury cases will be satisfied if there be the testimony of one witness to facts that are absolutely incompatible with the innocence of the accused, corroborated by circumstances which, of themselves and independently of such directly inculpatory evidence, tend, with a reasonable degree of certitude, to show that the accused is guilty as charged. 'Upon a trial for perjury direct evidence is not limited to a denial in ipsissimis verbis of the testimony given by the defendant, but includes any positive testimony of a contrary state of facts from that sworn to by him at the former trial, or which is absolutely incompatible with his evidence, or physically inconsistent with the facts so testified to by him.'"

[8] Viewed in the light of these decisions, the testimony in this case of the two drug store attendants and that of the handwriting expert is positive evidence tending to prove that appellant left the money at the drug store, and it is therefore absolutely inconsistent with his sworn statement before the grand jury that he did not do so, and is consequently incompatible with his innocence

of the charge against him. This testimony, if believed by the jury without any inference or presumption, conclusively proved the fact that defendant was the person who left the money for Hervey. The only doubt in our minds as to the sufficiency of this evidence was whether expert testimony would comply with the requirements of the rule prescribed in prosecutions for perjury. We have not been able to find any authority holding that expert testimony is not sufficient in such a case. On the other hand, the decisions of our courts are to the effect that no distinction is to be made between expert testimony and other evidence as to its weight or preference. In the late case of *Rolland v. Porterfield*, 183 Cal. 466, 469, 191 P. 913, 914, the court said:

"Whatever the individual opinion as to the value of expert testimony, it has been clearly settled in this state that, as regards the preference or weight to be given the testimony in any particular case, the law makes no distinction between expert testimony and evidence of other character."

The same principle has been held in a long list of California cases. *Estate of Blake*, 136 Cal. 306, 68 P. 827, 89 Am. St. Rep. 135; *People v. Wilkins*, 158 Cal. 530, 111 P. 612; *Estate of Hess*, 183 Cal. 589, 192 P. 35; *Estate of Nelson*, 191 Cal. 280, 216 P. 368.

[9] The testimony of the drug store attendants and the handwriting expert being sufficient to establish the falsity of appellant's statements before the grand jury that he did not leave the package containing the money at the drug store, the next question that arises is whether there is sufficient corroboration of this testimony to meet the requirements of section 1103a of the Penal Code. In the first place, we have the testimony of the witness Hervey, who testified that appellant, only a few minutes before Hervey called at the drug store and asked for the money, had told him that the money was at the drug store, and that he could get it by calling for a package left there for "George Allen or Ruth Allen." This circumstance, standing alone, would amount to incriminating evidence against the appellant. That appellant informed Hervey where and how to get the money, which was to be used for the purpose of bribing the officer, raised a strong inference of appellant's complicity in said crime, and when this evidence is considered in connection with the other evidence in the case, that appellant actually left the money at the drug store for Hervey, it tended in a marked degree to corroborate this latter evidence.

In addition, however, to the testimony of Hervey, we have the witness Lindquist and the proprietors and employees of the Pelton Apartments. Lindquist testified that he had no friend by the name of Rollins, and that he did not tell appellant he had, or that any

person by the name of Rollins would help him get bail. The witnesses from the Pelton Apartments testified that no person by the name of Rollins resided there at or near the 17th day of May, 1923, the day appellant testified that he telephoned to Rollins, and the latter informed him that the \$700 would be left at the drug store. Appellant having given Hervey information as to where and how the latter could get the money, and having denied that he left the money where he told Hervey he would find it, was of necessity obliged to offer some explanation as to how he came into possession of the information he imparted to Hervey. This explanation was that Rollins had informed him of the place where the money would be left. The fact that his explanation as to the source from which he acquired this information was proven to be false, by the testimony of the witness Lindquist and the proprietors and employees of the Pelton Apartments, strongly corroborated the other evidence in the case that the appellant himself placed the money at the drug store for the use of Hervey.

[10] The corroboration required under section 1103a of the Penal Code is the same as that required under section 1111, regarding the testimony of an accomplice. "There is no essential difference between the provisions of section 1103a, of the Penal Code and section 1111 in so far as the law requires that the corroborating evidence 'shall tend to connect the defendant with the commission of the offense.'" *People v. Woodcock*, 52 Cal. App. 412, 418, 199 P. 565, 568. "The corroborating evidence may be slight; * * * nevertheless, the requirements of the statute are fulfilled if there be any corroborating evidence which, of itself, tends to connect the accused with the commission of the offense." *People v. Melvane*, 39 Cal. 614, 616; *People v. Clough*, 73 Cal. 348, 15 P. 5; *People v. McLean*, 84 Cal. 480, 24 P. 32; *People v. Barker*, 114 Cal. 617, 46 P. 601; *People v. Martin*, 19 Cal. App. 295, 125 P. 919. The testimony of appellant before the grand jury that he did not leave the money at the place indicated must be considered in connection with his further testimony that Rollins told him the money was there in a conversation which he had with Rollins over the telephone at the Pelton Apartments, and that he had such conversation with Rollins at the instance of Lindquist. Proof that Lindquist had no such conversation with appellant, and that he knew no such person by the name of Rollins, and that no such person by the name of Rollins was at the Pelton Apartments at the time appellant claims he telephoned to Rollins tended to prove the falsity of his testimony that he did not leave the money at the drug store. Especially is this true when we take into consideration the further fact that appellant had told Hervey where the money

was left and how it could be obtained. These statements of appellant before the grand jury were so intimately connected and were so dependent, one upon the other, that proof of the falsity of one of such statements tended to prove the falsity of the others. We are therefore of the opinion that the evidence given by the drug store attendants and Carlson that defendant left the money at the drug store finds sufficient corroboration in the testimony of Hervey and also in the testimony of Lindquist and the proprietors and employees of the Pelton Apartments.

[11] In connection with appellant's claim that the evidence is not sufficient to support the verdict, he makes the further contention that he was acquitted of the charge set forth in the first indictment, and that such acquittal was an acquittal on all assignments of perjury set forth in the second indictment which were also contained in the first indictment, and that the court, in determining the question as to whether the evidence is sufficient to support the verdict, is precluded from considering any evidence in the case which is applicable to any of the assignments of perjury contained in the first indictment. As we have before noted, two indictments were found against appellant. In the first only a small portion of appellant's testimony before the grand jury was set out and charged to have been false, and in the second a much larger portion of his testimony before the grand jury was alleged to be untrue, including all that contained in the first indictment. By order of court the two actions were consolidated, and the appellant was placed on trial on both indictments. Thereafter the case was tried as one action. In the instructions given by the court, not only those given by it upon its own motion and those given at the request of the people, but also those given at the request of the appellant, the court made frequent references to "the indictment," and in no instance was any reference made to the first indictment or to the second indictment, or to any other fact or circumstances indicating that the defendant was being tried upon more than one indictment. In the instructions given at the request of appellant, "the indictment" is referred to 24 times, and in the instructions requested by appellant and refused by the court, appellant refers to "the indictment" 9 times, but in no instance in any of these instructions, which were either given or refused by the court, does appellant refer to the first indictment or the second indictment, nor does he ask or request the court that the jury be instructed to render separate verdicts upon the two indictments. The jury rendered its verdict finding "the defendant guilty of perjury as charged in the indictment." It was numbered, however, 21,289, being the number assigned to the action against the defendant upon the second in-

dictment and before the actions had been consolidated. It would appear, from these references to the proceedings of the court, that not only the court and the prosecution, but the appellant himself, treated the indictments, after the order of the court consolidating the actions as one indictment. The jury, in rendering their verdict in the form in which they did simply followed the course pursued by the court and all the parties to the action, including the appellant, and we think under these circumstances their verdict may well be treated as a general verdict finding the defendant guilty as charged of the crime for which he was placed upon trial in the actions as consolidated. Even if the jury had plainly indicated that their verdict only applied to the second indictment, they would thereby have found appellant guilty of all charges contained in the first indictment, for the reason, as already stated, that all assignments of perjury set forth in the first indictment were included in the second indictment.

[12] But conceding for the sake of argument the contention of appellant that there were two distinct and separate indictments, upon which the defendant was placed on trial, and that the jury's verdict only applied to the second indictment, did the failure of the jury to render a verdict upon the first indictment acquit the defendant of those assignments of perjury contained in the second indictment which were also charged in the first? In support of appellant's claim that such verdict was an acquittal of all the charges which were contained in both indictments, he relies upon a statement of the law found in 16 Corpus Juris, at page 1107, as follows: "A conviction and judgment upon one of several counts, with no verdict upon the others, is an acquittal of the others." A large number of cases are cited in the above work in support of this text. We have examined these cases, but failed to find that any of them go to the extent claimed for them by appellant. And our attention has not been directed to any authority which holds that where a defendant is upon trial on two or more indictments and the jury renders a verdict of guilty upon the charge contained in one of said indictments, and fails to render any verdict upon the charge contained in the other indictment, that such failure of the jury to render a verdict upon one indictment affects in any manner whatever the verdict rendered upon the other of said indictments. The most that these authorities hold is that the failure of a jury to render a verdict as to all the charges upon which a defendant is being tried is equivalent to or operates as an acquittal of the defendant as to those charges upon which no verdict was rendered, and would be a bar to any subsequent prosecution of the defendant upon said charges. This result would arise, not from any verdict of the jury, but from the

action of the court in discharging the jury without rendering a verdict. The same result would follow if the defendant had been placed upon trial upon a valid indictment before a jury and the jury discharged without the consent of the defendant and before the introduction of any evidence. The defendant could not thereafter be further prosecuted upon the charge contained in said indictment, not because he had been acquitted by the jury at the former hearing, for he had not been, but because he had been once placed in jeopardy at said former hearing, and therefore could not be again brought to trial upon the same charge. As far as the accused is concerned, the proceedings at the first hearing operated as and were equivalent to an acquittal of him, for the reason that he could not be further prosecuted on said charge. This is made clear in a number of the cases cited in Corpus Juris in support of the statement from the text above quoted:

"Doubtless, where a jury, although convicting as to some, are silent as to other counts in an indictment, and are discharged without the consent of the accused, as was the fact in the Dealy Case, the effect of such discharge is 'equivalent to an acquittal,' because, as the record affords no adequate legal cause for the discharge of the jury, any further attempt to prosecute would amount to a second jeopardy, as to the charge with reference to which the jury has been silent." *Selvester v. United States*, 170 U. S. 262, 18 S. Ct. 580, 42 L. Ed. 1029.

"Where on a trial on an indictment of different counts, there is a specific verdict of guilty on one count, and the verdict is silent as to the other counts, and there is a conviction on the verdict of guilty, it is a bar to further prosecution on the counts on which the verdict is silent. (Id.) So much is settled in this state." *People of State of N. Y. v. Dowling*, 84 N. Y. 478, 483.

"The question of guilt or innocence of both offenses charged was submitted to the jury, and that body found him guilty of but one, and designated which. Trial and conviction upon this indictment is a bar to any subsequent prosecution for the larceny therein charged. * * * It will be equivalent to a verdict of not guilty on such counts." *Guenther v. People*, 24 N. Y. 100.

[13] It follows therefore, in the present action, that the appellant was not acquitted of the assignments of perjury set forth in the first indictment by the failure of the jury to render a verdict upon the charges contained therein. If any advantage can accrue to appellant by such failure, it would be that he could plead once in jeopardy to any attempt which might be made in the future to prosecute him upon said charges. His claim, however, that the court is precluded from considering the evidence applicable to the assignments of perjury set forth in the first indictment, in determining whether the evidence is sufficient to support the verdict of the jury as rendered, is untenable and finds no sup-

port in law or reason. As we view the law, it is the right and duty of the court to resort to all such evidence in deciding the question of the sufficiency of the evidence to justify the judgment.

[14] The next point urged by appellant in support of his appeal is that the court erred in the admission of the following evidence: (1) That relating to an alleged conspiracy between appellant and Lindquist involving the forging and uttering of certain bail bonds, and in the refusal of the court to permit appellant to show by the records of a former case that he had been acquitted by the jury of said charge of uttering said forged bail bonds; and (2) in permitting the prosecution to impeach its own witness Hervey and in so doing to introduce incompetent evidence under the guise of refreshing his recollection.

The testimony relating to the conspiracy between appellant and Lindquist involving the forging and uttering of certain bail bonds was admitted over the repeated and strenuous objection of appellant. It tended to show that on the day Lindquist was released from prison, he called upon appellant and arranged with him for the release of Gilbert and Johnson, then in the county jail awaiting trial upon the charge of grand larceny. The bonds of each had been fixed by the magistrate at the sum of \$10,000. The agreement between appellant and Lindquist was that for a consideration of \$1,400, to be paid appellant, he would execute and deliver releases for these two prisoners. Accordingly, Lindquist appeared at the county jail on the evening of the same day with such orders, and upon them Gilbert and Johnson were released, and appellant was paid said sum of \$1,400. Later on, appellant produced two bail bonds which purported to be given for the release of Gilbert and Johnson, but which were proven to be forgeries. Lindquist was thereupon arrested, charged with the forgery of said bonds, and while under arrest he attempted to bribe Deputy Sheriff Reimer, who had said matter under investigation, "to fix" said case, and was to pay him the sum of \$700. It was this sum of \$700, which was to be used to bribe Reimer, that was left at the drug store and which the witness Hervey secured therefrom and gave to Mrs. Lindquist. Evidence was admitted which tended to show that the money was left at the drug store by appellant, which evidence, if legally sufficient and if true, would prove the charge of perjury upon which defendant was then being tried. It was the theory of the prosecution at the trial, and the same contention is now made by the Attorney General, that the testimony relative to the conspiracy of appellant and Lindquist involving the forging and uttering of these bail bonds showed a motive on the part of appellant, and offered a reason for his assisting Lindquist to extricate himself from

the trouble in which he found himself, to the extent of supplying the money with which he hoped to bribe the officer. The grounds upon which this evidence was objected to were that it showed or tended to show the commission of other crimes by appellant, and, furthermore, that he had theretofore been placed upon trial for uttering said forged bail bonds, and had by a jury been acquitted of said charge, and therefore, the prosecution was estopped from again litigating the issue decided in said former action. Appellant at the time of making said objection offered to prove by the record of said former action his acquittal of said charge of forgery, to which offer the district attorney objected and said objection was sustained by the court.

[15] It is unquestionably the general rule that evidence which tends to show that the accused is guilty of the commission of crimes other than that for which he is then on trial is inadmissible against him. There are, however, exceptions to this general rule, and one of these exceptions is that where the evidence, to which objection has been made, although it shows defendant guilty of other crimes tends directly to prove the crime for which he is then being tried, such evidence is admissible against him on said trial. *People v. Lane*, 101 Cal. 513, 36 P. 16; *People v. Wilson*, 117 Cal. 688, 49 P. 1054; *People v. Valliere*, 123 Cal. 576, 56 P. 433; *People v. Brown*, 130 Cal. 591, 62 P. 1072; *People v. Cook*, 148 Cal. 334, 83 P. 43; *People v. Argentos*, 156 Cal. 720, 106 P. 65. In the case of *People v. Cook*, supra, at page 341 (83 P. 46), the court said:

"The result of the discussion, I think, may be summed up in the proposition that evidence which is relevant to any material fact in issue in a criminal case cannot be excluded because it may prejudice the defendant by proving him guilty of other crimes than that for which he is on trial."

In *People v. Argentos*, supra, at page 725 (106 P. 67), the court said:

"Where it appears that evidence of the commission of such other crime has a direct and logical bearing upon the question of the guilt of the accused as to the crime with which he is charged, evidence of the commission of such other offense is admissible."

And on page 726 (106 P. 67), the court further said:

"What weight that evidence might have was a question for the jury, but that it was admissible, notwithstanding it showed the defendant was charged with some other offense than the one for which he was being tried, and though its tendency might have been to prejudice him in the minds of the jury, is not, under the authorities, open to question."

Such evidence is always admissible to prove motive. In the same case of *People*

v. Argentos, supra, at page 725 (106 P. 67), the court also said:

"But this evidence was not admitted with a view merely of proving that defendant had been charged with another offense. It was offered and, we think, properly admitted as bearing on the question of motive."

In *People v. Cook*, supra, at page 340 (83 P. 46), the following language was used by the court:

"But when some distinct offense is so connected with the crime charged in the indictment that proof of the former, in connection with other evidence, would sustain a probable inference of guilt as to the latter, such distinct offense may be proved—as, for instance, to show a motive on the part of defendant to commit the crime charged."

This evidence regarding the conspiracy between appellant and Lindquist in relation to these bail bonds would undoubtedly have a tendency to show a motive on the part of appellant for furnishing the funds with which the officer was to be bribed "to fix" the case against Lindquist. If the charge could be dismissed against Lindquist, it would probably result in the matter being dropped, and appellant might also escape prosecution thereon. While, as far as we have been able to ascertain from the record, it did not appear that appellant was then under indictment for uttering said forged bail bonds, it does appear that at some time subsequent thereto he was placed on trial on said charge. From this fact it is only reasonable to infer that he was then at least under suspicion, and that Reimer was then investigating his connection with the forged bail bonds, as well as that of Lindquist. He was therefore, equally with Lindquist, interested in having the investigation of said charges brought to a speedy end, and, to him and Lindquist a favorable termination. Any evidence, therefore, that would tend to show a motive on appellant's part for furnishing the bribe money would be material as tending to prove that said money was furnished by him, and proof that he furnished the money and left it at the drug store for Hervey went to the very gist of the charge that his statement before the grand jury that he did not leave it there was false. There was therefore no error in admitting this testimony, unless the verdict of acquittal rendered in appellant's favor on the forgery charge rendered it inadmissible.

[16] As to the effect of a verdict of acquittal under such circumstances, the authorities in this state are few, but we think they establish the rule that such a verdict does not render evidence of other crimes, although these other crimes were made the subject of prior indictments and the defendant had been tried on such charges and acquitted of them, inadmissible in a subsequent action against

the defendant on another and different charge. In the early case of *People v. Frank*, 28 Cal. 507, the question was directly before the court and decided adversely to appellant's contention. On page 515 of the opinion in this case, the court said:

"The exception to the admission of certain other drafts claimed to have been forged and uttered by defendant about the same time, for the purpose of proving guilty knowledge, on the score that they had been the subject of other indictments upon which the defendant had been tried and acquitted, is not in our judgment well taken. It is well settled that in cases like the present it may be shown that the defendant uttered, at or about the same time, other forged notes or bills, whether of the same kind or a different kind, or that he had in his possession other forged notes or bills, tending to prove that he knew the note or bill in question to be forged. *Roscoe on Criminal Evidence*, 90 et sequens; 1 Phil. on Ev. Cowen & Hill's notes, 768; 3 Greenleaf on Ev. § 15. Nor does it matter if such other notes or bills are the subjects of other indictments pending at the time. *Commonwealth v. Stearns*, 10 Metc. (Mass.) 256. And in *Houston's Case*, 1 Bailey (S. C.) 300, it was held that the principle upon which such evidence is admitted is unaffected by the fact that the defendant has been tried and acquitted upon the notes or bills produced in evidence, although the force of the evidence may be thereby weakened."

The only other case in this state upon the subject, to which our attention has been called, is the recent case of *People v. Berry*, 191 Cal. 109, 215 P. 74. No reference was made in this latter case to the *Frank Case*, and there is nothing to be found therein which directly or indirectly overrules the earlier case or lays down any different rule than that enunciated in the *Frank Case*. In *People v. Berry*, 191 Cal. 109, 215 P. 74, the Supreme Court said:

"It cannot be successfully said that by the acquittal of the defendant of all but one of the crimes of the consolidated indictments, the jury found the defendant was not a member of a general conspiracy, but of only one conspiracy, and hence the evidence of the other offenses was inadmissible, and for that reason the defendant did not have a fair and impartial trial. We have no doubt that evidence of each and all of the enumerated transactions, whether covered by the indictments or not, was admissible under the similar offense rule as tending to prove a conspiracy. The interlocking of the participants in the various frauds, their common use of the same fictitious entities, their uniform insistence that their banking needs in carrying out their numerous swindling operations should be entrusted solely to the defendant as assuring an element of safety, were facts justifying an inference that a general conspiracy existed, and the defendant's guilty connection therewith was abundantly shown."

In addition to the above statement, and immediately following it, the court further said:

"If the defendant were to be tried again on the Herr transaction, the prosecution would, it appears clear, be entitled to prove each of the transactions, although the defendant had been acquitted on some of them. *McCartney v. State*, 3 Ind. 353, 56 Am. Dec. 510; *Bryant v. U. S.*, 257 F. 382, 385 [168 C. C. A. 418]; *Zobine* on Federal Crim. Law Proc. § 451; *Walsh v. U. S.*, 174 F. 615 [98 C. C. A. 461]; *Bell v. State*, 57 Md. 108. As these transactions would be admissible in a new trial, it follows that their admission in this case was not error."

Upon a rehearing the court struck out this latter paragraph from its opinion. No reason was given by the court for its elimination of this statement from its opinion, and appellant argues that the reason must have been that the court did not consider that the law was correctly stated therein, and therefore that this case is an authority supporting his contention. In view of the fact that the judgment of conviction rendered by the trial court was affirmed by the Supreme Court, we are not prepared to agree with appellant in his contention or to give to the case of *People v. Berry*, 191 Cal. 109, 215 P. 74, the construction claimed for it by appellant. On the other hand, we think the opinion in this case (as it now stands) is in accord with the opinion rendered in *People v. Frank*, supra, and that under the rule as enunciated in these cases the evidence relating to the forged bail bonds was admissible, notwithstanding that defendant had been previously acquitted of the crime of uttering said bonds.

[17] As we have already seen, appellant, at the time he interposed his objection to the introduction of the evidence relative to the forged bail bonds, offered to prove by the records of the former action that he had been acquitted by a jury therein of forging said bail bonds. It is now contended (in the reply brief of appellant for the first time) that even if said record was not admissible to show that the offered testimony was inadmissible, or, in other words, to show an estoppel as against the prosecution, appellant was still entitled to have said record of his acquittal before the jury for the purpose of weakening the effect of the evidence against him. In other words, as against the testimony of the prosecution that he had uttered the forged bonds, he claims he was entitled to show as a part of his defense that he had been acquitted of said charge. The authorities are not in entire accord upon this question, but we find it unnecessary to pass directly upon this question in this action. We have already attempted to show that said record was not admissible to prove an estoppel and thereby prevent the prosecution from proving appellant's connection with said forged bonds. This was the only purpose for which said record was offered. If it were admissible for that purpose, then it would have been proper for the appellant to have

made said offer at the time he did; that is, before the introduction of any evidence by the prosecution regarding the forgery of said bail bonds. Had the court accepted said offer and admitted said record, it would then have been its duty to have passed upon the question of estoppel before admitting any evidence relative to appellant's connection with said forged bail bonds. But, if the record of the former action had been offered simply to weaken the case of the people, then it was a matter of defense, and could not have been properly offered or admitted during the people's case. Our attention has been called to a number of instances when appellant, during the trial, offered to prove by said record his acquittal of the charge of uttering said bail bonds, but these offers were all made while the prosecution was putting on its case and in connection with appellant's objection to the admission of evidence regarding the forged bail bonds. These objections to the admission of such evidence were, in our opinion, all properly overruled by the court, and the refusal of the court at said times to entertain appellant's offers to introduce the record in the former action was also proper and free from error. Our attention has not been called to any offer of appellant to prove said record as a part of his case or as a defense of the action against him. If said record were admissible at all, it was admissible only as a defense and as a part of appellant's case. As far as we are able to ascertain from the record, until the filing of the reply brief by appellant, neither in the trial court nor in this court had the claim ever been made by appellant that his said offers to prove the record of said former action were made as a part of his defense and for the purpose of rebutting the case made against him by the prosecution. On the other hand, the times at which said offers were made, and the language used on the occasion of the record being offered, indicate clearly that appellant's sole object in making said offer was for the purpose of stopping the prosecution from proving appellant's connection with said forged bail bonds. Under these circumstances, it was not error on the part of the court to have refused to admit said record. Had the offer been made at the proper time, that is, as a matter of defense, and for the purpose of rebutting the evidence offered on the part of the prosecution, and had the court then denied said offer, a different case would have been presented which might call for a different conclusion.

[18, 19] The other assignment of error in the admission of evidence was directed to the action of the court in permitting the prosecution, over the objection of defendant, to cross-examine and impeach the witness Hervey, a witness called on behalf of plaintiff, and to read to said witness for the purpose of refreshing his memory, as well as of impeaching him, portions of his testimony given be-

fore the grand jury. The witness Hervey testified that appellant, immediately on their leaving the Angelus Hotel and on their way from said hotel to the corner of Fourth street and Broadway, told him that if he would go to the Owl drug store at the corner of Fifth street and Broadway and inquire for a package which had been left there for George Allen or Ruth Allen, that one would be given him, and that acting upon these instructions from appellant he went to this drug store, asked for the package as directed by appellant, and a package was delivered to him containing a loaf of bread, in one end of which was the \$700 in bills. He was then asked by the prosecution whether appellant had told him that he would find the money in a package with a loaf of bread, and he answered that he did not remember. The prosecution, over the objection of appellant, then read to the witness Hervey portions of his testimony given before the grand jury, in which this witness had stated that appellant had told him, on their way from the hotel, that the money would be in a package with a loaf of bread. In answer to questions by the district attorney as to whether he gave said testimony before the grand jury, Hervey stated that if it was in the transcript he believed he so testified, but that he had no recollection of appellant ever telling him that he would find the money in a loaf of bread or in a package with a loaf of bread. Appellant now contends that the admission of this testimony was error for the reason that Hervey gave no testimony that was adverse to the prosecution, but he simply stated that he was unable to recollect the conversation to which he testified before the grand jury. Appellant concedes that, had Hervey testified at the trial that appellant had not told him that the money was in a package with the loaf of bread, then it would have been proper for the prosecution to have shown that he made statements inconsistent with the testimony as then given, but, as Hervey only stated that he was unable to remember any such conversation with appellant, then it was highly improper and extremely erroneous to permit the prosecution to prove the statements made by Hervey before the grand jury. This question is not a new one to the courts of this state, but from the case of *People v. Jacobs*, 49 Cal. 384, down to very recent times, the Supreme Court has consistently and persistently enunciated the rule contended for by appellant. *People v. Jacobs*, 49 Cal. 384; *People v. De Witt*, 68 Cal. 584, 588, 10 P. 212; *People v. Wallace*, 89 Cal. 158, 164, 26 P. 650; *People v. Mitchell*, 94 Cal. 550, 556, 29 P. 1106; *In re Kennedy*, 104 Cal. 429, 431, 38 P. 93; *People v. Conkling*, 111 Cal. 616, 44 P. 314; *People v. Crespi*, 115 Cal. 50, 55, 46 P. 863; *People v. Creeks*, 141 Cal. 529, 75 P. 101. In the last-named case of *People v. Creeks* at page 532

(75 P. 102), the court states the rule as follows:

"Where a witness called by a party has simply failed to testify to all that party expected or desired, but has not given testimony against him, it is not permissible for the party calling him to prove that such witness had previously made statements which, if sworn to at the trial, would tend to make out his case."

In the more recent case of *Estate of De Laveaga*, 165 Cal. 607, 631, 133 P. 307, 317, the court states the rule in the following language:

"Assuming that contestant had the right on the ground of surprise to impeach Mrs. Cebrian by showing that she had made, at other times, statements inconsistent with her present testimony (Code Civ. Proc. §§ 2049 and 2052), he had no right to show previous statements made by her as to matters concerning which she failed to testify at all on the trial, as for instance upon matters as to which she said that she did not remember."

We are unable to find anything at variance with this rule as above enunciated in any of the authorities to which our attention has been called in the brief of the Attorney General. We think this rule must therefore be held to be the settled law of this state. According to this rule it was clearly error for the court to permit the prosecution to prove the statements of Hervey before the grand jury as to what appellant told him in regard to finding the money in a package with a loaf of bread, in view of the fact that Hervey did not deny having such a conversation, but simply testified that he did not remember it.

[20, 21] Appellant makes the further contention that the court erred both in refusing to give certain instructions proposed by him and in giving certain other instructions at the request of the prosecution. Appellant offered five instructions, purporting to set forth a correct statement of the law requiring the testimony of two witnesses, or of one witness and corroborating evidence, in order to convict in prosecutions for perjury. The instructions were all refused by the court, and, at the request of the prosecution, the court instructed the jury as follows:

"Perjury must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances, and it is not sufficient where the testimony of two witnesses are relied upon that each of the witnesses testified to different false statements made by the defendant, but the law requires in such case that the two witnesses testify to one or more statements found by the jury beyond all reasonable doubt to have been falsely made by the defendant while under oath.

"In this case it is not the theory of the prosecution that any two witnesses have testified to false statements made by the defendant, but it is the theory of the prosecution that one witness has testified directly to the false state-

ments made by the defendant, and that the testimony of such witness is corroborated by the circumstances and that each of the two witnesses who have testified to false statements made by the defendant corroborate.

"It is therefore necessary for you to understand what is meant by the word 'corroborate' and 'corroboration.' To corroborate means to strengthen; to make more certain; to add weight or credibility to a thing; to confirm by additional security; to add strength. Evidence which does any of these things is evidence which corroborates, and is corroborating evidence. It does not mean facts which, independent of the evidence being corroborated, will warrant a conviction, but it is evidence which tends to prove the defendant's guilt independent of the evidence which is corroborated."

[22] If this instruction contains a correct statement of the law relative to the character of the evidence required in prosecutions for perjury, we are of the opinion that there was no error on the part of the court in refusing appellant's proposed instructions upon the subject of corroborating evidence. Appellant criticises this instruction in two respects: First, because, as he contends, it assumes that the defendant made false statements; and, secondly, because it does not correctly state the law. As to the first criticism, that is, that this instruction assumes that appellant made the false statements with which he was charged, we are not of the opinion that, assuming this criticism to be well taken, the jury were misled by the instruction. The jury were repeatedly told by the court in other instructions that the defendant could not be convicted of perjury unless the statements charged to be false were proven so beyond a reasonable doubt by the testimony of two witnesses, or of one witness and corroborating circumstances. In support of the further criticism that this instruction does not correctly state the law, appellant directs our attention to the following portion thereof:

"It is therefore, necessary for you to understand what is meant by the words 'corroborate' and 'corroboration.' To corroborate means to strengthen, to make more certain, to add weight or credibility to a thing, to confirm by additional security, to add strength. Evidence which does any of these things is evidence which corroborates and is corroborating evidence."

In *People v. Compton*, 123 Cal. 403, 411, 56 P. 44, 48, in discussing an instruction in some respects similar to that under consideration, the Supreme Court said:

"Here the jury was told that it is sufficient if such corroborative evidence tends in any way to connect the defendant with the commission of the crime. Such is not the law. It could tend to connect him with the crime by considering it with the testimony of the accomplice; yet, if it is necessary so to consider, it would not be legally sufficient. It is legally sufficient only if, standing alone, it tends so to connect him."

Had the instruction under consideration in the present action ended with the portion thereof last quoted, it might come within the objection indicated in *People v. Compton*, supra, but it will be noted that the instruction continues with the following sentence:

"It does not mean facts which independent of the evidence being corroborated, will warrant a conviction, but it is evidence which tends to prove the defendant's guilt, independent of the evidence which is corroborated."

In this concluding sentence of the instruction, the jury were correctly told that corroborating evidence in a prosecution for perjury "is evidence which tends to prove defendant's guilt independent of the evidence which is corroborated." This statement in the instruction not only states the law upon the subject correctly, but renders the instruction as a whole free from the criticism of the appellant. We are therefore of the opinion that the court did not err in giving the foregoing instruction, nor was any error committed by the court in refusing the five instructions proposed by appellant and hereinbefore referred to. It is conceded that the corroboration required in perjury cases is the same as that required of testimony given by an accomplice. In either case it is a sufficient compliance with the statute if the corroborating evidence, standing alone, tends to connect the defendant with the crime. "The corroboration of an accomplice's testimony, as has been said, may be slight. * * * But it must in and of itself, and independent of the testimony of the accomplice, tend to inculcate the defendant on trial with the commission of the crime." *People v. Coffey*, 161 Cal. 433, 119 P. 901, 39 L. R. A. (N. S.) 704. Reading the instruction, therefore, as a whole, we are of the opinion that it contains a correct statement of the law upon the subject of corroborating evidence, and is not subject to the criticism made against it by appellant.

[23] The court instructed the jury in the language of section 125 of the Penal Code. Appellant contends that this was error, and in support of this contention relies upon *People v. Von Tiedeman*, 120 Cal. 128, 52 P. 155. In that action the court said:

"This section of the code was given to the jury, and the application of the principle there declared to the facts of the case stated in various forms by the judge in his charge."

After setting out a number of these "various forms," the court continues:

"Such a construction of section 125 absolutely eliminates the whole question of criminal intent; and criminal intent is the vital element in every crime of perjury. * * * The court omitted to instruct the jury that this was an essential element of the crime; that, in order to find the defendant guilty of the crime charged, they must find that the statement which he was

charged with having made was made by him 'willfully.'"

The court finally concludes that:

"Under the instructions given, the jury were at liberty to find the defendant guilty, even though they should find that the statement had been made by him in the honest belief that it was true."

In the present action the court, in another instruction, told the jury that:

"The false testimony must have been corrupt and willful, and ignorance of the true facts, inadvertence, or mistake, are not substitutes for willfulness or corruptness."

This last-mentioned instruction supplied that which was lacking in the instructions in the case of *People v. Von Tiedeman*, supra, and rendered the giving of the instruction in the present action, in the language of section 125 of the Penal Code, proper and free from error.

[24] It was not error for the court to refuse the following instruction, requested by appellant:

"You are instructed that a magistrate, in approving bail bonds, has a legal right to assume that the persons qualifying thereon are in truth and in fact the persons whom they purport and claim to be, when they appear before such magistrate to justify."

[25] Such an instruction could only have confused the jury. Besides, it is not a correct statement of the law upon the subject. If this were the law, then John Doe and Richard Roe, two men well known personally to the magistrate, might qualify upon a bail bond as John Smith and William Jones, and it would be the legal right of the magistrate to assume that they were the persons whom they purported and claimed to be, even though the magistrate knew of his own knowledge that they were not such persons. It is the duty of a magistrate, in accepting bail, to the very limit of his knowledge and in the exercise of the greatest care, to see that the bail bond he accepts is legal in form, that the sureties whose names are signed thereto are the persons they purport to be, and that they are able to respond to the full extent of the penalty thereof in case the principal fails to comply with the conditions of said bond. The magistrate accepting bail is the sole representative of the law, standing between the people of the state on one hand, and those accused of crime upon the other, and if he fails in his duty, then efficient law enforcement is rendered impossible.

[26] Neither did the court err in refusing to give an instruction, requested by appellant, that "any committing magistrate may accept bail or approve bail bonds whether the person admitted to bail was so admitted by such committing magistrate or any other

committing magistrate." We find nothing in the law of this state that would warrant the giving of such an instruction. On the other hand, the plain provisions of the Penal Code are directly opposed to any such promiscuous exercise of authority by magistrates. Section 1277 of the Penal Code provides that "the admission to bail may be made by the magistrate by whom he is so held, or by any magistrate who has power to issue the writ of habeas corpus." Section 1280 provides that "the bail must in all cases justify by affidavit taken before the magistrate," etc. And the provisions of section 1281 are that "upon the allowance of bail and the execution of the undertaking, the magistrate must, if the defendant is in custody, make and sign an order for his discharge." From these sections of the Code it is apparent that it is the intent of the law that the magistrate admitting the defendant to bail is the only one before whom the bail may justify, and the only magistrate authorized to make and sign the defendant's discharge upon the allowance of bail and the execution of the undertaking. It is true that there was evidence indicating that it was the practice among the township justices of Los Angeles township for any one of them to approve bail bonds, notwithstanding the fact that the justice approving the bond was not the committing magistrate in the proceeding in which the bond was given. Appellant was not only permitted to offer evidence tending to prove this fact, but the court instructed the jury that if they should find that such a practice existed, that they might take that into consideration as going to the matter of intent of the appellant in approving bonds in actions in which he was not the committing magistrate. In our opinion, the court was as favorable to the appellant in its instructions upon this phase of the action as he could reasonably ask or expect.

Numerous other assignments of error were contained in the record, and exhaustive arguments in support thereof are presented by appellant in both his opening and closing briefs. Many of these assignments go to the action of the court in refusing to instruct the jury as requested by appellant, and the others are based upon the court's rulings in giving certain instructions proposed by the prosecution. We have carefully considered the arguments advanced by appellant in support of these alleged errors, but are not convinced that appellant has sustained any substantial injury by the rulings of the court in these matters.

[27] The only question remaining for decision is whether the error of the court in permitting the prosecution to cross-examine the witness Hervey, by reading to him portions of his testimony given before the grand jury, was of such a nature as would justify this court in reversing the judgment herein. If appellant really had the conversation with

Rollins which he claims to have had, in which the latter told him that the money would be left at the drug store, it would not be unreasonable to suppose that Rollins might have informed him in this conversation as to the kind of a package in which the money would be found. And if Rollins so informed appellant, it would not be anything strange or unreasonable for appellant to have given Hervey the same information that he received from Rollins. Therefore proof of these facts would not have materially injured appellant. While it must be admitted that this manner of sending money is somewhat unusual and out of the ordinary, there was nothing criminal in the mere fact that the money was left in a package with a loaf of bread, any more than if it had been left in a leather pocketbook. But appellant had testified before the grand jury that he did not know the size, kind or character of the package in which the money was left, and later at the trial he testified that he did not know that it was wrapped in a package with a loaf of bread, and, furthermore, that he did not tell Hervey that he would find it in a package with a loaf of bread. Taken, therefore, in connection with the testimony of the appellant, the testimony given by Hervey before the grand jury was directly contradictory to the testimony of appellant at the trial. In itself it was of slight moment, and did not prove directly any of the assignments of perjury set out in the information, but, as testimony contradictory to that given by appellant, its importance and materiality was greatly enhanced, and accordingly the injury to appellant in having it improperly brought before the trial jury was correspondingly augmented.

Notwithstanding this error and its consequent injury to appellant's case, we are not prepared to say that this court is justified or even authorized to reverse the judgment by reason of such error. Eliminating this improper evidence given by Hervey entirely from the record, it remains highly improbable that the jury would have rendered any other verdict than that of guilty. With this evidence out of the case entirely, there was still remaining the testimony of Lindquist that he knew of no person by the name of Rollins, and that he had no conversation with appellant about Rollins, or any one else, in reference to assisting him to raise bail money; there is also the evidence of the Pelton Apartment House owners and their employees that there was no such person as Rollins stopping at the apartment house at the time appellant states he phoned Rollins regarding bail money for Lindquist; also that of Hervey that appellant told him that the money was left at the drug store for "George Allen or Ruth Allen," and the admission of this fact by the appellant himself; and that of the drug store attendants that the money was

left there by a man who wrote on a card "George Allen or Ruth Allen," and left it with the package; and finally the testimony of the handwriting expert that the handwriting on this card was that of appellant. While this evidence was not without contradiction, yet the jury must have believed it in order to have rendered a verdict of conviction, and we are unable to perceive how their view of this evidence would have been materially, if at all, different, had the examination of Hervey been confined within proper limits. The error was not, therefore, of such a nature as would justify a reversal of the judgment.

The judgment and order denying appellant's motion for a new trial are affirmed.

We concur: CONREY, P. J.; HAHN, Justice pro tem.

74 Cal. App. 313

WARD v. PARKFORD et al. (Civ. 5176.)

(District Court of Appeal, First District, Division 2, California. Sept. 2, 1925.)

1. Adverse possession §114(1) — Adverse possession of plaintiff's assignor held not shown.

In action to quiet title, evidence held not to show adverse possession of plaintiff's assignor.

2. Adverse possession §112 — Burden of proof on plaintiff.

In action to quiet title, plaintiff, relying on adverse possession of his assignor, had burden of proof.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action by Harrison R. Ward against E. A. Parkford and others. Judgment for defendants, and plaintiff appeals. Affirmed.

John F. Poole, of Los Angeles, and H. E. Gleason, of Madera, for appellant.

A. L. Abrahams and Paul Barksdale D'Orr, both of Los Angeles, for respondents.

STURTEVANT, J. The plaintiff commenced an action to quiet title against a large number of defendants. One of the defendants, E. A. Parkford, appeared and answered. In his answer he denied the material allegations of the plaintiff's complaint, and set forth a special defense in which he pleaded certain facts which he claimed would constitute an equitable estoppel that would preclude the plaintiff from any recovery. Still later the defendant Parkford filed a cross-complaint. The plaintiff answered the cross-complaint, and a trial was had in the trial court on all of the issues so made by the pleadings. The court made findings on the material allegations of the plaintiff's complaint and the answer thereto, and it made

findings on some of the issues presented by the other affirmative allegations made in the above-mentioned pleadings of the defendant Parkford. A judgment was entered in favor of the defendants and against the plaintiff, and from that judgment the plaintiff has appealed.

[1] In his brief the appellant contends: (1) That John S. Baker, his assignor, acquired title to the property in dispute by adverse possession acquired under a written instrument consisting of a certificate of sale made by the tax collector of the irrigation district in which the land in dispute was located; (2) that there was no evidence to support the finding that a trust relation existed between the plaintiff and the defendant so that the plaintiff could acquire no title to said property adverse to that of the defendant; and (3) that the tax deed produced by the defendant was void and conveyed no title, and in this behalf he specifies six different infirmities in said deed. When the respondent's brief came in, it contained a reply to the first and second point, and made no reply to the third point, for the reason that the appellant must recover, if at all, by reason of the strength of his own title, and not by reason of a weakness in the title of his adversary. In replying to the first point made by the appellant, the respondent is at some pains to show (1) that the appellant's assignor never had the property inclosed by a fence for the period of 5 consecutive years; and (2) that the appellant's assignor never, for five consecutive years, plowed and pastured, or plowed or pastured, the land in dispute. In his reply brief the appellant states that he does not contend that he or his assignor had the land inclosed with a fence in such a manner as to give the appellant's assignor or the appellant title to the land. However, the appellant strenuously contends that the witness Baker testified to a set of facts showing that he held the adverse possession by plowing or pasturing the land. In this connection he cites particularly that portion of the transcript which reads as follows:

"Q. And when would you say you first plowed lot 83 after you got your deed from Koontz? A. I know I plowed it in '94.

"Q. In 1894. And what with reference to each year thereafter and up to what time? A. Sometimes there was quite a voluntary crop and I pastured it and next year I would plow it again.

"Q. And that continued for how long? A. For 10 or 12 years.

"Q. That is, for 10 or 12 years after 1894 you continued to either pasture the land or plow it? A. Yes, sir. * * *

"Q. And during all that time you claimed it as your property? A. Certainly."

The passages cited by the appellant are the strongest and clearest passages support-

ing or tending to support his claim that we can find in the transcript. However, the few lines quoted are excerpts culled from an examination that covered approximately 125 pages of the transcript. To nearly every other question propounded to him the witness gave an evasive answer. As quoted, he claimed to have obtained his deed from the tax collector in 1893, and that, commencing with 1894, for 10 or 12 years he continued to either pasture the land or plow it. That would lay the foundation for the action as being from 1894 to 1904 or 1906. In reply to a direct question on the subject he testified that he plowed the land twice. He plowed it in the spring and later he plowed it in the fall of the same year. In answer to another direct question he stated that he plowed the land years before the boom in 1886. Asked if he plowed it about 1884 and 1885, he testified that it was probably 1885, he couldn't tell—he was tangled up a little about it. At no place in the testimony except as quoted above did the witness designate any certain period of time including 5 consecutive years when he had the land fenced, or when he plowed it or pastured it, or both. In no part of the record do we find the claim made that, when the land was not fenced and the witness was pasturing the land, his stock pastured it to the exclusion of the stock of other owners. Asked if he pastured the particular lot in suit, the witness answered that he had lots adjoining. The witness gave his testimony on July 10, 1923. On that date he was asked if in a conversation between himself, Mr. Parkford, and Mr. Abrahams, in the latter's office on July 8, 1923, that is, 2 days before, he had not made the statement that he had abandoned all claims to the land in question since 1914. His replies were numerous, but one answer that came the nearest to being responsive was as follows:

"I did tell you something or say something about that I had lost my deed, that I did not think they were worth enough to administer on and under the circumstances that I did not think that I owned anything."

The appellant does not call to our attention any evidence in the record which purports to make the appellant's case any stronger than the testimony quoted above. Neither party calls to our attention any testimony in the record that was given by any other witness on the subject-matter which we have discussed. Under such circumstances it is apparent that the trial court, in rendering its judgment, in effect held that the witness Baker had not convinced the mind of the court. Under all of the circumstances we think that the trial court was entirely within its rights in so holding. *Blankman v. Vallejo*, 15 Cal. 638, 645; *Baker v. Fireman's Fund Ins. Co.*, 79 Cal. 34, 41, 21 P. 357; *Prewett v. Dyer*, 107 Cal. 154, 159, 40 P. 105;

County of Sonoma v. Stofen, 125 Cal. 32, 35, 57 P. 681; Brown v. Peterson, 25 App. D. C. 359, 4 Ann. Cas. 980, 982.

[2] However, the record is entirely silent as to any evidence establishing the fact that Baker's possession was adverse to the individual owning the record title or to any one else. Baker testified that he plowed the land twice. There was no evidence that others did not plow the land many times. Baker testified that he pastured the land. There was no evidence that the record owner did not do the same thing, and there was no evidence that the record owner had any knowledge of any kind or nature that Baker ever pastured the land. Baker testified that he thought he plowed the land in 1885—8 years before he obtained a tax deed. If he followed his usual custom, then he pastured the land during the intervening years between that date and 1893, the date of his deed, that is, during such years as he did not plow it. Nevertheless, he did not claim these acts done prior to 1894 to be adverse. He testified to no facts showing that his conduct toward the title of the record owner was any different after the date he obtained a tax deed than it was before he obtained a tax deed. The burden of proof showing that Baker's possession was adverse rested on the appellant, and the burden was not sustained. De Frieze v. Quint, 94 Cal. 653, 663, 30 P. 1, 28 Am. St. Rep. 151; Ball v. Kehl, 95 Cal. 606, 613, 30 P. 780; Jordan v. Beale, 172 Cal. 226, 229, 155 P. 990.

If we are correct in the propositions which we have discussed above, and we think that the record abundantly supports our conclusions, then it becomes unnecessary to discuss any other point made by the appellant or the respondent.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

74 Cal. App. 378

McFAYDEN v. TOWN OF CALISTOGA.
(Civ. 2667.)

(District Court of Appeal, Third District, California. Sept. 16, 1925.)

1. Towns ⇨39(1)—Town could return truck, hired by town clerk and president of board of trustees without authority, at any time, and thus avoid further liability for its use.

Contract, made by president of board of trustees and town clerk in name of town without authority, for hire of truck, being void, town was not bound to keep truck for any fixed period, but could return it to seller at any time and thus avoid further liability for its use.

2. Bailment ⇨3—Town, repairing and using leased truck after discovering defective condition, without notifying lessor or requesting him to repair it, held not misled by his false representations.

Town, not returning leased truck or notifying lessor of defective condition or requesting him to repair it after discovering such condition, but causing it to be repaired and thereafter used for many weeks, held not misled by lessor's alleged false representations.

3. Bailment ⇨31(2)—Evidence of condition of truck when delivered to town for hire admissible on issue of compensation for its use.

Evidence of condition of truck when delivered to town for hire under unauthorized contract by president of board of trustees and town clerk held admissible on issue of compensation to owner for its use.

4. Bailment ⇨32—Damages for condition of truck when redelivered to lessor by lessee not recoverable, in absence of evidence that lessee negligently used it, or that condition was not due to ordinary wear.

In absence of evidence that town's use of truck, delivered to it for hire, was negligent, or its condition, when redelivered to lessor, due to any other cause than ordinary wear, owner could not recover damages under Civ. Code, §§ 1928, 1929, because of its condition when redelivered to owner by town.

5. Bailment ⇨20—Measure of compensation for use of hired truck stated.

Measure of compensation for use of hired truck, in absence of proof of lessee's negligence, is reasonable value of its use in work contemplated and to which put by lessee considering its condition, capacity, and character of work, and costs of repairs, not necessitated by lessee's want of ordinary care or use of truck for purpose not contemplated by parties, cannot be recovered.

6. Towns ⇨37—Agreement by three members of town board of trustees at special meeting, of which fourth member not present was not notified, not binding on town.

Agreement by three members of town board of trustees at special meeting, of which no notice was given fourth member, not present thereat, authorizing president of board and town clerk to purchase truck, held not binding on town.

7. Towns ⇨46(4)—Contract held unenforceable as contract of sale postponing time of payment beyond fiscal year in which signed.

Contract for lease of truck to town for 20 months at stated rental, on payment of which in installments with interest on deferred payments lessor was to execute bill of sale, held contract of sale postponing time of payment beyond fiscal year in which signed, in violation of Const. art. 11, § 18, and hence not enforceable by seller.

8. Bailment ⚡26—Notice by lessee to lessor of truck to make repairs prerequisite to recovery of sums expended therefor by lessee.

Under Civ. Code, §§ 1955, 1957, notice by town to one from whom it leased truck to repair deteriorations, not caused by town's fault nor natural result of use of truck, was prerequisite to recovery from lessor of sums expended by town for repairs.

9. Towns ⚡46(4)—Town accepting and using truck hired by trustees liable for reasonable value of use, subject to constitutional inhibition against incurring indebtedness exceeding year's revenue.

While contract in violation of Const. art. 11, § 18, and Municipal Corporation Bill, § 865, prohibiting municipalities from incurring indebtedness in any year exceeding income and revenue provided therefor, is void and incapable of ratification, town board of trustees could make valid contract for use of truck at agreed rental, and, having accepted delivery of and used truck, town is liable on implied contract to pay reasonable value of such use, subject to such constitutional inhibition.

10. Evidence ⚡158(17)—Parol evidence of business transacted at meeting of town board of trustees admissible.

Minutes of meeting of town board of trustees are prima facie evidence of business transacted thereat, under Code Civ. Proc. §§ 1920, 1926, but parol evidence is admissible for same purpose.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Jack McFayden against the Town of Calistoga. Judgment for plaintiff, and defendant appeals. Reversed.

Wallace T. Rutherford, of Napa, for appellant.

E. S. Bell, of Oakland, and Herbert V. Keeling, of Lakeport, for respondent.

FINCH, P. J. The complaint alleges that on the 25th day of November, 1919, "the plaintiff delivered to the defendant for hire" a truck; that continuously thereafter, until the 6th day of September, 1920, the defendant "had the possession of said truck, and during such period of time used the same on and upon the public streets and highways of said town, and in the municipal work thereof; that on or about the said 6th day of September, 1920, defendant notified plaintiff that it would redeliver the possession of said truck to him, and thereupon plaintiff did receive the possession thereof from defendant; that the sum of \$5,160 was and is a reasonable sum for the hire of said truck during the aforesaid period of time"; that the plaintiff duly filed and presented his claim for said sum, but that the trustees of the defendant refused to allow any part thereof; that "at the time of the creation of said indebtedness, and at the time (of) the presentation of the claim therefor, * * * there were funds in ex-

cess of the available money in the treasury that could have been legally apportioned and appropriated for the purpose of paying said claim"; and that plaintiff has been paid but \$500 of said indebtedness. For a second cause of action the complaint alleges that the defendant, "through its neglect, carelessness, and ill use" of the truck, damaged it in the sum of \$513.44.

The answer admits that the defendant used the truck "for a period of not exceeding 40 days"; denies all the other material allegations of the complaint; and alleges that the president of the board of trustees and the town clerk, in the name of defendant, entered into the contract hereinafter considered; that plaintiff was thereupon paid the sum of \$500 as a first payment thereon; that neither the execution of such contract nor the payment of said money was authorized by defendant; that at a regular meeting of the board, prior to the execution of the contract, the plaintiff misrepresented the qualities and condition of the truck; that the "truck was in a run-down condition, and many of the parts of said truck * * * were in poor repair, and in a worn-out condition" at the time it was delivered to defendant; that, by reason of such condition, the defendant necessarily expended the sum of \$575.82 "in labor and repairs on said truck, in replacing broken and worn-out parts"; and "that the use of said truck * * * was more than amply repaid by the expenditures made * * * in repairing said truck." The defendant also filed a cross-complaint for the recovery of the said sum of \$500 alleged to have been illegally paid to plaintiff at the time of the execution of the contract. Verdict and judgment went for plaintiff in the sum of \$1,700, and this appeal is from the judgment.

The complaint is based upon the theory that the contract executed in the names of the parties is void, and respondent states in his brief on appeal that the contract "was undoubtedly void." In his reply brief counsel for appellant states:

"We admit, if the truck had been in proper condition, and could have done the work it was delivered to the town to do, and there were available funds, the town would have to pay a reasonable rental for its use."

[1-3] The defendant's alleged defense of false representations is without support in the evidence. The contract being void, the defendant was not bound to keep the truck for any fixed period, but it had the absolute right to return it to the plaintiff at any time and thus avoid further liability for its use. Within a few days after its delivery the defendant discovered its condition. It did not return the truck or notify plaintiff of its condition or request him to put it in a condition fit for use, but caused the truck to be repaired, and thereafter used it for many

weeks. The evidence is conflicting as to whether the condition of the truck which made such repairs necessary existed at the time of its delivery to defendant or resulted from its use by defendant. The evidence tending to show the falsity of the representations made by the plaintiff is very weak, but, if it were otherwise, the defendant's continued use of the truck after discovery of its condition shows that such use was not induced by the alleged representations. One cannot be misled by a false statement after he has learned that it is false. Evidence was admissible, of course, of the condition of the truck at the time of its delivery as bearing upon the compensation to which plaintiff is entitled for the use thereof.

[4, 5] The evidence does not support plaintiff's claim for damages. It fails to show that the defendant's use of the truck was negligent, or that its condition upon redelivery was due to any cause other than the ordinary wear naturally resulting from the work contemplated by both parties. "The hirer of a thing must use ordinary care for its preservation in safety and in good condition." Civ. Code, § 1928. "The hirer of a thing must repair all deteriorations or injuries thereto occasioned by his want of ordinary care." Civ. Code, § 1929. Respondent states in his brief that the appellant left the truck exposed to the weather from April to September, 1920, but the plaintiff's witnesses assigned other causes as the basis of their testimony to the effect that the truck was in a damaged condition when redelivered, and there is no evidence to show that such damage was caused by exposure to the weather. The measure of compensation to which the plaintiff is entitled, in the absence of proof of negligence, is the reasonable value of the use of the truck in the work contemplated by the parties, and to which it was in fact put by defendant, taking into consideration its condition and capacity and the character of such work. To add to such compensation the cost of repairs not made necessary by defendant's want of ordinary care or the use of the truck for a purpose not contemplated by the parties would be to award double compensation. The question of plaintiff's right to recover the alleged damages was submitted to the jury without any instruction that such damages could be awarded only on proof of want of ordinary care by the defendant.

[6] On the 25th day of November, 1919, there was held what purported to be a special meeting of the board of trustees. Notice of the meeting was not given to the trustees, and only three of them were present thereat. The trustees in attendance adopted a resolution purporting to authorize the purchase of the truck involved in this action, and pursuant to such resolution the president of the board and the town clerk executed the contract herein before referred to. The contract provided for the lease of the truck to defend-

ant for 26 months at a rental of \$3,500; \$500 thereof to be paid upon the execution of the contract, \$1,500 January 1, 1921, and \$1,500 January 1, 1922, "with interest on the deferred payments of 6 per cent. from date until paid." The contract contained the following terms:

"The lessee admits receipt of said personal property in good order and condition, and, in the event that any installment of rent shall not be paid when due, hereby agrees to deliver the same to the lessor in as good order and condition, reasonable use and wear thereof being excepted, upon demand being made therefor by the lessor or his assigns, and the lessor is hereby authorized to take immediate possession thereof. The lessee hereby agrees to keep said motor truck in good order and repair, and to keep the same insured in the name of the lessor during the life of this agreement in the sum of not less than \$1,500. The lessor agrees that in the event that the full amount of \$3,500 rental shall be paid, that he will immediately execute and deliver to the lessee a good and sufficient bill of sale of the above described personal property."

Over defendant's objections, the court admitted in evidence the minutes of the aforesaid meeting of the three trustees and also the said contract. The court refused to give the following instruction requested by defendant:

"I instruct you that the agreement of November 25, 1919, offered and received in evidence, is not a binding obligation on the town of Calistoga, nor are any of the recitals or conditions in said agreement in any way binding upon them if you find from the evidence that no notice of the special meeting of November 25, 1919, was ever given to J. G. Finch, one of the town trustees, and that he was not present at said meeting."

[7] The proposed instruction correctly states the law applicable to an important feature of the case which was not covered by any instructions given by the court. The jury doubtless gave weight to the terms of the contract relative to the rental to be paid for the use of the truck and the obligation therein imposed upon defendant "to keep said motor truck in good order and repair." Looking at the substance of the contract rather than its form, it appears to be a contract of sale, the consideration being fully furnished by plaintiff upon the execution of the contract and his delivery of the truck, the time of payment only being postponed beyond the fiscal year in which the contract was signed. It has been held that such a contract is violative of the provisions of section 18 of article 11 of the Constitution. *Chester v. Carmichael*, 187 Cal. 287, 294, 201 P. 925. The void contract afforded no basis for a recovery. *Ayres v. Lipschutz* (Cal. App.) 228 P. 720, 721.

[8] The defendant's claim of offset in the sum expended by it for repairs is without merit. The parties knew that the truck had

been used for several years prior to the time of its delivery to defendant. The evidence produced by defendant shows that at that time the truck was in "fair condition." It is shown without conflict that the defendant made the alleged repairs without any notice to plaintiff or request that he make them.

"One who lets personal property must deliver it to the hirer, * * * put it into a condition fit for the purpose for which he lets it, and repair all deteriorations thereof not occasioned by the fault of the hirer and not the natural result of its use." Civ. Code, § 1955. "If a letter failed to fulfill his obligations, as prescribed by section nineteen hundred and fifty-five, the hirer, after giving him notice to do so, if such notice can conveniently be given, may expend any reasonable amount necessary to make good the letter's default, and may recover such amount from him." Civ. Code, § 1957.

If it be conceded that the repairs made by the defendant were such as the plaintiff was under obligation to make, notice as required by section 1957 was a prerequisite to a recovery by the former from the latter.

[9] The case was tried upon the theory that the inhibitions against incurring indebtedness by a municipality exceeding in any year the income and revenue provided for such year, prescribed by section 18 of article 11 of the Constitution, and section 865 of the Municipal Corporation Bill (Stats. 1883, p. 93), have relation to the time of the presentation of a claim for such indebtedness rather than the time of its creation. In *Arthur v. City of Petaluma*, 175 Cal. 216, 221, 165 P. 698, 699, it is said:

"Lack of available money of the revenue of the fiscal year against which the claim constitutes a charge, from whatever cause, and entirely regardless of the absolute validity of the claim, is a complete answer to any attempt to enforce payment from what are styled in some of the later of the cases cited, 'the ordinary revenues' of the city for succeeding years. * * * Having a valid claim, one valid when the indebtedness was incurred, the subsequent exhaustion of funds from which the same could be paid before the claimant was able to obtain formal allowance and payment does not make his claim bad, but only affects his remedy to obtain payment, and he is entitled to have his claim established by a judgment for the amount due. * * * The judgment should not be drawn in such a way as to preclude enforcement in the possible event that legal provision is subsequently made for the payment thereof."

While a contract made in violation of the constitutional inhibition is void and incapable of ratification, the trustees could have made a valid contract for the use of the truck at an agreed rental therefor. Having accepted delivery of the truck and having used it, the defendant is liable, not on the contract of November 25, 1919, but on its implied contract to pay the reasonable value of such use.

Higgins v. San Diego Water Co., 118 Cal. 524, 555, 45 P. 824, 50 P. 670. Such implied contract, however, is subject to the constitutional inhibition against incurring an indebtedness in any year in excess of the revenues thereof. *Buck v. City of Eureka*, 124 Cal. 61, 68, 56 P. 612, 615. In that case it is said:

"The validity of the liability depends upon the fact as to whether there were unappropriated revenues when the liability was incurred; and no judgment should be entered until that fact is established. The liability was incurred when from time to time the services were fully rendered, and the city with knowledge accepted the benefit of them; * * * and evidence should be received as to the condition of the revenues at that time."

[10] Some question arose at the trial as to whether parol evidence is admissible to prove the official acts of the board of trustees at a meeting thereof. The minutes of such a meeting are prima facie evidence of the business transacted thereat. Code Civ. Proc. §§ 1920 and 1926. Parol evidence, however, is admissible for the same purpose. *Gordon v. City of San Diego*, 108 Cal. 264, 269, 41 P. 301; *People v. Town of Ontario*, 148 Cal. 625, 638, 84 P. 205; *Westerman v. Cleland*, 12 Cal. App. 63, 69, 106 P. 606. The foregoing discussion covers all the points made by the parties; and it seems clear that the judgment cannot be affirmed.

The judgment is reversed.

We concur: HART, J.; PLUMMER, J.

74 Cal. App. 371

PEOPLE v. REMINGTON et al. (Cr. 1209.)

(District Court of Appeal, Second District, Division 2, California. Sept. 14, 1925. Hearing Denied by Supreme Court Nov. 12, 1925.)

1. Criminal law § 622(2)—Not abuse of discretion to deny defendant separate trial on ground that codefendant had made implicating statements respecting him.

On trial of defendants jointly indicted for robbery, held it was not an abuse of discretion to deny motion of one defendant for separate trial made on ground that codefendant had made statements implicating him in robbery.

2. Criminal law § 730(3)—Reversal for asking prejudicial and improper questions not granted, where not asked in bad faith, and court promptly ruled on same and instructed jury to disregard them.

In prosecution for robbery, where defendant contended that district attorney was guilty of misconduct in asking defendant improper and prejudicial questions, held, that reversal was not required, since it did not appear prosecuting officer sought to get incompetent evidence before jury knowing it to be inadmissible, or that questions were asked in bad faith for purpose of creating prejudice against defendant, and

court properly ruled on such questions and instructed jury to disregard them.

3. Criminal law §683(1)—On surrebuttal, defendant in criminal action entitled to rebut only new matter adduced by state.

On surrebuttal, defendant in criminal action entitled to rebut only new matter adduced by state.

4. Criminal law §683(1)—Rebuttal by state, denying defendant's testimony in indirect rather than direct manner, held not new matter in a substantial sense, authorizing surrebuttal.

In a prosecution for robbery, where defendant testified that he had scar on nose on a certain day, and prosecution in rebuttal offered testimony to show that scar had had time to heal, held that such rebuttal could not be substantially regarded as new testimony, it being new only in the sense that it was an indirect rather than a direct denial of defendant's rebuttal; and hence offer of surrebuttal was properly denied.

5. Criminal law §1186(4)—Evidence held so conclusive of defendant's guilt that offer of surrebuttal, if erroneously refused, did not require reversal.

In a prosecution for robbery, held that evidence was so nearly conclusive of defendant's guilt that error, if any, in rejecting defendant's offer of surrebuttal would not justify reversal, in view of Const. art. 6, § 4½.

6. Criminal law §1172(1)—Instruction, incorrect or insufficient as abstract proposition, may not be erroneous or injurious when considered in relation to facts to which it relates.

An instruction which is incorrect or insufficient as abstract proposition may not be erroneous or injurious when considered in relation to the facts to which it relates, and if it appears under the evidence taken into consideration by jury that jury must necessarily have found existence of element of guilt which instruction specifically fails to mention, such omission cannot be said to be prejudicial to accused.

7. Criminal law §1172(1)—Instruction failing to include as essential element of guilt that money taken must not be property of accused held not erroneous, where jury necessarily found that it was not.

In a prosecution for robbery, failure of court in stating facts warranting conviction to include essential element, namely that money taken was not property of accused, held not error, since jury must necessarily have found under evidence that money taken by accused was not his own property but that of bank from which stolen.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Raymond R. Remington was convicted of robbery, and he appeals. Affirmed.

Perky & McConnell, of Long Beach and Clarence S. Hill, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Erwin W. Widney,

Deputy Atty. Gen., and Hamish B. Eddie, of Los Angeles, for the People.

FINLAYSON, P. J. The appellant, Remington, and one Shevlin were jointly charged with the crime of robbery. Remington, who was found guilty as charged, appeals from the judgment of conviction, and likewise from an order denying him a new trial.

It is charged in the indictment that the two defendants, armed with a pistol, a dangerous and deadly weapon, feloniously and through the use of force and fear, took from the possession and immediate presence of one P. N. Fox the sum of \$6,373, lawful money of the United States, which belonged to the First National Bank of Watts. The robbery, which seemingly is conceded to have been committed by some one, was perpetrated in the vault of the bank on August 29, 1924. Remington denied that he was the robber or that he had aught to do with the crime, and sought to prove an alibi. He was, however, positively identified as the robber by two of the bank's employees—Fox, the assistant cashier, and one H. F. Logan. That both of these witnesses had ample opportunity to become familiar with Remington's general appearance and identifying marks, if any, is shown by the following circumstances to which they testified: Two days prior to the robbery, at about the hour for closing the bank, Remington called and asked for the cashier. He pretended to be a reporter for a Los Angeles newspaper, and said that he had information that the bank was to be "held up," and that he was there to get a "scoop" for his paper. On the morning of the following day, at about 9:30 o'clock, Remington returned to the bank and asked Fox if he had left a brief case in the bank when he was there the day before. On the same day Remington again called at the bank, at about the hour of noon, and pretended to call a newspaper office on the telephone. He talked to Fox upon this occasion. Later on that day Remington returned and again pretended to call the newspaper on the telephone. At the hour for closing the bank Fox and Logan left the building, accompanied by Remington and Shevlin, the latter having come into the bank a few minutes previously. On the third day, the date of the robbery, as Fox and Logan were preparing to close the place and while Fox was setting the time lock and Logan was carrying books into the vault, Remington appeared, drew two pistols, pointed them at the two bank employees, and compelled them to enter the vault, where he tied them with heavy cords. While Fox and Logan were thus helpless Remington took from the vault the sum of \$6,373 and made his escape. There is other evidence in the record besides that of the two bank employees tending to show that Remington was the robber who rifled the vault and stole the bank's money.

[1] At the time of his arraignment and

again just prior to the commencement of the trial Remington demanded that he be tried separately. In support of his motion for a severance he presented an affidavit by his attorney to the effect that his codefendant had made statements to the arresting officers implicating him in the commission of the robbery. The request for a separate trial was denied.

Appellant's first point is that where two persons are jointly charged with a crime and it is brought to the attention of the court in an appropriate legal manner, as, for example, by affidavit duly presented before trial, that the prosecution will adduce evidence of declarations made by one of the accused which are not admissible as to the other, it is an abuse of discretion to deny the latter a separate trial. The point is not well taken. The question was considered by our Supreme Court in the recent case of *People v. Perry*, 234 P. 890, and was there disposed of adversely to appellant's contention.

[2] It next is urged that the district attorney was guilty of misconduct in asking of appellant during his cross-examination certain questions which it is claimed were improper and prejudicial. To the first of the questions thus asked the court sustained an objection upon the ground that it was too broad. Whereupon the district attorney re-framed his question to accord with the court's views. Later on in the cross-examination the district attorney propounded another question cognate to the one first asked, but differing from it in certain important particulars. The court sustained an objection to this question in the form in which it was asked. When giving its charge to the jurors the trial court instructed them as follows:

"If counsel has intimated by questions which the court has not permitted to be answered that certain things are or are not true, you must disregard such questions and refrain from any inference based upon them."

It does not appear that by asking the questions the prosecuting officer contumaciously sought to get before the jury incompetent evidence knowing it to be inadmissible. There is nothing in the record to indicate bad faith or that the questions were asked for the wanton purpose of raising a prejudice against appellant. *People v. Wells*, 100 Cal. 459, 34 P. 1078, a case upon which appellant seems to place much reliance, was an exceptional one in its facts. It was an aggravated case, in which the court evidently believed that the public prosecutor had wantonly and repeatedly transcended the limits of a fair investigation with the object of prejudicing the rights of the defendant and poisoning the minds of the jurors. The case here is very different. There is no reason to believe that the district attorney harbored

a desire or a design to do appellant a wanton injustice. As we had occasion to say in *People v. Peete*, 54 Cal. App. 369, 202 P. 67:

"It frequently happens that in the heat of a trial counsel ask improper questions. But judgments cannot be reversed for an inadvertence of this character, unless, from an examination of the record, we may be of the opinion that it has caused a miscarriage of justice. In view of the court's prompt rulings and instructions to disregard the questions, which it will be presumed were heeded by the jury, it cannot be said that defendant's cause suffered by reason of anything contained in these questions, however improper they may have been."

[3, 4] Appellant assigns as error the refusal of the trial court to permit him to introduce surrebuttal testimony. It seems that a witness for the people, one of the two bank employees, testified, while the prosecution was putting in its case in chief, that upon the occasion when he first saw appellant in the bank prior to the robbery the latter had no marks or scars upon his face. It will be recalled that appellant's first visit to the bank, according to the testimony of the people's witnesses, was on August 27, 1924. Appellant took the stand as a witness in his own behalf, and, in response to his counsel's questioning, testified that he was cut on the nose by flying glass during an automobile accident on August 11, 1924—16 days prior to the time when the bank employees testified that they first saw him. He also testified that on the 27th, 28th, and 29th days of August, i. e., on the day of the robbery and on the two preceding days, a scab over the healing cut was still on his nose. When putting in its rebuttal the prosecution adduced the testimony of two witnesses who testified that they saw appellant on the 25th of June preceding the robbery, and that at that time he had a sore on his nose covered by a piece of plaster or cotton. By this testimony it evidently was the purpose of the prosecution to afford a basis for the inference that the injury to appellant's nose did not occur on August 11th, as testified to by him, but at some time prior to June 25th, and that therefore the scab resulting therefrom had had time to disappear when he was seen by the bank employees on the 27th, 28th, and 29th days of August. At the close of the prosecution's evidence appellant's counsel offered to call his client in surrebuttal to testify that on June 25th he had no sore or scab on his face. The court refused to permit the offered evidence to be introduced.

On surrebuttal the defendant in a criminal action is entitled to rebut only *new* matter educed by the people. If the evidence which appellant offered as surrebuttal may be deemed to be such, it was so in only a limited and extremely technical sense; for the evidence which the witnesses for the prosecution gave on rebuttal can be regard-

ed as new and substantive testimony in only a literal and not a substantial sense. It tended merely to contradict appellant's testimony that his nose had a scab upon it on the 27th, 28th, and 29th days of August. Its purpose and effect was, instead of denying appellant's testimony directly, to deny it indirectly. As was said in *People v. Hill*, 116 Cal. 566, 48 P. 711, "It was only the *method* of meeting defendant's evidence, and not the matter which was new or different."

[5] But conceding that the testimony offered by appellant was proper surrebuttal, nevertheless its rejection does not warrant a reversal. By a careful examination and consideration of the record before us we have been irresistibly constrained to the conclusion that the evidence of appellant's guilt is so nearly, if not entirely, conclusive that the error in rejecting the offered surrebuttal, if error it be, did not and could not result in a miscarriage of justice, and therefore, in view of the provisions of section 4½ of article 6 of the Constitution, we would not be justified in ordering a reversal.

[6] Finally, it is claimed that error was committed in giving an instruction wherein the court undertook to state the facts which, if found to exist, would warrant a conviction. It is claimed that in its enumeration of the circumstances which would justify a conviction the court failed to include an essential ingredient of guilt, namely, that the money was not the property of the accused. It does not necessarily follow that prejudicial error was committed simply because the instruction is lacking in this particular. An instruction which is incorrect or insufficient as an abstract or general proposition may not be erroneous or injurious when considered in connection with the particular case and the facts to which it relates. If it appear that under the evidence which the jurors are to take into consideration they necessarily must have found the existence of that element of guilt which the instruction fails specifically to mention, then the omission to directly charge respecting it cannot be said to have been prejudicial to the accused. *People v. Morine*, 138 Cal. 631, 72 P. 166; *People v. Whalen*, 154 Cal. 475, 98 P. 194; *People v. Lee Nam Chin*, 166 Cal. 573, 574, 137 P. 917; 8 Cal. Jur. p. 634.

[7] Here the jury necessarily must have found that the money taken by appellant was not his property. Never for one instant was he so bold as to claim that any part of the \$6,373 was his; nor could he consistently do so in the light of the uncontradicted facts, which show beyond the shadow of a doubt that it was the bank's money. As men of ordinary intelligence and common sense the jurors must have known that they would not be warranted in convicting appellant if the money taken by him was his own. For

these reasons the court's failure to mention this fact in its enumeration of the circumstances which would warrant a conviction could not possibly have prejudiced appellant.

The judgment and the order appealed from are affirmed.

We concur: WORKS, J.; CRAIG, J.

74 Cal. App. 286

WITHERILL v. BREHM et al. (Civ. 2855.)

(District Court of Appeal, Third District, California. Aug. 31, 1925.)

1. Waters and water courses ⇨158½(1)—Agreement for division of water held not shown.

In action to quiet title to water rights, defendant's claim that predecessor in title had by agreement divided water in the creek held unsupported by weight of evidence; agreement in question appearing to constitute merely temporary, permissive use on part of defendant's predecessor in title.

2. Waters and water courses ⇨127—Requisites of prescription stated.

Requisites for acquiring title to water by prescription are that use must have been open, continuous for a period of five years or more under a claim of right, must have been beneficial, and taxes paid by claimant.

3. Waters and water courses ⇨137—Statutory period necessary to acquire prescriptive right.

To acquire prescriptive right to water, statutory period need not necessarily be five years immediately preceding action.

4. Waters and water courses ⇨143—Appropriator entitled only to amount reasonably necessary for purpose of diversion.

Appropriator of water of public streams is entitled only to an amount necessary for the purpose for which the diversion is made, and, in determining extent and right to water, object in view at time of appropriation, intent of appropriator, amount and character of land owned by him, and his ability and surroundings must be considered and rights exercised with reference to condition of country and needs of community subject to prior rights acquired.

5. Waters and water courses ⇨137—To acquire title by adverse possession, water must be used with claim of right, uninterrupted, and for beneficial purpose.

To acquire title to water by adverse possession, it must have been used with claim of right, uninterrupted, and for beneficial purpose.

6. Waters and water courses ⇨143—Appropriator's right limited by quantity applied for beneficial purposes.

Extent of user's right in waters is limited, not by quantity of water actually diverted, nor by capacity of ditch, but by quantity which is applied for beneficial purposes.

7. Waters and water courses ☞137—Title by adverse possession acquired by continuous use during portions of time required for beneficial use.

In order to acquire title to water by adverse possession, it is not necessary that a claimant should use water at all times for prescribed statutory period to establish uninterrupted or continuous use, but it is only necessary that he use it continuously during such portions of the time as is required for the beneficial use to which it is put.

8. Waters and water courses ☞152(8)—Evidence held to show title by adverse possession.

In action to quiet title to waters, *held* that evidence was sufficient to show that plaintiff and his predecessors in title had sufficiently conformed to the law in acquiring title thereto by adverse possession.

9. Waters and water courses ☞127—Right as against lower riparian owner may be acquired by prescription.

The right to take water from a stream as against a lower riparian owner may be acquired by prescription.

10. Waters and water courses ☞154(1)—Water diverted passes with deed as appurtenant to land.

Water, diverted from a stream and flowing through a ditch for irrigation or for domestic purposes, is appurtenant to land, and is real property, and passes with deed to property without being specifically mentioned, in view of Civ. Code, § 662.

11. Evidence ☞11—Common knowledge that in early days open ditch was usual method used to convey water for mining and irrigation.

It is common knowledge that in early days the open ditch was usual method for conveying water for mining and irrigation purposes, and that modern methods would have then been practically prohibitive.

12. Waters and water courses ☞144½—Open ditch method of transporting water held not unreasonable under circumstances.

In an action to quiet title to waters, *held* that, under the circumstances disclosed, open ditch method of conveying water and applying it to land was not unreasonable or extravagant, though large quantity of water was thereby wasted.

13. Waters and water courses ☞21—Prior appropriator's rights superior to riparian rights acquired through grant from railroad company.

Plaintiff's rights, acquired by prior appropriation of water from public streams, *held* prior and superior to riparian rights subsequently acquired by defendants through grant of railroad company, regardless of whether plaintiff's land or water rights were within grant made to railroad company (Act July 25, 1866), and regardless of whether such grant was prior to the enactment of Act July 26, 1866, § 9 (U. S. Comp. St. § 4647), recognizing prior rights of appropriators in public domain.

14. Costs ☞32(1)—Costs properly taxed against defendants in suit to quiet title to water.

In view of Code Civ. Proc. § 1022, *held* that costs were properly taxed against defendants in suit to quiet title to water rights alleged to have been acquired by prescription.

15. New trial ☞119—Court's continuance of defendant's motion for new trial to time beyond limitation within which motion must be made not erroneous, in view of defendants' lack of diligence.

In action to quiet title to water rights, court's continuance, in absence of counsel, and without opposition, of defendant's motion for new trial to time beyond limitation within which motion must be made under Code Civ. Proc. § 660, *held* not erroneous or prejudicial, in view of fact that defendants were not diligent in presenting and prosecuting motion for new trial; it being their duty to see that it was set within statutory time.

16. Waters and water courses ☞152(11)—Court must fix "duty of water."

In absence of statute, court must fix the reasonable "duty of water," which is defined as the quantity of water necessary to properly irrigate a given tract of land.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Duty of Water.]

17. Waters and water courses ☞152(11)—Allowance held erroneous as in excess of amount of water necessarily required.

In an action to quiet title to water, a judgment allowing 75 inches of water *held* excessive under evidence showing cultivation by plaintiff during prescriptive period of not more than 20 acres.

18. Waters and water courses ☞143—Judgment quieting title to use of water year round held erroneous.

In action to quiet title to water, judgment quieting title to 75 inches of water for the year round *held* excessive, where it was shown that waters were not used during certain months; since one may acquire by prescription right to waters only for period of time during which it is beneficially used.

Appeal from Superior Court, Siskiyou County; H. D. Gregory, Judge.

Action to quiet title to water rights by Alice Witherill, executrix of the last will and testament of Andrew Witherill, deceased, against A. Brehm and others. Judgment for plaintiff, and defendants appeal. Reversed.

Taylor & Tebbe, of Yreka, and John S. Partridge, J. W. McCaughey, and Vincent Surr, all of San Francisco, for appellants.

B. K. Collier and Jas. P. McNamara, both of Yreka, for respondent.

THOMPSON, Justice pro tem. This is an action to quiet title to certain rights alleged to have been acquired by prescription to 75 inches of the water of Grouse creek, which

is a branch of Scott river in Siskiyou county, Cal. The judgment awarded plaintiff title to 75 inches measured under a 4-inch pressure, to be used for domestic and irrigation purposes. This was conveyed to the premises of plaintiff by means of an open ditch which has been maintained for that purpose since 1854. The defendants were restrained from interfering with plaintiff's right or title thereto.

Plaintiff claims title by mesne conveyance to some 200 acres of land in section 18, township 40 north, range 7, in Siskiyou county. This land is not riparian to Grouse creek. Appurtenant to the land, however, is a certain irrigation ditch a mile and a half in length, two feet in width and a foot and a half in depth. This ditch taps the water of Grouse creek near the point where it empties into Scott river above the premises of plaintiff. For more than 50 years plaintiff and his predecessors in title have owned the land, maintained the ditch, and used the water thus conveyed to their land for mining, agricultural, and domestic purposes. The amount of water which the creek and ditch contains varies greatly according to the season. In summer both are frequently dry. The ditch passes through a porous serpentine soil, and practically half the water is lost in transit by seepage and evaporation. The evidence is conflicting as to the number of acres of land actually irrigated by this means, and as to the continuousness of its use. It appears to a fair degree of certainty that plaintiff and his predecessors in title have used the ditch and water continuously when the ditch was not dry, and when required, for more than 50 years, for mining, domestic purposes, and irrigation of from 20 to 30 acres of land. This use appears to have been open, notorious, adverse, and with a claim of title.

One Frawley first dug and used the ditch in 1854 for mining purposes. After this mining venture it appears to have been used continuously for domestic and irrigation purposes. The witness Parker testifies to this, and claims that from 90 to 100 acres were under cultivation. But the majority of this land was above the dwelling house, and appears to have been irrigated from the water directly from Scott river. It is doubtful whether the court is warranted in assuming that more than 20 acres of land have been continuously irrigated by means of the water from Grouse creek ditch. The use of the water by plaintiff and his predecessors in title does not appear to have been interrupted or interfered with until Andrew Welker broke the dam in 1918. At this time plaintiff's title had fully matured.

The first claimant to plaintiff's title was a mere appropriator of the public domain, a miner of the early California type. His use and claim long antedates the presence of any claimant under defendant's claim of title.

From Frawley, the miner, plaintiff's title first passed to one Wm. W. Agee, thence to Haslip by deed dated March 5, 1866, thence to Schmitt, and then to Louis Schneider, to Vaughn, and, finally, to Andrew Witherill, the plaintiff. The first direct reference to the water rights and the ditch is in a deed of conveyance from Katherine Schneider, the widow of Louis Schneider, to Blattner Vaughn in February, 1915. The ditch and water rights were duly assessed with the land to plaintiff's predecessors in title ever since 1894. A homestead patent was issued by the United States to Louis Schneider February 3, 1883.

The defendants claim title to the water of this creek and ditch as riparian owners of about 6 acres of land adjacent to Grouse creek. They are successors to the title of Andrew Welker, the Central Pacific Railroad Company by patent dated March 14, 1896, granted pursuant to an act of Congress dated July 25, 1866, thence to J. F. Welch, to the Grouse Creek Mining Company, and finally to the defendant Latchem as lessee, for mining purposes. Latchem operated his mining project in the name of Northern California Mines Company. The defendants claim: (1) That their riparian rights are superior to the adverse title of plaintiff; (2) that the source of water rights claimed by plaintiff are within the grant of railroad lands from the United States to the Central Pacific Railroad Company; (3) that adverse possession on the part of plaintiff has not been established; (4) that 75 inches of water under a 4-inch pressure is excessive for the necessary use of plaintiff; (5) that costs were improperly taxed against defendants, and (6) that defendants were prejudiced by a continuance of their motion for new trial, on the court's own motion, to a time when it would be deemed to be automatically denied pursuant to section 660, Code of Civil Procedure.

[1] Andrew Welker, whose father was a former owner of defendant's title, testified that his father mined along Grouse creek between 1893 and 1911, but did not resort to the ditch for water supply. It is claimed there was a division of the water of Grouse creek ditch by agreement. In 1902 or 1903 Andrew Welker claims his father and Louis Schneider had trouble over the water; that his father went to Schneider and procured an agreement to divide the water equally. He said:

"Schneider owned the water at that time. My father went over to see Billy and told him he was going up there and break the dam and turn the water down."

He was then asked if he was present at that conversation, and replied that he was not; whereupon that evidence was stricken from the record.

Defendant's claim that the water was divided by agreement is supported by evidence

that is very uncertain and unsatisfactory. The weight of evidence indicates that no such agreement was made. Welker did irrigate a few acres of land below plaintiff's ranch. In the dry season, when water was scarce, he claims to have gone to Mr. Vaughn, the then owner of plaintiff's premises, and to have obtained permission to use one-half the water from Grouse creek. Andrew Welker was asked: "Isn't it a fact that you told Vaughn you needed a little water down on your garden, and he said if you needed some to go and take it?" To which the witness replied, "Yes, I did." This would indicate nothing more than a temporary and permissive use.

It is claimed there was an agreement with defendant's predecessor in title, Mr. Brehm, to divide the water in 1919. Upon being asked if he had not agreed to such a division, Mr. Vaughn replied:

"No; no division. I can state to you the little understanding we had. Fourth of July, 1918, * * * Mr. Welker went up and broke the dam. * * * That evening they came up to my place and asked me, 'Ain't there some way you and Ande can get along with your water without quarreling with it?' * * * I says, 'There would be if Ande wanted to do what is right, and recognize my rights.' He says, 'Why don't you use all the water and wet up the field good, and let Ande take it two or three or four days, whatever it might take to wet up his garden and alfalfa, and then turn it all back to you again?' 'Well,' I says, 'if Ande wanted to do that way * * * that would be all right.' Next morning Joe and I went over to Andrew's and suggested this to him, and he agreed to it. I told him to go and turn down all the water that he thought he could by leaving me sufficient water for the house and domestic use. Which he did. * * * In possibly four or five days he came back to my place and said, 'I got my field all wet up, and I turned you back the water this morning.' I told him all right, and I went on to use it probably a week or ten days. * * * He came to my place again and asked how I was getting on irrigating. I told him my field was pretty well soaked up. * * * Then he said, 'I would like to wet mine up again.' And I said, 'All right, go ahead and take the water; only leave enough for domestic use.' * * * He goes and takes the water, and in two days he came back past my place and said, 'I couldn't get that water down to my garden; the ditch dried out, and I turned it all back to you this morning.' That is the last words Mr. Andrew Welker and I ever had about the water."

The record contains absolute denials on the part of Mr. Vaughn that he ever agreed to any permanent division of the water with Mr. Welker. The most that can be said of the agreement, appearing from the statement above quoted, is that it constituted merely a temporary, permissive use on the part of Welker.

[2-4] It is true that the requisites for acquiring title to water by prescription is that the use must have been open, continuous for a period of five years or more, under a claim of right, and must have been beneficial, and

the taxes paid by claimant. 1 *Wiel on Water Rights*, No. 522, p. 628; 2 *Kinney on Irrigation*, No. 1048, p. 1876. The statutory period necessary to acquire prescriptive rights need not necessarily be the five years immediately preceding the commencement of the action. In the case of *Union Mill & Mining Co. v. Dangberg* (C. C.) 81 F. at page 94, many of the principles involved in adverse title to water rights have been concretely stated as follows:

It is well settled that the right to water flowing in public streams may be appropriated for a beneficial use; if it is used for irrigation the appropriator is entitled to only the amount necessary to irrigate his land; by making a reasonable use of the water; the object in view at the time of the appropriation of the water should be considered in determining the extent and right of the water used; the quantity of water actually beneficially used, and not the capacity of the ditch or aqueduct through which it passes, will determine the title to water appropriated for irrigation, watering stock, or domestic use; one cannot acquire title to any more water than is necessary for the purpose of his appropriation; the intention of the appropriator, his object, and purpose in taking the water, his acts and conduct in regard thereto, the amount and character of land owned by him, his necessities, ability and surroundings must be considered in determining and defining his rights; the rights acquired must be exercised with reference to the general condition of the country, and the needs of the community; and must be subject to any prior rights acquired.

The foregoing principles are supported by a uniform line of authorities in California and all the states where the question to water rights from public streams has arisen.

[5-7] It is equally well settled that, to acquire title to water by adverse possession, it must have been used with a claim of right, uninterrupted, and for a beneficial purpose. *California Pastoral Co. v. Madera Canal & Irr. Co.*, 167 Cal. 78, 138 P. 718. The extent of the user's right is limited, not by the quantity of water actually diverted, nor by the capacity of the ditch, but by the quantity which is applied for beneficial purposes. *Barrows v. Fox*, 98 Cal. 63, 32 P. 811; *Smith v. Hawkins*, 120 Cal. 89, 52 P. 139. It is not necessary that a claimant should use the water all the hours of each day, nor every day in the year for the prescribed statutory period, in order to establish uninterrupted or continuous use; it is only necessary that he shall have used it continuously during such portions of the day or year as is required for the beneficial use to which it is applied. 1 *Wiel on Water Rights*, No. 583, p. 630.

[8] So far as the necessary elements which constitute adverse possession to water rights is concerned, the record indicates that the plaintiff and his predecessors in title have sufficiently conformed to the law. Their use

of the water does not appear to have been by mere permission of any other claimants. The entire record indicates that they were constantly asserting a claim of title by all their acts and conduct.

[9] A portion of defendant's land is riparian to Grouse creek below the point where plaintiff's ditch diverted the flow of water. It does not satisfactorily appear whether any portion of plaintiff's land is also riparian to this creek or not. But assuming that plaintiff's land is nonriparian to this creek, and that defendant's land is riparian to it below the mouth of the diverting ditch, still it is the settled law of this state that the right to take water from a stream, as against a lower riparian owner, may be acquired by prescription. *Arroyo Ditch Co. v. Baldwin*, 155 Cal. 280, 100 P. 874; *Gallagher v. Montecito Valley Water Co.*, 101 Cal. 245, 35 P. 770; *Bathgate v. Irvine*, 126 Cal. 144, 58 P. 442, 77 Am. St. Rep. 158; *Rice v. Meiners*, 136 Cal. 292, 68 P. 817; *Coonrad v. Hill*, 79 Cal. 587, 21 P. 1099; *American Co. v. Bradford*, 27 Cal. 360; *Southern Cal. Inv. Co. v. Wilshire*, 144 Cal. 68, 77 P. 767; *Pyramid Land Co. v. Scott*, 51 Cal. App. 636, 197 P. 398; *Williams v. Costa*, 52 Cal. App. 396, 198 P. 1017.

[10] It is claimed that the evidence fails to show that the ditch or water rights in question were included in any assessment of taxes on plaintiff's property, or that such water rights appear in any of the earlier deeds of conveyance. The evidence does, however, show that the ditch and water rights were duly assessed with plaintiff's property in 1894. The earlier deeds do not refer to the ditch or water rights. But, in order to convey an easement in water flowing through a ditch for the purpose of irrigating land, the water rights need not be mentioned in the deed. Water diverted from a stream, and flowing through a ditch to irrigate land, or for domestic purposes, is appurtenant to the land, and is real property, and passes with the deed to the property without specifically mentioning such appurtenance. *Civ. Code*, § 662; 9 Cal. Jur. 286; *Coonrad v. Hill*, 79 Cal. 587, 21 P. 1099; 8 R. C. L. No. 125, p. 1070; *Farmer v. Ukiah*, 56 Cal. 11; *Stanislaus Water Co. v. Bachman*, 152 Cal. 717, 93 P. 858, 15 L. R. A. (N. S.) 359. Each deed in form, in plaintiff's chain of title, contained the language conveying the real property, "together with the appurtenances thereunto belonging." This was sufficient conveyance of the water rights as appurtenant to the land.

[11, 12] Extravagance in transit of the water by means of an open ditch through porous serpentine soil is charged, as well as in the mode of application of the water for irrigation purposes. No doubt a considerable loss of water from evaporation and percolation might be saved by the use of wooden troughs or metal pipe lines. But in determining the method to be pursued in transmitting water

for irrigation, a court should consider all the conditions and surrounding circumstances of the case. This open ditch has been used for conveying the water in question ever since its appropriation in 1854. It is common knowledge, of which the courts will take notice, that in the early mining days of California this was the usual method resorted to for mining and for irrigation. The more modern means of conserving water in transportation were then little used, particularly in the remote mountainous regions. The expense and labor of such modern methods would have then been practically prohibitive. In *Middelkamp v. Bessemer*, 46 Colo. 102, 103 P. 280, 23 L. R. A. (N. S.) 795, it is said:

"All irrigation canals must, of necessity, seep more or less along * * * their lines, * * * until prevented by other means than [by the exercise of] ordinary diligence. * * * We do not think the time has yet been reached * * * when the owners * * * can be held to such a high degree of diligence in their construction as to be compelled to prevent them from seeping at all."

The loss of from 30 to 50 per cent. of water in transportation in arid districts is not uncommon. The method of transporting the water and applying it to the land in this case was not unreasonable under the circumstances and conditions disclosed by the evidence.

[13] Defendants claim title to the water, as riparian owners of land acquired by mesne conveyance through the Central Pacific Railroad Company, of land included within the 20-mile grant of railroad lands on either side of its tracks by patent from the United States dated March 14, 1896, pursuant to the act of Congress of July 25, 1866. This act of Congress was passed just one day prior to the act of that legislative body which recognized and acknowledged the prior rights of appropriators of water on the public domain for mining, irrigation, or manufacturing purposes. It is claimed no reservation was made in this act of July 25, 1866, in favor of such appropriators.

The act of Congress granting railroad lands to the Central Pacific Railroad Company is found in United States Statutes at Large, vol. 14, p. 239, and provides in part:

It is enacted "that there be, and hereby is, granted to said companies, * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections * * * shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by the companies in lieu thereof. * * *"

The very day following the preceding enactment Congress, recognizing the prior rights of individuals on the public domain passed an

act found in United States Statutes at Large, vol. 14, p. 251, entitled:

"An act granting the right of way to ditch and canal owners over the public lands, and for other purposes."

The ninth section of that act provides:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed. * * *" U. S. Comp. St. § 4647.

The custom and the decisions, even prior to the enactment of Congress recognizing these rights of California, assured the protection of such vested claims. In a number of well-considered opinions of Mr. Justice Heydenfeldt, as early as 1856, it was held that the rights of possession of water and of easements for ditches and canals on public lands would be protected. These rights were declared to be founded on the doctrine of a presumption of a grant to the appropriator. In view of the notorious occupancy by citizens of this state, in public lands and the water of public streams, used for mining, manufacturing of lumber, construction of canals and ditches, the cultivation of farms, and various industries, the government recognized their right of ownership and acquiesced in their appropriation by failure to interfere with these industries. *Conger v. Weaver*, 6 Cal. 548, 65 Am. Dec. 528; 1 *Kinney on Irrigation*, No. 610, p. 1060.

In the case of *Drake v. Earhart*, 2 Idaho (Hasb.) 750, 23 P. 541, Chief Justice Beatty of that state said: All the patents granted, or pre-emptions of homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches. The rulings have been uniform that the patentee of lands has no claim upon the water flowing through the same as against a prior appropriator. *South Yuba Water Co. v. Rosa*, 80 Cal. 333, 22 P. 222. As far back as 1855 the Supreme Court of California in *Irwin v. Phillips*, 5 Cal. 145, 63 Am. Dec. 113, and in *Tartar v. Spring Creek Water Co.*, 5 Cal. 395, distinctly held that the prior appropriator of water should hold it against the riparian claim of the owner of land through which it flowed, and also in all branches of industry the prior appropriator of land, water, and easements would be protected. Not only had such become the law by custom, by the legislative will and the decisions of the courts, without dissent, but the general government for many years, without protest, acquiesced in such occupation and use of its lands and waters by its citizens, while valuable properties and industries were building upon this principle. To put

the question beyond uncertainty, and to prove and adopt what already existed as the common law of the West, Congress passed the Act of July 26, 1866.

The United States Supreme Court has uniformly upheld the same doctrine. In the case of *Broder v. Natoma Water & Mining Co.*, 101 U. S. 274, 25 L. Ed. 790, wherein a similar contention was made, Mr. Justice Miller said:

"In reference to the lands of plaintiff held under conveyance from the Pacific Railroad Company, it might be a question of some difficulty whether the right was so far a vested right in that company before the passage of this act of 1866, that the latter would be ineffectual as regards these lands. But we do not think that defendants are under the necessity of relying on that statute. We are of opinion that it is the established doctrine of this court that rights of * * * persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866, and that the section of the act which we have quoted [section 9] was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one. This subject has so recently received our attention, and the grounds on which this construction rests are so well set forth in the following cases," that without further comment, we will rely upon them. *Atchison v. Peterson*, 20 Wall. 507, 22 L. Ed. 414; *Basey v. Gallagher*, 20 Wall. 670, 22 L. Ed. 452; *Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313; *Wyoming v. Colorado*, 259 U. S. 461 (42 S. Ct. 552), 66 L. Ed. at 1012.

Under the foregoing authorities, regardless of whether plaintiff's land or water rights were within the twenty-mile grant of railroad lands to the Central Pacific Railroad Company, and regardless of whether that grant was made by Congress prior to its enactment recognizing the prior rights of appropriators of the public domain, the plaintiff's prior rights were bound to be protected. Plaintiff's rights were prior and superior to the riparian rights afterward acquired by defendants through the grant from the railroad company.

[14] The costs were not improperly taxed against defendants. Plaintiff was entitled to recover his costs of suit. This is an action to quiet title to water rights alleged to have been acquired by prescription. Plaintiff's title was quieted as to at least a portion of the water claimed by him. It has been repeatedly held that the Code provisions awarding costs apply to an action affecting conflicting claims of water rights. *Code Civ. Proc. § 1022*; 7 Cal. Jur. 257; *Northern Cal. Power Co. v. Waller*, 174 Cal. 377, 163 P. 214; *Stimson v. Lemoore*, 31 Cal. App. 396, 160 P. 845; *Peake v. Harris*, 48 Cal. App. at page 380, 192 P. 310.

[15] Nor was it prejudicial error for the court, in the absence of counsel, and without opposition, to continue defendant's motion for a new trial to a time beyond the limitation within which the motion must be made under section 660, Code of Civil Procedure. His notice of intention was filed April 30, 1923, setting May 11th as the time for presenting the motion. Seven several continuances were had; one at the motion of defendants, five by consent of respective counsel, and finally, on July 21st, at the court's own motion, in the absence of counsel, it was again continued. The last continuance appears to have been inadvertently made. It does not appear that any counsel were present, although this was the regular time set by consent for the hearing of the motion. On July 14th, preceding, when respective counsel were present and consented to a continuance, the two months allowed by section 660, Code of Civil Procedure, had already elapsed. This record shows a lack of diligence of the part of defendants in the prosecution and presenting of their motion for new trial. They were bound to take notice of the limitation of time within which to present it. It was their duty to be present and see that it was set within statutory time. If it had been inadvertently continued by the court at a time while the right to present the motion was still alive, defendants should have moved the court to advance the matter on the calendar. No diligence is shown on the part of defendants. They cannot complain of this inadvertence.

[16, 17] We now come to the consideration of defendant's final contention that 75 inches of water is greatly in excess of the reasonable quantity which should be allowed in this case. We think this contention must be sustained. The evidence is very conflicting as to the number of acres of land actually irrigated, and as to the quantity of water necessary. The evidence as to the number of acres actually irrigated varies from 8 to 80 acres. Probably the weight of evidence may be said to support a claim that about 20 acres were actually irrigated for the purposes of raising hay, grain, and garden. In addition to this, water was also required for domestic purposes in supplying 4 or 5 cows, a span of horses, a small flock of chickens and turkeys, and a household composed of two members.

Grouse creek, characteristic of these California mountain streams, was practically dry a portion of the season until the fall rains occurred. In traversing the mile and a half through a porous, serpentine soil, nearly one-half of the water was lost in transit from seepage and evaporation. In the absence of statute, the court must fix the reasonable duty of water. In this state there is no statute regulating the duty or amount of water reasonably necessary for irrigation. Many states have adopted such statutes. The term "duty of water" has been defined to mean the quantity of water necessary to properly irrigate a

given tract of land. *Hough v. Porter*, 51 Or. 318, 95 P. 732, 98 P. 1083, 102 P. 728. In Idaho the statute allows one second-foot of water for 50 acres; in Nebraska, New Mexico, Oklahoma, South Dakota, and Wyoming the statute allows one second-foot for 70 acres; North Dakota allows one second-foot for 80 acres, and Nevada allows 3 acre-feet per year for five months, and one-half acre-foot in addition per month for three additional months. In the absence of statute the duty of water is usually figured in inches under a given pressure. An inch per acre is generally considered liberal. 1 *Wiel on Water Rights*, 523. It is apparent there can be no exact or uniform rule for computing the duty or reasonable quantity of water for irrigation. The needs of the soil for developing plant life depend upon the properties of the soil, the climate, and various other conditions.

There are three methods of measuring water in California: The miner's inch, the second-foot and the acre-foot or acre-inch. These measurements are also sometimes reduced to gallons. It would avoid much confusion if our engineers and Legislature were to adopt a uniform method of measuring water. The standard miner's inch is equal to $1\frac{1}{2}$ cubic feet of water per minute passing through a given orifice. *Stats. of Cal.* 1901, p. 660. A cubic foot of water equals about 7.48 gallons. In California the miner's inch represents the quantity of water that will flow in one second through a 1-inch aperture in a board or planks obstructing the stream, which aperture is located 4 inches below the surface or head of the stream. Fifty miner's inches are equivalent to 1 second-foot. *King on Irrigation*, 241. There are 43,560 square feet in an acre of land. An acre-foot of water is such a quantity of water as will cover the entire acre 1 foot in depth. It would therefore take 43,560 cubic feet of water to constitute 1 acre-foot of water. Seventy-five inches of water is therefore equivalent to $1\frac{1}{2}$ second-feet, or $112\frac{1}{2}$ cubic feet per minute, or 841.40 gallons per minute. Since the miner's inch is equal to $1\frac{1}{2}$ cubic feet per minute, the 75 inches of water allowed by the trial court in this case each day of 24 hours, during the entire 12 months of the year, would supply 20 acres of land with $112\frac{1}{2}$ cubic feet of water per minute, or 6750 cubic feet per hour, or 162,000 cubic feet per day, or 4,860,000 cubic feet per month, or 58,320,000 cubic feet per year. Reducing this quantity of water to gallons it will be necessary only to multiply these figures by 7.48, since there are that number of gallons in a cubic foot.

Since it would take 43,560 cubic feet of water to cover an acre of land one foot deep, it would require 871,200 cubic feet to furnish 1 acre-foot of water for 20 acres of land; 4,860,000 cubic feet per month would be equivalent to about 5.58 acre-feet per month, or 66.96 acre-feet per year. Allowing a loss of one-

half of this quantity in transit by evaporation and percolation, there would still be an excessive amount to irrigate 20 acres of land, together with the use for domestic purposes.

Assuming that 1 second-foot of water is equivalent to about 50 miner's inches, this judgment has provided for $1\frac{1}{2}$ second-feet of water to irrigate 20 acres of land, plus the necessary water for domestic purposes. Undoubtedly the trial court calculated on the basis of much more land to be irrigated. But we think the weight of evidence will not warrant a finding of more than 20 acres during the time the prescriptive rights were maturing. And again, assuming that one-half of this quantity is lost in transit, there would still be allowed three-fourths of a second-foot for 20 acres, which would be equivalent to 1 second-foot for 26.6 acres. This is excessive.

Compared with the statutes of other states governing the duty of water for irrigation the quantity allowed by the trial court is excessive. As we have seen, Idaho allows only 1 second-foot for 50 acres. Nebraska, New Mexico, Oklahoma, South Dakota, and Wyoming allow only one second-foot for 70 acres, while North Dakota allows only one second-foot for 80 acres. In the case of *Gardner v. Wright*, 49 Or. 636, 91 P. at page 297, it is said:

"It being shown * * * that defendant has between 60 and 70 acres of land in cultivation, including orchard, upon which good crops have been raised each year, it will be assumed that a flow of 60 inches of water is ample for defendant's irrigation and domestic requirements."

The amount of water allowed by the judgment is clearly excessive in view of the rule that one may acquire by prescription only such quantity as has been actually, necessarily, and beneficially used by the claimant for the statutory period of time.

[18] It also appears without contradiction that plaintiff did not require or use any of the water for irrigation purposes for November to April or May. In other words, there was a part of each year during which the plaintiff did not actually take or use any part of this water from Grouse creek ditch for necessary irrigation purposes. It follows that during such portion of the year he therefore could have acquired no prescriptive right to the water. The judgment has erroneously quieted title to 75 inches of water the year round without regard to those months during which it was not in fact used. To this extent the judgment is not supported by the evidence. In *Northern California Power Co. v. Flood*, 186 Cal. at page 306, 199 P. 317, it is said:

"The value of water for irrigation is too great in this state to allow a landowner to gain a right thereto * * * by using the

same for only a half or any other portion of the time less than the whole."

It is there held that one may acquire prescriptive right to water for the period of time only during which it is actually beneficially used. *Pabst v. Finmand*, 190 Cal. 124, 211 P. 11.

For the reason that the judgment allows an excessive quantity of water, and that it is not confined to those months during which it was actually and necessarily used for beneficial purposes the cause must be remanded.

The judgment is therefore reversed.

We concur: FINCH, P. J.; PLUMMER, J.

that serving and filing notice of intention waived notice of entry of judgment, and motion to dismiss appeal on such ground will be denied.

2. Appeal and error *Cal. Civ. Proc.* § 801(1)—On denial of motion to dismiss appeal from judgment, motion to dismiss appeal from order striking notice of intention to move for new trial from files denied.

On denial of motion to dismiss appeal from judgment as being taken too late, motion to dismiss appeal from order striking defendants' notice of intention to move for new trial from files, based solely on ground that, if appeal from judgment is dismissed, appeal from such order would be ineffectual, must be denied.

In Bank.

Action by Kathryn W. Hutton against William Chapman and another. Judgment for plaintiff and defendants appeal. On motions by plaintiff to dismiss appeals by defendants from judgment and from an order striking from files notice of intention to move for a new trial. Motions denied.

Charles Lantz, W. P. Hyatt, and F. C. Huber, all of Los Angeles, for appellants.

Charles S. Conner, of Los Angeles, for respondent.

RICHARDS, J. [1] The respondent moves to dismiss two appeals taken by the defendants; the first being an appeal from the judgment, and the second an appeal from an order striking from the files the defendants' notice of intention to move for a new trial. As to the first of these motions, the record upon which it is based discloses that the action is one to quiet title; that judgment in favor of plaintiff was rendered on May 2, 1924, and entered on May 8, 1924. No notice of the entry of judgment was ever given, served, or filed. Notice of intention to move for a new trial was served and filed on May 27, 1924, and an amendment to such notice of intention was filed on August 27, 1924. Notice of motion to strike from the files the notice of intention to move for a new trial was served and filed on August 22, 1924, and was granted on September 3, 1924. Both notices of appeal were served and filed on the last-named date. The motion to dismiss the appeal from the judgment is based upon the ground that said appeal was taken too late; the basis of said motion being that the defendants having, by the serving and filing of their notice of intention to move for a new trial on May 27, 1924, waived notice of the entry of judgment, the power of the court to pass upon said motion for a new trial expired within two months thereafter, under the terms of section 660 of the Code of Civil Procedure. This precise question was determined by this court adversely to the respondent's contention in the case of *Strehlow v. Mothorn*, 239 P. 850, and upon the

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HUTTON v. CHAPMAN et al. (L. A. 8426.)

(Supreme Court of California. Oct. 27, 1925.)

1. Appeal and error *Cal. Civ. Proc.* § 345(1)—On failure to serve notice of entry of judgment, power of court to pass on motion for new trial did not expire in two months after serving and filing notice of intention to move for new trial, so as to require dismissal of appeal.

On failure to serve notice of entry of judgment, power of court to pass on motion for new trial did not expire in two months after serving and filing notice of intention to move for new trial, under Code Civ. Proc. § 660, on theory

authority of that decision the motion of the respondent herein to dismiss the appeal from the judgment must be denied.

[2] As to the respondent's motion to dismiss the appeal from the order striking the defendants' notice of intention to move for a new trial from the files, said motion being based solely upon the ground that, if the appeal from the judgment is dismissed for the reason urged, the appeal from said order would be ineffectual, this being the sole ground of the latter motion, it follows that, since the motion to dismiss the appeal is to be denied for the reasons stated, the motion to dismiss the appeal from the order striking the defendants' notice of intention to move for a new trial from the files must also be denied.

The motions are denied.

We concur: MYERS, C. J.; WASTE, J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.; SHENK, J.

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SEID PAK SING et al. v. BARKER et al.
(two cases). (S. F. 9935; Sac. 3352.)

(Supreme Court of California. Oct. 29, 1925.)

1. Contracts ⇨152—Maxim of noscitur a sociis is applicable in determining scope and meaning of words, sentences, and clauses of contract.

While a written instrument as to interpretation of any particular clause therein is to be read as a whole, and particular clause or sentence thereof under scrutiny is not to be controlled as to its meaning by its position or context in the instrument, maxim of noscitur a sociis is applicable to use of context in determining scope and meaning of words, sentences, and clauses of contract.

2. Landlord and tenant ⇨159(2)—Lessees entitled to include expenditures in making leased premises cultivatable and losses from breaches of lessor's covenants in arriving at amount of return which their mortgage on leased premises was to secure.

Under lease of land for agricultural purposes, providing that lessor should give to lessees a mortgage on part of lands as security for his performance of covenants therein to drain and render cultivatable the lands covered by lease, if lessor breached such covenants, lessees, in arriving at amount of return which their mortgage was to secure, were entitled to include their expenditures for drainage and rendering lands cultivatable, and for protection of their crops when planted, and damages resulting from their losses in crops occurring through breach of such covenants.

3. Appeal and error ⇨854(2)—Disallowance of difference between sum found to have been actually expended by lessees and amount allowed on account of such expenditure held not to require reversal.

On issue as to amount of expenditures in rendering leased premises cultivatable lessees

were entitled to include in amount of return which mortgage given by lessor for faithful performance on his part of covenants in lease was to secure, disallowance of difference between sum found to have been actually expended, and amount allowed on account of such expenditure will not require a reversal, even though reasons given by trial court for making deduction were erroneous, where lessees were granted by the judgment substantially all that they asked.

4. Damages ⇨78(6)—Provision in lease limiting recovery for destruction of crops through failure of lessor to protect lands from overflow held invalid, as for stipulated damages.

Under lease of lands for agricultural purposes, provision limiting lessees' recovery to \$40 per acre in event of a total destruction of crops growing on leased premises through failure of lessor to keep his obligation to protect such lands from overflow, held invalid, in view of Civ. Code, § 1670, prohibiting stipulated damages, such provision not coming within exception to rule embodied in section 1671.

5. Landlord and tenant ⇨159(2)—Measure of lessees' damages for destruction of potato crop through failure of lessor to protect land from overflow stated.

Where lessees' crop of potatoes was destroyed by overflow through failure of lessor to keep its obligations to protect such lands therefrom, measure of plaintiffs' damages was market value of crop at date of its destruction.

6. Landlord and tenant ⇨154(2)—Tenant may recover damages from breach of landlord's obligation to repair, though he undertakes to make repairs himself.

A tenant who undertakes to make repairs in premises he occupies which landlord has covenanted, but failed or refused to make, and who uses due care and skill in attempting to make such repairs, but damage nevertheless results from defects which it was duty of landlord to repair, tenant may recover such damages as have been caused by breach of landlord's obligation.

7. Landlord and tenant ⇨158—Tenant in attempting to do work which landlord is obligated to perform must use such care as man of ordinary prudence would use under circumstances.

Duty of tenant in attempting to do work which landlord was obligated to perform is to use such care and diligence as man of ordinary prudence would use under the circumstances, although they may not have done the very thing nor used the very means that should have been used, as developed by subsequent information.

8. Landlord and tenant ⇨158—Tenants did not assume risk of losses resulting from defects in levees which lessor had expressly covenanted to repair.

Under lease of land for agricultural purposes, with covenants by lessor to protect lands from overflow, tenants held not to have assumed risk of losses resulting from defects in levees, where lessor expressly covenanted to construct and repair such levees within a stated time, which time was made the essence of the contract, and it was only after failure of lessor so

to do had been prolonged until danger of overflow became imminent that tenants undertook to do the work themselves.

9. Landlord and tenant ☞159(2)—Damages, claimed by lessees for loss of profits when unable to cultivate their crops on leased premises, held not so speculative as not to be allowable.

Damages, claimed by lessees to have been sustained by loss of profits from portions of leased lands which they were unable to cultivate and crop at all on account of lessor's breach of covenant to prevent such lands from becoming overflowed, held not too speculative or uncertain so as not to be allowable.

10. Damages ☞79(5)—Provision in lease, fixing sum per acre as agreed damages for general violations of lessor's covenants, held valid.

Provision in lease of land for agricultural purposes, fixing sum of \$40 per acre as agreed damages for general violations of lessor's covenants, held valid in so far as it furnishes an agreed amount of damage for loss of prospective crops as within exception provided in Civ. Code, § 1671.

11. Landlord and tenant ☞159(2)—Tenants not entitled to double recovery on breach of landlord's covenants to keep leased premises free from overflow.

On breach of landlord's covenants to keep lands leased for agricultural purposes free from overflow, lessees, while entitled to recover rental actually paid by them, were not also entitled to damages sustained for crops destroyed and for prospective profits for crops unplanted.

12. Landlord and tenant ☞223(5)—Tenant not entitled both to return of rents and to set off damage for disturbance of possession in action against him for stipulated rental.

While a tenant who has been disturbed in possession of demised premises or damaged, but who retains possession, may have his election to sue for return of rents paid or to successfully set off his damages suffered in an action against him for stipulated rental, he cannot have both forms of relief.

13. Appeal and error ☞154(1)—Estoppel ☞62(1)—Plaintiffs not precluded by their efforts and erroneous decision of trial court from prosecuting their own appeal or electing upon a retrial as to which form of relief they would stand upon.

Plaintiffs who on breach of landlord's covenants were erroneously allowed by trial court to recover rentals and damages for such breach, and who sought to take advantage of trial court's erroneous action, held not precluded from prosecuting their own appeal or from electing upon a retrial as to which form of relief they would stand upon, where no prejudice to defendants had resulted.

14. Mortgages ☞590—Junior mortgagees not entitled to deficiency judgment against holder of prior deed of trust, if premises embraced in their mortgage on foreclosure failed to produce amount secured thereby.

In suit to establish right of lessees as owners of a junior mortgage given by lessor to se-

cure covenants in lease and to redeem leased premises from lien of a prior deed of trust, lessees held not entitled to deficiency judgment against holder of prior deed of trust, if premises embraced in their mortgage on foreclosure failed to produce amount secured thereby, where makers of lessees' mortgage and persons primarily liable for breaches of covenants were not made parties to the action, and such breaches occurred prior to time defendant became holder of deed of trust.

In Bank.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by Seid Pak Sing and others, co-partners doing business under the firm name and style of Sing Kee Co., and another, against Harry B. Barker and others. From the entire judgment defendants appeal, and from portions thereof disallowing certain items of damages, plaintiffs appeal. Reversed as to both appeals.

In S. F. 9935:

Nutter, Thornton & Miller and Platt Kent, all of San Francisco, Elston, Clark & Nichols, of Berkeley, and Sloss, Ackerman & Bradley and M. C. Sloss, all of San Francisco, and George Clark, of Berkeley, for appellants.

A. H. Ashley, of Stockton, and Sterling Carr, of San Francisco, for respondents.

In Sac. 3352:

A. H. Ashley, of Stockton, and Sterling Carr, of San Francisco, for appellants.

Nutter, Thornton & Miller and Platt Kent, all of San Francisco, Elston, Clark & Nichols, of Berkeley, and Sloss, Ackerman & Bradley, of San Francisco, for respondents.

RICHARDS, J. There are in this case two appeals, one by the plaintiffs from certain portions of the judgment, and it is taken upon the judgment roll; that other by the defendants from the whole judgment, and is based upon the entire record. The plaintiffs' appeal, though not first in the order of its taking, will be first considered and disposed of before passing to a determination of the larger questions embraced in the defendants' appeal. The action as originally brought was one to establish the right of the plaintiffs as the owners and holders of a junior mortgage upon certain premises to redeem said premises from the lien of a prior deed of trust upon the same owned and controlled by certain of the defendants, and to fix the basis of such redemption. The facts with relation to the earlier phases of this controversy are undisputed, and may be briefly summarized as follows: During the early part of the year 1917 one John Landers was possessed of certain large tracts of delta lands lying some 15 miles south of Stockton, containing in excess of 750 acres of land, and, being the whole

of what is known in that region as "Mildred Island." During the summer of that year Landers borrowed \$35,000 from the San Joaquin Valley Bank, a corporation, which was represented in a promissory note for said sum, dated June 21, 1917, executed by John Landers and Marie Landers, his wife, and as security for the payment of said note the makers thereof executed a deed of trust covering all of the lands known and described as Mildred Island, of which said deed of trust the San Joaquin Valley Bank was made the beneficiary, and two other certain persons were named therein as the trustees thereof. This deed of trust, while executed upon the said date, was, as the trial court found, not delivered until the 5th day of November, 1917. It was also not the first incumbrance upon certain portions of said lands, since at the date thereof there was an outstanding mortgage upon a portion of said lands in favor of one Henry E. Bothin, upon which, as the trial court found, there remained a balance due of \$13,000, but which indebtedness has since been satisfied. There was also about 145 acres of said tract which was still standing of record in the names of persons and corporations other than John Landers and wife. On or about the 21st day of September, 1917, the said John Landers, purporting to act as the owner of the above premises as a whole, made and entered into a lease thereof to Pak Sing, also known as Seid Pak Sing, and Sing Kee Company, a copartnership, for a period of two years, commencing on the 1st day of January, 1918, and ending on the 31st day of December, 1919. The premises described in said lease as comprising the whole of Mildred Island were therein estimated as containing a total acreage of 1,237.58 acres, the annual rental of which was for the first year to be \$25.50 per acre of the lands leased as so described, and for the second year the sum of \$26 per acre of the lands so leased. The acreage was to be measured and determined by the area within the compass of the center of the levee. No deduction was to be made therefrom of the pieces or parts of the land used for canals, ditches, or drainage purposes, but it was provided that, though the measurement thus prescribed should determine the acreage for the purpose of fixing rental, the levee itself and all convenient space thereabout was not to be included within the lease, but the absolute possession, control, and custody thereof should remain in the owner, nor was the cultivation of the land by the tenant to extend beyond the base of the levee. In this portion of the lease thus designating the area and measurement of the land upon the basis of which the rentals were to be estimated it was provided as follows:

"But if any part of the land should not be sufficiently drained to make it susceptible of cultivation in the proper season, then the rental for the year of such season shall be diminished pro

rata according to the amount of acreage so excluded from cultivation."

The tenants covenanted and agreed to pay the rent prescribed in said lease in the following manner, to wit: \$10,000 on the 1st day of September, 1918; \$10,000 on the 1st day of October, 1918; the balance for the year 1918 on the 1st day of November, 1918; \$10,000 on the 1st day of September, 1919; \$10,000 on the 1st day of October, 1919; the balance for the year 1919 on the 1st day of November, 1919. Upon the date of the execution of the lease the tenants were to make and deliver to the lessor three promissory notes each in the sum of \$10,000, which should be evidence of the rental to be paid for the first year of the term of the lease, and which notes should be absolutely negotiable and not subject to any equities between the parties arising out of the lease or however arising. As security for the payment of the rent reserved for the second year of the term of the lease and of the performance of all of the terms and conditions thereof the tenants were to deposit with the lessor on the 5th day of January, 1918, the sum of \$5,000 with which they were to be credited upon the last installment of their rent. The tenants were also to make and deliver to the lessor on the 1st day of January, 1919, a chattel mortgage upon an undivided one-fourth of the growing crops upon said lands as further security for the payment of the rent and performance of the covenants of said lease by the said lessees to be performed during the second year of the term thereof. On the part of the lessor it was agreed that, "if during the life of this lease any part of the crops grown by the tenant shall be destroyed by reason of the breaking of the levee or by reason of the failure of the owner to keep and perform the terms and conditions of this lease, the owner shall pay to the tenant for each acre of crop totally destroyed the sum of \$40. If the destroyed and damaged crops should be less than total, then the owner shall pay to the tenant therefor for each acre of crop so partially destroyed and damaged a due and proper pro rata of said sum of \$40, the amount of such pro rata to be determined by the parties hereto," or in the event of disagreement by arbitration. There was also a provision to be commented upon hereafter, fixing a like amount as damages for any and all breaches of the terms and covenants of said lease by the lessor or his assigns. As further security for the performance of the obligations of the owner to the tenants under the terms of said lease it was provided that the owner should give to the tenants a mortgage upon the southerly 780 acres of the leased lands which should be prior to and prevail over any other lien or incumbrance except the deed of trust above referred to. The covenants of the owner with the tenants followed. They were: (a) To clear the land of tule and willow

roots; (b) to plow the land once; (c) to erect certain camps, buildings, barns, and warehouses of designated dimensions upon the land; (d) to install all siphons necessary for the growing of potatoes, beans, and other crops; (e) to drain to the necessary depth seepage water, as desired by tenants; (f) to install ditches and pipes necessary for seepage water; (g) to install, maintain, and operate the necessary pumping plant and apparatus for drainage of land; (h) to construct and maintain all necessary drainage ditches, canals, and bridges. The owner further covenanted that the camps and buildings should be ready for occupancy on the 1st day of January, 1918; that the said land should be ready for cultivation as follows: The southerly 780 acres thereof on the 1st day of February, 1918, and the remaining acres thereof on the 1st day of March, 1918. There were certain other minor and auxiliary covenants on the part of both of the parties to the lease, and it was provided therein that every term, condition, and covenant of the lease, whether expressed or implied, is of the essence thereof, and shall at the option of the party not offending constitute ground for the forfeiture thereof or for the enforcement of such other covenants as were therein or by law provided. Finally it was provided that the terms, conditions, and covenants of the said lease should inure to the benefit of and be binding upon the heirs, executors, successors, and assigns of the parties thereto.

The parties to this lease, having executed the same, entered upon the performance of its terms, covenants, and conditions at the times provided therein, and as a result of the performance and nonperformance on the part of the respective parties thereto the lessees thereunder commenced the present action by filing their original complaint on January 26, 1919; wherein, after alleging their own qualification to bring and maintain this action, they alleged that said John Landers was, on or about June 21, 1917, the owner of the lands in question with the exception of the portions thereof above noted, and that on said date he with his wife executed the deed of trust above referred to, and that the said deed of trust became effective by delivery on or about the 3d day of November, 1917; that the said John Landers, as lessor on the 21st day of September, 1917, entered into and executed the lease above referred to, pleading in substance and effect its terms, particularly with reference to the provisions therein relating to the execution by the former of the mortgage to the plaintiffs which forms the basis of the present action as presented in plaintiffs' original complaint. In so doing the plaintiffs set forth in *hæc verba* the provision in said mortgage that the same was given "as security for the faithful performance by said John Landers of the obligations, terms, and conditions of the lease of all the above described lands," etc. The plain-

tiffs proceeded to allege that the deed of trust to which said mortgage had by its terms been subordinated was on January 10, 1918, duly and regularly assigned to the Bank of Italy, a corporation, and was thereafter, and on December 9, 1918, by said Bank of Italy assigned to Harry B. Baker, one of the defendants herein, who thereupon appointed one H. B. M. Miller, another of the defendants herein, as trustee thereof in the place and stead of the trustees theretofore named therein; that at the time of these respective assignments of said deed of trust each of the said assignees thereof, and also the trustee substituted therein, had actual notice of said mortgage and of the fact that the plaintiffs were the owners and holders thereof, and had also actual notice of the obligations for which said mortgage had been given as security, and of the fact that the said plaintiffs advanced and paid a sum in excess of \$50,000 under the terms of said lease, a large part of which said sum the plaintiffs had been obliged to pay by reason of the failure of said John Landers to keep the obligations to be by him kept and performed under the terms of said lease; that on February 27, 1918, the said John Landers and wife conveyed and transferred to Midland River Land Company, a corporation, all of the premises described in said deed of trust; that on October 1, 1918, said Midland River Land Company conveyed said premises to Joseph Basile, Jr.; and that on December 4, 1918, Joseph Basile, Jr., and wife conveyed the said premises to Leonard J. Grossman, another of the defendants herein; that said John Landers, and each and all of his said successors in the ownership or possession of said premises, in violation of the terms of said lease, have failed and refused, and still fail and refuse, to give to the plaintiffs herein the possession of the lands described in said lease with the exception of 152 acres thereof, and have failed and refused to clear said lands of willows or tules, or to plow the same, or to perform the said work agreed to be performed by said John Landers under said lease, and that said plaintiffs have been damaged thereby in the sum of \$54,000, consisting in the sum of \$30,000 paid by plaintiffs upon their said three notes, each for \$10,000, and of the further sum of \$24,000 damages sustained by the failure of the said Landers and his transferees to perform the said covenants of said lease. The plaintiffs proceed to allege that the defendants H. B. Barker, H. B. M. Miller and Leonard J. Grossman are each agents and representatives of the defendant Chicago Bonding & Surety Company, a corporation, and that the acts and transactions of each of the said persons as above set forth, including the acquisition of the properties covered by said deed of trust by said Grossman, have been done as the agents of and for the benefit and on behalf of the said Chicago Bonding & Surety Company; that prior to the commencement of this action the said defend-

ants, acting for and on behalf of said corporation, have been purchasing outstanding claims and liens against the properties described in said deed of trust, but which outstanding claims and liens were and are upon portions of said properties upon which said deed of trust was not a first lien, and which said liens and claims are subsequent to the lien of the plaintiffs' said mortgage upon the lands covered thereby, and upon which said deed of trust is a first lien. The plaintiffs then proceed to allege that according to their information and belief the defendants herein have entered into a fraudulent and unlawful conspiracy, scheme, and plan to cause the said properties described in said deed of trust to be sold, not primarily for the payment of the promissory note for the sum of \$35,000, which it secured, but mainly and chiefly for the payment of many large and fictitious obligations which the said defendants allege they have purchased, and for the payment of which they wrongfully allege they are entitled to sell said premises, but in order, in fact, to defeat and destroy the force and effect of the plaintiffs' said mortgage upon said premises, and that in furtherance of said scheme and plan these defendants procured the said Grossman to purchase the legal title to said premises prior to the 21st day of December, 1918, which was the date upon which an installment of interest fell due upon the said promissory note which said deed of trust secured, and conspired and agreed that said Grossman should not pay said installment of interest when so due in order to effect a default under the terms of said promissory note, which would render the whole of said promissory note, both principal and interest, due and payable, and thus enable the holder of said promissory note and the trustee under said deed of trust to proceed to sell said premises; and that in accordance with said scheme and conspiracy the said defendant Miller, as the trustee under said deed of trust, did, on the 6th day of January, 1919, cause notices of such sale to be given and published to the effect that said premises would be sold under said deed of trust on January 29, 1919, at public auction to the highest bidder; that thereupon, and upon learning of the fact and date of said proposed sale, the said plaintiffs on the dates of January 17 and 21, 1919, demanded of said defendant Miller that he advise them as to the amount necessary to redeem said premises from the operation and effect of said trust deed, and particularly from that portion of said premises upon which said deed of trust is a first lien; and that upon the 22d day of January, 1919, said Miller served upon said plaintiffs a notice to the effect that the sum of \$185,000, with interest thereon from various dates, would be required to redeem said premises from the lien of said deed of trust, but that said Miller has failed and refused to advise plaintiff of the amount required to redeem that portion of said prem-

ises upon which said deed of trust is a first lien and upon which plaintiffs' said mortgage is a second lien from said deed of trust; that the aforesaid amount claimed as necessary to redeem said premises from said deed of trust is a padded and misleading amount, and was made and furnished in an endeavor to prevent said plaintiffs from redeeming from said deed of trust as a first lien that portion of said premises upon which their said mortgage is a second lien, and also of preventing other persons from purchasing or bidding for said premises at said trust sale, so that the defendants might purchase said property at a sum far below its real value, but free and clear of the plaintiffs' said mortgage thereon, and thus defeat the right of the plaintiffs to foreclose their said mortgage for the recovery of the said amounts advanced and paid out by said plaintiffs and secured thereby. Wherefore the plaintiffs seek by this action to have the court ascertain and determine the actual amount due upon and secured by said deed of trust by a proper accounting, and thus enable the said plaintiffs to redeem said premises from the same, and they also pray for an injunction and for general relief.

To this original complaint of the plaintiffs herein the defendants appeared and answered separately; the answers of these defendants being, however, substantially the same, and consisting in certain admissions as to matters of writing and of record, but otherwise of denials of the averments of said complaint either directly or upon or for the want of information or belief. Certain of the defendants added to their answers certain special defenses not material to the present inquiry. In addition to the denials of the defendant Grossman's answer he presented an amended answer and cross-complaint, alleging in the latter certain matters upon which he sought affirmative relief. To this cross-complaint the plaintiffs filed an answer and later, by leave of the court, a supplemental answer, putting in issue its averments. The plaintiffs a little later applied for and were granted leave to present, and did present and file, an amended and supplemental complaint, wherein, after dealing with certain of the matters referred to in the defendant Grossman's amended answer and cross-complaint, the plaintiffs proceeded to set forth with much particularity the additional respects in which the said John Landers and his assigns had failed, refused, and neglected to perform the aforesaid covenants and obligations of said lease to be by them performed, and also to set forth in detail the damages sustained by plaintiffs as a result thereof, and to pray for an accounting and for general relief against all of said defendants. To this supplemental complaint the said defendants united in an answer, putting in issue its essential averments. The issues having been thus made up, the trial court proceeded with the trial of the cause,

and upon its submission made and filed its findings of fact and conclusions of law. It is not necessary at this stage of the case and upon the plaintiffs' appeal to deal with these in detail or treat of any other portions thereof than those which are involved in the plaintiffs' said appeal from the portions of the judgment of which the plaintiffs by this appeal complain. These portions of the judgment thus appealed from by the plaintiffs may well, for clarity, be stated at this point in the language of the plaintiffs' notice of appeal:

"IV. That, by reason of the provisions of the lease from said John Landers to said plaintiffs and providing, 'But, if any part of the land should not be sufficiently drained to make it susceptible of cultivation in the proper season, then the rental for the year of such season shall be diminished pro rata according to the amount of acreage so excluded from cultivation,' plaintiffs are not entitled to recover the sum of \$2,055.38 expended by them for levee work, by reason of the fact that said sum of \$2,055.38 was not expended by plaintiffs in order to protect any crop or crops planted by plaintiffs on said Mildred Island and growing thereon at the time said sum was expended for levee work, and that plaintiffs are only entitled to recover under the terms of said lease the amounts expended by them for such levee work during the time said crops were planted or growing upon said Mildred Island, and in order to protect said crops.

"V. That, by reason of the provision of the said lease from said Landers to the plaintiffs herein, which provision is set forth in paragraph IV of this judgment, the plaintiffs are not entitled to recover the sum of \$17,850.09 expended by them for cleaning the land upon Mildred Island of brush, willows, and tules.

"VI. That, by reason of the provision of the said lease from said Landers to the plaintiffs herein, which provision is set forth in paragraph IV of this judgment, the plaintiffs are not entitled to recover the sum of \$51,274.58 as net loss of profits for the year 1918 upon land not turned over or delivered to plaintiffs by John Landers or his assigns.

"VII. That, by reason of the provision of the said lease from said Landers to the plaintiffs herein, which provision is set forth in paragraph IV of this judgment, the plaintiffs are not entitled to recover the sum of \$206,735.85 as net loss of profits for the year 1919 upon land not turned over or delivered to plaintiffs by John Landers or his assigns.

"VIII. That, by reason of the provisions of the said lease from said Landers to the plaintiffs herein, which provision is set forth in paragraph IV of this judgment, the plaintiffs are not entitled to recover the sum of \$4,500 as loss of potato seed purchased in the year 1918 by plaintiffs to be planted upon said Mildred Island."

The plaintiffs' said appeal being upon the judgment roll alone, we are now to look at the findings and conclusions of the trial court having relation to the foregoing portions of said judgment in order to determine whether they are or are not sustained thereby. With the question of the sufficiency of the evidence to justify its findings with respect

to these particular matters we are not called upon at this stage of the case to deal. The trial court found in conformity with the pleadings and admissions of the parties that the lease in question had been entered into between them, and hence of necessity that the parties thereto had agreed to and were respectively bound by all of the conditions, covenants, and obligations therein which were on the part of the lessor and lessees respectively to be performed. The trial court further found, generally speaking, that the averments of the plaintiffs' original complaint, referred to in said findings by the numbers of the paragraphs thereof, were true. With respect to the averments of the plaintiffs' supplemental complaint the trial court found in the main, and with certain exceptions and limitations hereinafter to be noted, that the averments thereof referred to by the numbers of the paragraphs were true. In so doing the trial court found to be true, with the exceptions to be noted, the following averment of the said supplemental complaint embraced in paragraphs from XV to XX thereof, viz:

"XV. John Landers and his assigns failed, neglected, and refused to construct any (and during said term there was and there is no) levee whatever along said dredger cut on said upper division; that is to say, said 457.58 acres is, along said dredger cut, wholly unprotected. Said dredger cut extends from Middle river to Latham slough, and the waters of said slough and said river flow through said cut. Said levee not constructed was necessary and as necessary as any other levee referred to in said lease, but its construction was not even attempted by John Landers or his assigns, although its construction was a material part of the consideration for said lease, and, although by Landers' agreement to construct the same said tenants were induced to enter into said lease, as Landers and his assigns well knew. No canal or ditch has been dug nor attempted to be dug in or on said upper division. It has never been cleared nor attempted to be cleared of tules and willow roots. Neither has it been plowed once nor attempted to be plowed once by John Landers, nor by any of his assigns. It has never been made ready nor attempted to be made ready for cultivation. It has been of no use, advantage, benefit, or profit whatever to said tenants. It could have been safely leveed and protected and ditched and drained so that it could and would have been of use and profit to said tenants.

"John Landers and his assigns never constructed nor maintained, but failed, refused, and neglected to construct or maintain, on or around said lower division a levee of sufficient height to prevent the surrounding water, at times of high water or of high tides, from flowing over it in many places. It was never worked down nor smooth. It cracked, and its cracks were not filled. The material placed therein was never sufficient in quantity to weight it down and solidify the seepage of water seeping through the same. It was during all of said term like a sieve, and in many places below ordinary high tide levels. By reason of such neglect, failure, and refusal upon the part of John Landers and his assigns, there was not, at any time during

said term, any necessary levee or any levee constructed or maintained in conformity with said lease. Said tenants, in an endeavor to protect themselves, prevent said lower division from being overflowed, and make it ready for clearing, plowing, and cultivation, at their own expense, caused work to be done on said levee around said lower division, and necessarily paid and incurred liability therefor during said term in the total sum of \$7,574.81. Said work was properly and skillfully done, and said charge therefor was reasonable. The construction and maintenance by Landers and his assigns of a sufficient levee around said lower division was a material part of the consideration on said tenants' part for their execution of said lease, and by said Landers' said agreement to construct and maintain such necessary levee they were induced to enter into said lease, as Landers and his assigns well knew.

"XVI. John Landers and his assigns failed, neglected, and refused to clear said leased land, or any part thereof, of tules and willow roots, or to plow the same once, except that in 1918 they so cleared and plowed 142.58 acres of said lower division. Said tenants were, for that reason, themselves compelled so to clear and plow once as much of said leased land as was possible, and in that behalf were compelled to incur liability and have therefor paid or incurred liability in the sum of \$17,850.09. Said clearing and plowing by said tenants were necessary, and the same was as well, carefully, and skillfully done as was under the circumstances practically possible. The said charge therefor was reasonable.

"XVII. John Landers and his assigns failed, neglected, and refused to install, maintain, and operate the necessary pumping plant and apparatus for the drainage of said lands after irrigation by siphons of the potatoes growing thereon; and, as a consequence, said tenants were, at their own expense, compelled to repair, supply with fuel, and operate the pumping plant and apparatus installed by Landers, and, as the capacity thereof was insufficient for such purpose, to hire a larger floating pump—all at an expense of \$6,638.48. Said repairing, supplying, operation, and hiring were necessary, and said charge therefor was reasonable.

"XVIII. John Landers and his assigns failed, neglected, and refused to install all siphons necessary for the growing of potatoes, and, as a consequence, said tenants were, at their own expense, compelled to install siphons necessary for such purpose, at an expense of \$410.66. Said installation thereof was necessary, and said charge therefor was reasonable.

"XIX. John Landers and his assigns failed, neglected, and refused to construct or maintain all necessary drainage ditches, canals, and bridges. As a consequence, said tenants were compelled at an expense of \$2,202.45 to construct and maintain the same. These were necessary and said charge therefor was reasonable.

"XX. John Landers and his assigns failed, neglected, and refused to drain to the necessary depth seepage water as desired by said tenants."

With respect to the averments of paragraph XV of said supplemental complaint above quoted the trial court found the same to be true, with the exception "that the amount expended by plaintiffs in the building, maintenance, and repairs upon the levees men-

tioned in said paragraph was the sum of \$9,620.81, instead of the sum set forth in said paragraph XV; that of said sum of \$9,620.81 so expended by said plaintiffs in the said work referred to in said paragraph XV of said supplemental complaint the sum of \$7,565.43 was expended by said plaintiffs in and for the protection of the crops planted by plaintiffs and growing or to be grown upon said premises."

With respect to the averments of paragraph XVII of the supplemental complaint above quoted the trial court found the same to be true, except "that the expense incurred by said plaintiffs for the work mentioned in said paragraph was the sum of \$6,855.03, instead of the sum referred to in said paragraph" (\$6,638.48). In its conclusions of law, and also in its judgment predicated thereon, the trial court, in dealing with the elements of the plaintiffs' alleged damages founded upon the foregoing alleged breaches of the covenants and conditions of the lease to be by the lessor and his assigns performed, and the consequences which flowed therefrom, concluded and adjudged that by reason of the clause in said lease providing as follows: "But, if any part of the land should not be sufficiently drained to make it susceptible of cultivation in the proper season, then the rental of the year of such season shall be diminished pro rata according to the amount of acreage so excluded from cultivation," the plaintiffs were not entitled to recover the sum of \$2,055.38 expended by plaintiffs for levee work as averred by them in paragraph XIX of their supplemental complaint, which the court in its findings had found to be true. The trial court further in its said conclusions of law and judgment concluded and adjudged that, by reason of the provision of said lease last above quoted, the said plaintiffs were not entitled to recover the sum of \$17,850.09 alleged by them to have been properly expended by them for clearing the land of brush, willows, and tules according to the averments of paragraph XVI of their supplemental complaint, which the said court in its findings found to be true. The trial court further in its said conclusions of law and judgment concluded and adjudged that, by reason of the provisions of said lease last above quoted, the said plaintiffs were not entitled to recover the sum of \$51,274.58 alleged by plaintiffs to be the net loss of profits for the year 1918 from lands not farmed by said plaintiffs by reason of the failure and refusal of said lessor and his assigns to keep and perform the terms of said lease, as found by said court in its foregoing findings of fact, and particularly in paragraph XLIV thereof, wherein the court specifically found the said sum of \$51,274.58 to be the profit which said plaintiffs would have netted from said unfarmed lands had the said lease not been breached by the said lessor and his

assigns in the respects so alleged and found. The trial court further in its said conclusions of law and judgment concluded and adjudged that, by reason of the provision in said lease last above quoted, the said plaintiffs were not entitled to recover the sum of \$206,735.85 alleged by plaintiffs to be the net loss of profits for the year 1919 upon land not turned over or delivered to and not farmed by said plaintiffs by said lessor or his assigns, as found by said court in paragraph XLV of its said findings of fact, and which net loss to said amount the said court in its said findings found the said plaintiffs to have sustained. The trial court further in its said conclusions of law and judgment concluded and adjudged that, by reason of the provisions in said lease last above quoted, the said plaintiffs were not entitled to recover the sum of \$4,500 for the loss of potato seed purchased by them in the year 1918 for planting upon said lands as averred in paragraph XXII of their said supplemental complaint, which said court in its findings of fact found substantially to be true.

[1] It is the foregoing five items in the conclusions of law and corresponding judgment of the trial court of which the plaintiffs complain upon this their appeal upon the judgment roll. The first question thus presented is as to whether or not the trial court was justified in so interpreting the provision in said lease last above quoted as to deny the plaintiffs the specific remedy in damages as to these items which they sought and which the trial court found they had sustained by reason of the failure and refusal of the lessor and his assigns to put and keep the major portion of the lands covered by said lease in condition for cultivation and use by the plaintiffs for the purposes for which said lands had been leased by them for the term of said lease. If the conclusions of law of the trial court in the foregoing respects are to find their justification solely in the interpretation which it has in each instance placed upon the last above quoted provision in said lease we are of the opinion that it was in error as to such interpretation and hence as to its legal conclusions based thereon. While it is true that a written instrument as to the interpretation of any particular clause therein is to be read as a whole, and that the particular clause or sentence thereof under scrutiny is not to be controlled as to its meaning by its position or context in the instrument, it is also true that the ancient maxim of *noscitur a sociis* has still some degree of application to the use of the context in determining the scope and meaning of the words, sentences, and clauses of contracts, and it may therefore be noted as a matter of some significance that the clause in this lease last above quoted is to be found in that portion thereof which deals with the amount of an-

nual rent to be paid per acre by the lessees, and not in that portion of said lease which purports to deal with the covenants and obligations of the lessor with relation to the placing and keeping of said lands in a condition for cultivation, and with the penalties which are prescribed for the failure or refusal on the part of the lessor to perform his several covenants in that regard. Looking to this lease as a whole, it would seem to be obvious, from the location of these lands, from the amount of rental to be paid per acre therefor, from the large advance payments in the form of negotiable promissory notes which the lessees were to make on account of the rental of said lands for the first year, from the nature and extent of the obligations assumed by the lessor, and, finally, from the rather unusual requirement in the lease that the lessor shall give to the lessees a mortgage upon a large part of the lands leased as security for the faithful performance on his part of the covenants therein to be by him performed, that it was the manifest intent of the parties to this lease that practically all of the lands covered thereby should presently be put into condition for intensive cultivation by the lessees through the performance on the part of the lessor of his express agreements to clear, levee, ditch, drain, and plow the whole thereof, and to erect buildings thereon suitable for the uses of the lessees in the course of such intensive cultivation of the whole of said land. If we are correct in this conclusion, it would seem irresistibly to follow that the clause in said lease above quoted, which purports to limit the amount of rental per acre which the lessees were to pay to the acreage actually so drained as to be susceptible of cultivation, would afford little, if any, substantial remedy to the lessees for the failure and refusal of the lessor to do and perform those covenants which would, if unperformed, work a defeat of the entire purpose of the parties in engaging in the undertaking for the reclamation and cultivation of this large tract of land as contemplated by the terms of this instrument when read as a whole. It is to be noted that the trial court expressly found that the insufficiency of drainage which rendered any portion of such lands not susceptible of cultivation was that created solely by the lessor's breach of the lease in that regard.

The respondents, however, contend that this provision in the lease is to be interpreted to mean that as to whatever acreage of said lands had not been prepared for cultivation by sufficient drainage such portion thereof was thereby to be practically withdrawn from the terms of the lease so that, not only were the lessees to pay no rental therefor, but the lessor was to be entirely relieved from the covenants and obligations of said lease in respect to that portion of the premises, and no longer to be held liable

to respond in damages for his failure to fulfill his agreement to do the various acts provided in said lease to be by him performed in order to properly drain said land and prepare the same for cultivation. The argument of the respondents in support of this contention is not convincing, and the case of *Edward Barron Estate Co. v. Waterman*, 32 Cal. App. 171, 162 P. 410, can hardly be said to be an authority in support thereof, since in that case it appears that the lease in question expressly provided that the sole penalty for the delay in the completion of the building for occupancy at the stated time was to be the abatement of the rent during the period of such delay, and that the lessees were not to be entitled to any damage, rebate, or recoupment on account of such delay other than that of the abatement of the rent. There is yet another reason why the failure of the lessor to perform his agreements to reduce said lands to such a proper state of drainage as to render them susceptible of cultivation should not be given the effect of removing the said undrained acreage thereof from the operation and obligations of said lease. It is to be found in the very terms of the clause in said lease upon which the respondents rely, since it is therein provided that the failure to so drain said lands as to render them susceptible of cultivation "in the proper season should only have the effect of diminishing the rental for the year of such season." It would thus seem that, since the terms of this lease were two years, covering two entire seasons of cropping, the failure of the lessor to properly drain the lands or any portion thereof during the planting season of the first year could have had no other effect than that merely of the diminution of the rental pro rata for that year, leaving the relations and the respective liabilities of the lessor and lessees as to the entire acreage of said lands entirely unchanged as to the occupation, preparation, and use of the whole thereof for the second year of the lease.

It is further to be noted that said lease contains certain specific provisions fixing the amount of damages to be recovered by the plaintiffs in the event of the lessor's failure to perform his covenant to properly drain said lands in order to render them susceptible of cultivation. This stipulation in the lease is not only inconsistent with the foregoing clause therein, as interpreted by said defendants, but would be entirely unnecessary and ineffectual if said clause is to bear such interpretation.

[2] It would follow from the foregoing considerations that, if, as the trial court found, the said lessor had breached practically all of his covenants and agreements in said lease to drain, clear, plow, and thus render cultivatable the lands covered by said lease, and if, as the trial court found, the plaintiffs had been thereby put to the neces-

sity of making certain expenditures in the way of the drainage or clearing or of work upon the ditches or levees upon or surrounding said lands in order to the cultivation thereof and to the planting of crops thereon or of the protection of their said crops when so planted, the conclusion of law from such findings of fact should have been that the plaintiffs were entitled to the inclusion of some amount as to each of the aforesaid items of outlay by them in arriving at the amount the return of which the plaintiffs' mortgage was to secure; and that the plaintiffs were also entitled to a like inclusion of some amount as damages for their losses in crops occurring through the aforesaid breaches of some or all of the said lessor's covenants; and hence that, in allowing no amount whatever in its conclusions of law and judgment on account of these items of outlay and of damage, the trial court was in error.

When we come to estimate the extent and consequences of such error we are led to a consideration of each of the said several items which form the gravamen of the plaintiffs' present appeal.

[3] As to the first of the five items of alleged error on the part of the trial court there seems to be some confusion as between the plaintiffs' pleadings and the findings of the court which may render that particular item unavailable to plaintiffs upon their limited appeal. The plaintiffs in paragraph XV of their supplemental complaint alleged that by reason of the failure and refusal of the lessor to build or maintain proper levees the plaintiffs were obliged to expend, and did expend, the sum of \$7,574.81 in doing the work to be done on said levees which the lessor had failed and refused to do in order to protect the said lands from being overflowed, and thus rendered incapable of drainage or cultivation. The court found that the plaintiffs had actually expended the sum of \$9,620.81 in doing the work of building, maintaining, and repairing said levees, but also found that only \$7,565.43 thereof was expended in and for the protection of crops planted by plaintiffs and grown upon said premises, in view of the fact that the plaintiffs were granted by the judgment substantially all that they asked, it would seem that the disallowances of the difference between the sum found to have been actually expended and the amount allowed on account of such expenditure would not furnish sufficient ground for reversal upon this appeal, even though the reasons given by the trial court for making the deduction should be deemed by us to be erroneous.

As to the second item for the exclusion of which the plaintiffs appeal, and which refers to the expenditure of \$17,850.09 by plaintiffs to clear certain portions of said land from brush, willows, and tules after the lessor's failure to keep the covenants of his

lease in that regard, it would seem that the conclusions of law and judgment of the trial court should have responded to its findings to the effect that such expenditure had been necessarily and properly made, and that its failure in any measure whatever so to do for the reason stated was error on the part of the trial court. The same reasoning, based upon similar findings and the proper conclusion to be drawn therefrom, applies also to the third and fourth items for the exclusion wholly from the judgment this appeal is founded, and which items refer to the plaintiffs' loss in profits in crops for the years 1918 and 1919, which they were unable to plant upon a large portion of said lands due to the lessor's failure to keep his aforesaid covenants; and a like reasoning and conclusion applies to the last of said items, which refers to the plaintiffs' loss of potato seed purchased but unable to be planted upon said lands by reason of the unavailability of a large part thereof for cultivation and the planting of said seed due to the lessor's breaches of said several covenants.

The respondents upon this appeal urge, however, several considerations in addition to those above referred to, touching upon the plaintiffs' present right to prosecute this appeal, and also to the extent, if any, of their right to a reversal of the judgment for the errors above adverted to. The defendants, in aid of the first of these considerations, presented a motion to dismiss this, the plaintiffs' appeal, or, in the event of the denial of that motion, to have the court limit the scope of said appeal as indicated in said motion. We have concluded to deny these motions upon the authority and for the reasons stated in the case of *Sing v. Barker*, 187 Cal. 587, 203 P. 737, and for the further and possibly more cogent reason that, in view of the questions presented upon this appeal, and also upon the defendants' appeal from the whole judgment, and upon the entire record in the case, we have deemed a review of the case in its entirety as presented upon both appeals expedient, if not essential to its ultimate determination upon a retrial, which appears to be inevitable.

The conclusion above arrived at to the effect that the plaintiffs were correct in urging upon this, their appeal, that they were entitled upon the findings to a judgment awarding them some measure of relief on account of the several items which form the gravamen of their case upon appeal brings us to a consideration of the question as to what that measure of relief should have been, and hence as to what the order of this court should be in returning this cause to the trial court for the correction of its aforesaid errors. If the plaintiffs' appeal were the only appeal in the case before us, the solution of this problem would be comparatively simple, requiring only a reference to such other of the findings of the

trial court as the defendants and respondents upon this appeal rely upon as limiting the utmost measure in any event of the plaintiffs' remedies. The logical order is, therefore, to next consider the respondents' contentions in this regard. As to the item embracing the plaintiffs' outlay of \$7,565.43 for the construction and maintenance of levees by the lessees, after the lessor had failed and neglected to so do, in order to prevent the overflow of said lands and to put them in condition for clearing and cultivation, the only objection which the appellants urge against the allowance of said item is that above considered and disallowed. The same may also be said of the item embracing the plaintiffs' expenditure of the sum of \$17,850.09 for clearing the land of brush, willows, and tules after the lessor's failure to fulfill his obligation so to do. The respondents' main contention upon the plaintiffs' appeal other than those above considered is that as to the three last items for disallowance of which the plaintiffs complain the plaintiffs are not entitled to a ruling of this court that the trial court was bound to allow all or any of said items in their entirety based upon the court's findings as to the plaintiffs' losses in each of said regards, for the reason that, if any amount whatever should be allowed on account thereof, the terms of the lease as found by the trial court fix the amount of such allowance. The first two of the items last above referred to are those having to do with the plaintiffs' loss of profits for the years 1918 and 1919, arising out of the lessor's failure to deliver a large portion of the lands covered by said lease in a condition for the cultivation of crops with their resultant profits during each of these years. The third of said items relates to the plaintiffs' damage in the loss of potato seed purchased for planting upon said uncultivable lands. As to the damages which the plaintiffs claim to have sustained from these three sources, and which the trial court found to have actually amounted to a very large sum, the respondents contend that the following clauses in the lease limit the possible amount of the plaintiffs' recovery in any event to a fixed and much smaller sum. The clauses in said lease thus relied upon by the respondents read as follows:

(a) "If during the life of this lease any part of the crops grown by the tenant shall be destroyed by reason of the breaking of the levee, or by reason of the failure of the owner to keep and perform the terms and conditions of this lease by him to be kept and performed, the owner shall pay to the tenant for each acre of crop totally destroyed the sum of \$40. If the destroyed and damaged crops shall be less than total then the owner shall pay to the tenant therefor for each acre of crop so partially destroyed and damaged a due and proper pro rata of said sum of \$40; the amount of such pro rata to be determined by the parties here-

to" (provision being made for arbitrators in the event the parties could not agree).

(b) "The liability of the owner hereunder shall not, however, exceed the said obligation to pay the \$40 or the pro rata thereof as aforesaid; the amount so to be paid by him shall be the absolute measure of his responsibility or obligation to the tenant on any covenant, term and condition hereof.

(c) "The owners shall not be liable for damages to said land or to personal property sustained in or about said land however caused, otherwise than as hereinabove provided. The tenant shall hold the owner harmless of liability for damage or injury to person or property caused by the use of said land by the tenant."

While the respondents herein insist upon their own appeal that the foregoing provisions of the lease are to be given express application to that portion of the findings and judgment of the trial court which undertook to find and award a large sum in damages to the plaintiffs for the total or partial destruction of a crop of potatoes due to the lessor's failure or refusal to put and keep the levees in a proper state of maintenance and repair, and of which specific portion of the findings and judgment the plaintiffs do not upon this appeal complain, the respondents do herein contend that the aforesaid provisions of said lease are also broad enough in their terms or necessary implications to include every sort of injury which the plaintiffs might sustain by the breach on the part of the lessor of any or all of the covenants and obligations of said lease to be by him performed; and hence that whatever relief this court may conclude that these plaintiffs are entitled to upon this particular appeal in the form of pecuniary compensation for injuries sustained through the lessor's breach of his covenants must be limited to the sum of \$40 per acre of the lands leased to them, and which, upon the finding of a leased area of approximately 970 acres, would amount, at most, to approximately \$38,800.

In response to the foregoing contentions of the respondents as to the meaning and effect to be given to the foregoing provisions of said lease purporting to limit the amount of the plaintiffs' relief against the lessor's breaches of the obligations of said lease, the appellants do not seriously or very effectively argue that the said provisions of said lease are not susceptible of the broad interpretation which the respondents would have us place upon them; but they insist that, if they are to be given such interpretation, they amount to nothing more than an agreement for the payment of a penalty or of stipulated damages for the breach of said obligation or series of obligations, and that, if for a penalty, they are void under well-settled rules of law, and, if for the payment of stipulated damages, they are void under the provisions of sections 1670 and 1671 of the Civil Code. The plaintiffs further in this connection contend that

the question as to whether, under section 1671 of the Civil Code, "it would be impracticable or extremely difficult to fix the actual damage" for the breach of the obligations of a contract is a question of fact for the determination of the trial court in each particular case; and that in this case the trial court has determined that question adversely to the defendants by its findings based upon the evidence in the case that the plaintiffs' damages for the lessor's several breaches of the obligations of said lease were ascertainable and by ascertaining the amount of the same for each separate breach thereof; and furthermore, that the presumption under section 1670 of the Civil Code, being that an agreement for the fixation in advance of liquidated damages is void, it was incumbent upon the defendants by proper pleadings and proof to repel such presumption by showing that the contract falls within the exception contained in section 1671 of the Civil Code; and that the defendants have not sustained that burden in this case as presented upon this appeal, citing *Thomas v. Anthony*, 30 Cal. App. 217, 220, 157 P. 823, and cases cited. The further discussion, however, of the application of the foregoing sections of the Civil Code to the facts of this case may, for reasons which will then appear, be more profitably considered upon the defendants' appeal from the whole judgment and upon the entire record to which we shall now address ourselves.

The point which the defendants first and most strenuously urge upon their said appeal is the point which we have already considered and determined upon the plaintiffs' appeal, viz. the interpretation to be placed upon the clause in said lease relating to the diminution of the rental according to acreage in the event portions of the lands leased shall not in any season be rendered susceptible of cultivation through insufficient drainage. We find in the very elaborate arguments of counsel for the defendants on their appeal upon this point no sufficient reason for changing our conclusions in that regard; nor do we think that the defendants' contention for the first time urgeable upon their appeal upon the whole record, to the effect that there was some evidence offered tending to show that during the preliminary discussion between the attorneys for the respective parties to said lease, during the preparation thereof, as to the protection to be afforded the lessor by the wording and insertion of said clause, is entitled to the controlling weight which the present appellants would assign to it. The said clause in the lease seems to us, from its position and terms, to be sufficiently clear in its scope and meaning as not to be aided by contemporaneous evidence touching its interpretation. We therefore hold that there is no merit in the first point urged upon the defendants' appeal.

[4] The next point urged by the defendants most earnestly upon their appeal is that already adverted to, viz. as to the application

of sections 1670 and 1671 of the Civil Code to the provisions in said lease fixing the liability of the defendants at the sum of \$40 per acre for damages sustained by the plaintiffs through the lessor's failure to fulfill the covenants and obligations of his lease. The defendants urge that the phrasing of said provisions of the lease present the limited liability of the lessor and of his assigns in two aspects: First, that relating to the latter's liability for crops wholly or partially destroyed by reason of the breaking of the levees or by reason of the failure of the lessor to keep and perform the terms and conditions of said lease and to be by him performed; second, that relating to a like agreed liability of the lessor for any and all other damage suffered by the lessees for any breach or breaches whatever of the covenants and obligations of said lease or otherwise on the part of the lessor. Under the first of these stipulations the defendants contend that the lessor was to be exempted from liability for the destruction of the crops of the lessees caused by the breaking of the levees beyond the limitation of \$40 per acre of such crops so destroyed; while under the second and much more inclusive fixation of liability the lessor was not to be held in damages beyond said limited amount for any breach of his said obligations, and particularly was not to be held liable beyond said sum for the loss of prospective crops and the profit therefrom due to the failure of the lessor to prepare, by drainage, clearing, plowing, and the maintenance of proper levees, a large portion of the leased premises for cultivation and cropping during both cropping seasons embraced within the two-year term of said lease. As to the loss of grown crops actually destroyed through the inundation of the cultivated lands due to the breakage of the levees, there would seem to be little doubt that the attempted fixation of liability on the part of the lessor for such losses in advance comes fully within the inhibition of section 1670 of the Civil Code against stipulated damages, and does not come within the exception to the rule embodied in section 1671 of said Code. The amount of \$40 per acre of crops destroyed is denominated "damages" in the clauses of the lease limiting the recovery to that sum in the event of a total destruction of such crops occurring through the failure of the lessor to keep his obligations to protect such lands from overflow. The damages arising from the loss or destruction of merchantable crops is ascertainable under well-known rules of law. *Tretter v. Chicago, etc., Ry. Co.*, 147 Iowa, 375, 126 N. W. 339, 140 Am. St. Rep. 304, 309, and notes. The appellants, however, cite cases to the effect that it lies within the power of parties to such agreements to entirely absolve the lessor from liability for such damages, and that, this being so, they would have the power to fix the measure of damages to any sum short of such entire ab-

solution. The chief authority upon which they rely in this behalf is the case of *Stephens v. Southern Pacific R. R. Co.*, 109 Cal. 86, 41 P. 783, 29 L. R. A. 751, 50 Am. St. Rep. 17, wherein this court held that a railroad company, in giving a lease of lands adjoining its depot grounds, might insert a covenant wholly relieving the company from liability for damage caused by fire from its engines. The rule laid down in that case, and followed in others cited by appellants, is doubtless correct, but it by no means follows therefrom that parties to contracts, who may stipulate in advance that there shall be no liability for damages suffered by one or the other from breaches of their respective obligations, may also stipulate in advance for a fixed sum to be allowed in damages for such breaches, since so to interpret these cases would be to render wholly nugatory the provisions of section 1670 of the Civil Code respecting liquidated damages. In determining, however, that the trial court did not err in holding void the stipulation relating to the fixation of damages for the loss of the plaintiffs' potato crop at \$40 per acre of such crop destroyed we are not to be understood as upholding its entire action in that regard, since the appellants further contend that in undertaking to admeasure such damages, in disregard of the stipulation in the lease, the trial court also disregarded and departed from the proper rules of law for determining the plaintiffs' actual damages for their loss of such crops. The finding of the trial court upon which its judgment was predicated allowing the plaintiffs the sum of \$96,481.20 damages for the loss of their said grown but yet unharvested crop of potatoes reads as follows:

"That on or about the 9th day of October, 1919, said plaintiffs had and there was growing upon 222 acres of said 382.9 acres of said lower division, a crop of potatoes not harvested; that on or about said date the levee alongside of dredger cut on said lower division, without any fault, act, or omission of said plaintiffs, or of any one acting for or under them (but solely from the failure, refusal, and neglect of John Landers and his assigns to construct and/or maintain said necessary levee), broke, and by reason of such breaking said 222 acres of undug potatoes were overflowed, ruined, and totally destroyed, to plaintiffs' actual damage in the sum of \$96,481.20; that said damages are arrived at as follows, to wit: That the average yield of potatoes per acre during the year 1919 upon said premises was 164 sacks per acre; that the average market price at the place of destruction of said potatoes during the year 1919 was the sum of \$3.15 per sack; that the expense of sacks for said potatoes for the year 1919 was the sum of 18½ cents per sack, and that the cost of digging potatoes was the sum of 25 cents per sack, and that the cost of hauling said sacks of potatoes from the field to the levee was the sum of 5 cents per sack, leaving the net value of said potatoes in the ground at the time of their destruction at the sum of \$2.65 per sack; that 36,408 sacks of potatoes were so destroyed, of the value of \$2.65 per sack in the ground,

making the total loss to plaintiffs of the said sum of \$96,481.20."

[5-8] It thus appears that the rule adopted by the trial court for admeasuring the plaintiffs' damages sustained in the loss of said crop of potatoes was based upon the average market price for the year 1919, less certain expenses for digging, sacking, and hauling to market said potatoes. We are satisfied that such was not the proper rule to be applied to the admeasurement of said damages. The proper rule to be applied in such a case is that of the market value of the crop at the date of its destruction. It was so held in the case of *Teller v. Bay and River Dredging Co.*, 151 Cal. 209, 90 P. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779, wherein, in a case similar in its main aspects with this one, the rule and the authorities supporting it are very fully discussed. In 17 *Corpus Juris*, p. 887, the principle is thus stated:

"The measure of damages for the entire destruction of a growing crop is its value at the time and place of destruction. A similar rule applies in case of the destruction of a matured crop"—citing many cases in support of the rule as thus stated.

We therefore conclude that the trial court was in error in the rule it adopted for the ascertainment of the plaintiffs' damages for the loss of their matured potato crop upon lands actually cultivated by them in the season of 1919. The effect of such error will be considered in the later discussion of another phase of this appeal. A more difficult question immediately arises, however, relating to the plaintiffs' alleged but disallowed claim for damages for the loss in profits for crops unplanted by them during the seasons of 1918 and 1919 upon portions of said leased lands which were not rendered susceptible of cultivation through the failure, neglect, and refusal of the lessor and his assigns to drain, clear, plow, and otherwise put into condition and protect for purposes of cultivation. It might be argued that this question does not arise upon this appeal since the trial court disallowed these claims. But, since the said disallowance of these claims for prospective profits was predicated by the trial court upon reasons which upon the plaintiffs' appeal we have held to be inadequate, and since the trial court will be called upon to reconsider this subject upon a retrial of the cause, we deem it proper to give to it such consideration as will hereafter appear. An interesting question arises as to whether such prospective damages for loss of profits to be derived by plaintiffs from those portions of said leased premises which they never did receive in a condition for cultivation, and never did cultivate, are not too speculative for admeasurement or recovery in this action, and also as to whether these damages are not so difficult of ascertainment as to give room for application of the limitation

contained in the lease. These aspects of the case will be later herein considered.

We have thus arrived at a discussion of the most serious question which has been presented by the entire record upon this, the defendants' appeal. It is the question as to whether the plaintiffs are entitled to be allowed any damages whatever for the consequences of the breaking of the levees surrounding these leased lands and their resultant overflow and the destruction of existing or loss of prospective crops growing or to be grown thereon. The findings of the trial court in that regard show that at the time the lessor and lessees entered into this lease the levees surrounding the leased premises were in a bad state, due to ill construction and disrepair; that the lessor undertook and covenanted to perform the work of placing and of keeping said levees in a proper state of construction, repair, and maintenance to protect said premises from overflow; that the lessor failed and neglected to keep his covenants in that regard; that in the latter part of the year 1918 the plaintiffs notified the said lessor of his failure to perform his covenants in the foregoing regard; and that it was necessary that such work should be done at once in order to protect the crops of the lessees growing on said premises from the danger of overflow; and that, the lessor still failing and neglecting to do said work, the lessees a little later notified him that if he did not immediately proceed to keep and perform the terms and agreements of said lease requiring the doing of said work by him the lessees would immediately proceed to do and perform said work and hold the same and the cost thereof secured by their mortgage; that, pursuant to said demands and notices, the lessees did immediately thereafter take possession of said levees, and did proceed to do work thereon by the aid of dredgers, pumping plants, and other machinery and activities; that, while they were so engaged in doing said work, the levees broke at a point about 60 feet from the place where the large pumping plant of the lessees was in operation, with the consequent flooding of the land and destruction, not only of the crop of potatoes then being grown thereon, but also with the effect of rendering practically all of the lands covered by said lease no longer susceptible of cultivation.

The trial court allowed the plaintiffs to include in the relief accorded them their claims for damages arising from the destruction of their grown crops of potatoes caused by said break in the levees, but it denied the plaintiffs any relief in the way of a recovery of damages for the losses in prospective profits from crops not susceptible of being grown upon the overflowed portions of said premises during the seasons of 1918 and 1919 for reasons which we have heretofore held to be an inadequate basis for such denial. It is, however, the further contention of the appel-

lants herein that the plaintiffs are entitled to no recovery or relief for the damages sustained by them through the breaking of said levees, for the reason that, when the plaintiffs took the possession and control of said levees, and undertook to do the work thereon which the lessor had covenanted, but failed, to perform, they assumed responsibility for the state of said levees, and were to be held responsible for whatever happened thereafter by reason of the inadequacy of said levees to protect the lands of the plaintiffs under cultivation from overflow. The difficulty with this contention on the part of these appellants is that it leaves out of consideration the fact that the trial court in its findings, in dealing with the work done by the plaintiffs upon these levees after they had undertaken such work, expressly found that the said work so undertaken by the plaintiffs "was properly and skillfully done," and further found that "said levee, * * * without any act or omission of said tenants or of any one acting for or under them (but solely from said failure, refusal and neglect of John Landers and his assigns to construct said necessary levee), broke, and by reason of said breaking and consequent inundation said 200 acres of undug potatoes were overflowed, ruined, and totally destroyed." In the face of these express findings it will be seen that the cases cited by the appellants in support of their said contention have no application to the situation here presented, since in each and all of said cases the doing by the tenant or by the landlord negligently or inefficiently of work which under the terms of the lease they were not bound to do at all is made the basis of all of these decisions denying recoveries to those, whether tenants or landlords, for losses due to conditions created by the improper or negligent performance of work which they themselves, while not bound to do at all, had undertaken to perform. The case of *Callahan v. Loughran*, 102 Cal. 476, 36 P. 835, may be said to fairly state the rule which has quite uniformly been adhered to in the foregoing regard. That was the case of a landlord who, not being bound to make certain repairs upon a stairway of premises demised by him, nevertheless undertook to do so. The wife of the tenant was injured in descending such stairway at a time when she believed the landlord had completed the work of making said repairs. In an action for the recovery of damages by the tenants for such injuries, this court held that it was necessary to allege and prove, in order to such recovery, that said injuries had been caused by the want of skill and care on the part of the landlord or his workmen in making said repairs, and that, failing in such averment and proof, the tenant was not entitled to recover. See, also, 16 R. C. L. pp. 1057, 1058. The same rule has been held to apply to a tenant who undertakes to make repairs in the premises he occupies which the landlord has cov-

enanted but failed or refused to make. If the tenant uses due care and skill in attempting to make such repairs, but damage nevertheless results from the defect which it was the duty of the landlord to repair, he may recover such damages as have been caused by the breach of the landlord's obligation in the first instance to effectually perform his covenant in that regard.

In 1 *Sutherland on Damages* (4th Ed.) p. 320, § 90, it is stated that the duty of the tenants in attempting to do work which the landlord was obligated to perform is such care and diligence as a man of ordinary prudence would use under the circumstances, although they may not have done the very thing nor used the very means that should have been used, as developed by subsequent information; and at page 321 it is further stated that the efforts of the tenants to reduce the effects of the landlord's wrong were to be confined to such efforts as were reasonable and made in good faith. The appellants, however, contend that, notwithstanding the found fact that the work which the plaintiffs undertook to do upon said levees after the lessor's default in keeping his covenants in that regard "was properly and skillfully done," such finding does not furnish an adequate reply to their contention that the plaintiffs are entitled to no relief or recovery in damages resulting from the breach in the levees, for the reason that the defects in the said levees were obvious when the plaintiffs took said lease and undertook to cultivate and crop said lands, and hence that in taking possession of the same and planting crops thereon in the presence and existence and with knowledge of these obvious defects and consequent danger of overflow they took the risk of whatever breaches in the levees occurred thereafter, and hence are not entitled to recover damages for the resultant overflow due to such original and obvious defects. We do not understand the rule invoked by the defendants in this regard to go thus far. It is true, as found by the trial court, that the levees in question were poorly constructed and at the time of the making of the lease had certain obvious defects; but it does not appear from the findings or otherwise that the levees in question were not for the time being sufficient to restrain the waters of the river from coming in upon said lands at their normal elevation, but that for the better part of the year 1918 these levees, though poorly constructed and not maintained in a proper state of repair, did in fact restrain said waters from breaking through said levees and entering upon said lands. The plaintiffs, in the presence of the express covenants of the lessor to properly construct and repair said levees within a stated time, which time was made the essence of the contract, had a right to rely upon the keeping of the said covenant by the lessor, and it was only after the failure of the lessor so to do had been prolonged

until the danger of overflow became imminent that the tenants, after vainly insisting that the lessor immediately proceed to perform his covenant, undertook by doing work themselves upon the levees to prevent such threatened overflow. Under such conditions, as found by the trial court, we are unable to uphold the defendants' contention that the plaintiffs from the inception of their entry upon the premises pursuant to their said lease assumed the risk of losses to result from defects in the levees which the lessor had expressly covenanted to repair.

The appellants also contend that the evidence discloses that the breach in the levees from which the plaintiffs' chief damage arose was caused by the plaintiffs' own acts in placing and operating upon said levees certain large machinery, the operation of which and the jarring caused thereby were directly responsible for the breach in the levees which occurred within a short distance from where such machinery was being thus operated. There is some evidence which tends to support that contention, but the trial court did not deduce therefrom the conclusion which the defendants upon this appeal would have us draw. On the contrary, the trial court expressly found that the operations of the plaintiffs in seeking to repair said levees were "properly and skillfully done," and further expressly found that the said break in said levee was not due to said assigned cause, and we are unable to say that these findings are contrary to or are not supported by the evidence, taken as a whole in the case.

[9, 10] Having thus arrived at the conclusion that the plaintiffs were entitled to be awarded some measure of damages for the lessor's breaches of the aforesaid covenants and agreements of said lease, the next question which presents itself is as to what the measure of such recovery should be with regard to those damages claimed by the plaintiffs to have been sustained by the loss of profits during the years 1918 and 1919 from the portions of said leased lands which they were unable to cultivate and crop at all on account of the lessor's breach of his aforesaid covenants. It is true that the trial court did not by its judgment award to the plaintiffs any damages whatever for the loss of such prospective profits; but it is also true that, as we have hereinbefore determined, the particular basis upon which it rested its said judgment was insufficient as a support for the same. Since this case must be retried, it is incumbent upon us to lay down a rule for the guidance of the trial court in the fixation of such damages. We do not agree with the defendants' contention that these damages are entirely too speculative and uncertain as to be beyond the realm of ascertainment or allowance. In the case of *Shoemaker v. Acker*, 116 Cal. 239, 48 P. 62, this court gave quite careful consideration to the question as to the recoverability of prospec-

tive damages arising from the failure of the defendant to permit the plaintiff to proceed with the management and cultivation of certain lands. It was the contention of the defendant in that case that the profits to arise from the cultivation of said hitherto uncultivated lands were too speculative and remote for recovery in damages; but this court held otherwise, and in so doing declared that, where loss of prospective profits is "the natural and direct consequences of the breach of the contract, they may be recovered; and he who breaks the contract cannot wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of damages." In the case of *Meer v. Cerati*, 53 Cal. App. 497, 200 P. 501, the plaintiff, as lessor, sued the lessees for damages for their failure to plant rice and other crops upon premises upon which they held a cropping lease, and the defense was made that prospective profits from unplanted crops were too speculative and uncertain for recovery in damages. The trial court, however, allowed expert testimony to be introduced concerning the probable profits from the planting of the leased lands to the designated crops, and the appellate tribunal upheld its action in so doing on the authority of *Shoemaker v. Acker*, supra. The court, however, as in the latter case, referred to the disadvantages and difficulties in the way of providing in such cases an accurate measure of the actual damages sustained. In the case of *McCready v. Bullis*, 59 Cal. App. 286, 210 P. 638, the court, in dealing with a judgment for the recovery of prospective profits lost through the failure of the defendant to keep his covenant for the supply of water to agricultural lands valueless for cultivation without such supply, emphasized the difficulties of making the proof in such a case adequate to measure with reasonable certainty the actual damage, and, while affirming the principle, reversed the case upon the nature of the evidence admitted in support of the claim for such damages. In the case of *Schumann v. Karrer*, 184 Cal. 56, 192 P. 849, the rule as declared in the foregoing cases is adhered to, and the language made use of in *Shoemaker v. Acker* as to the difficulties in making adequate proof as to the actual damage sustained in such cases is quoted with approval. In none of these cases, however, were the courts called upon to consider the validity of provisions in the leases under review providing for liquidated damages, and we incline to the view that, in the presence of the suggested difficulties in fixing the actual damages in such cases, an inserted agreement in the lease for liquidated damages as to prospective profits in cases such as this should be upheld as within the exception provided for in section 1671 of the Civil Code. An examination of the lease in question will show that the provision therein for the fixation of \$40 per acre for the destruc-

tion of growing crops through the breach of the lessor's covenant to repair and maintain the levees so as to protect such crops from inundation is severable from the provisions in said lease fixing the sum of \$40 per acre as the agreed damages for the general violations of the lessor's covenants. While, therefore, we have held that the first above mentioned provision is void as to the damages to the grown crop of potatoes destroyed through the breakage of the levee, we are of the opinion that the later and severable provisions of the lease, in so far as they furnish an agreed amount of damage for the loss of prospective crops, are valid as within the exception provided by section 1671 of the Civil Code.

[11-13] The appellants' next contention, urged both upon their own appeal and upon their motion to dismiss the plaintiffs' appeal, is that the plaintiffs are not entitled to a judgment for the return of rentals paid by them and also to a judgment for damages arising by reason of interferences with their use, occupation, and cultivation of the leased lands or for the loss of crops in the course of such cultivation. We are disposed to agree with this contention as supported both by reason and by a consistent line of authority. In an extended note to the case of *Toy v. Olinger*, 20 A. L. R. pp. 1366, 1369, will be found a full discussion, with abundant citation of cases, covering the rights of tenants who remain in possession of parts or all of the demised premises after breaches by landlords of covenants covering the tenant's use and enjoyment of the leased premises. From the cases therein considered it fully appears that, while a tenant who has been thus disturbed or damaged, but who retains possession, may have his election to sue for the return of rents paid or to successfully set off his damage suffered in an action against him for the stipulated rental, he cannot have both forms of relief. In the case of *Stewart v. Murphy*, 95 Kan. 421, 148 P. 609, Ann. Cas. 1917C, p. 612, such double damages were disallowed, and in the notes to that case the limits of the tenant's right of recovery in such cases are quite fully set forth. In the case of *Cable v. Hanson* (Tex. Civ. App.) 224 S. W. 922, the trial court, having allowed recovery for rent paid, also undertook to allow an extra item of damage for a stated breach of the lease. The court upon appeal disallowed the latter item by an application of the rule above stated. We are satisfied that the rule thus laid down has application to the facts of the case at bar. The plaintiffs were entitled to have a recovery of the amount of rental actually paid by them for the years 1918 and 1919, but they were not also entitled to a judgment for the whole damage sustained by them both for crops destroyed and for prospective profits for crops unplanted in the event the trial court allowed them a recovery of the rents paid. In so far,

therefore, as the trial court made such double allowance, we think it was in error, and its judgment to that extent must be reversed. An examination of the record discloses that the plaintiffs did not, in either their original or their supplemental complaint, plead their right to or pray for the allowance of both of these forms of relief. Whatever recovery of such double remedy as was directed by the judgment of the trial court was without any express insistence of the plaintiffs up to the time of such judgment. It is true that the plaintiffs, in taking their limited appeal herein, have apparently sought to retain the benefit of both forms of relief, and it is also true that they have further accentuated that effort by their attempts to procure an enforcement of the judgment as to those portions thereof which awarded them such double relief and from which they did not appeal. But they have been thus far unsuccessful in both of these regards, and have not actually received the duplicated damages awarded them by such judgment or any portion thereof. The defendants' prior appeal from the whole judgment and the undertakings given by them upon such appeal have prevented these consequences, and it is therefore our opinion that the plaintiffs ought not, by any erroneous action of the trial court, or by their own ineffectual effort to take advantage thereof, be foreclosed either from prosecuting their own appeal or from making their election upon a retrial of this case as to which form of relief they will stand upon. These are the real considerations which move us to a denial of the defendants' motion to dismiss or limit the scope of the plaintiffs' appeal.

The appellants' next contention is that the trial court committed several errors in undertaking to define the scope of the plaintiffs' relief. The first of these is urged to be in the fixation of the amounts which the plaintiffs were to be required to pay in order to relieve the premises covered by their mortgage from the prior lien of the trust deed originally securing the indebtedness of John Landers to the San Joaquin Valley Bank, and which by various assignments had come to stand in the name of the defendant L. J. Grossman. It was the claim of the defendants upon the trial that the original amount of said indebtedness had been largely augmented by the payments of certain outstanding claims and liens affecting said leased lands, and which payments had been necessary for the protection of the lien of said trust deed, and that they should therefore be given priority under the terms thereof over the lien of the plaintiffs' mortgage. We do not deem it necessary to review the evidence in detail touching the alleged increments in the amount required to be paid by plaintiffs in order to entitle them to a cancellation of said trust and of the indebtedness secured thereby, since we are satisfied that the find-

ings and judgment of the trial court thereon are supported by the evidence in the case, and will not therefore be reviewed upon this, the defendants' appeal.

The appellants' next contention under this head is that the trial court was in error in that portion of its judgment which required the holder of said promissory note and of the trust deed securing the same (neither of which original documents had been produced at the trial nor presented in evidence) to deposit the same with the clerk of the court within a stated time after the entry of said judgment, to the end that they might be surrendered to said plaintiffs upon their deposit and payment of the amount found due thereon and secured thereby; and that, in the event of the failure of the holder or holders of said instruments to so produce and deposit the same, they should be held and adjudged to be canceled without the making by plaintiffs of the payments on account thereof to be made upon their production pursuant to the order of said court. If such is to be deemed the scope and effect of the judgment and order of the trial court in the foregoing regard, then we think it would be clearly error, for, while the failure or refusal of the holder or holders of said original documents to produce and surrender the same in accordance with the direction of said court might be held to be contempt of the court and of its said order, this would not justify the court in entirely relieving the plaintiffs of the duty to pay and satisfy the amount found to be due upon said original indebtedness and the trust deed securing the same and which the trial court had properly held to be a first lien upon the premises upon which the plaintiffs' mortgage was held to be a second lien. We are not by any means assured, however, that the foregoing interpretation of the terms of said judgment, insisted upon by the appellants, is to be deemed the correct one, since the said judgment and order does not expressly so declare. The utmost that we think may be said in criticism of that portion of said judgment is that it fails to state with sufficient clarity what course should be pursued by plaintiffs to be relieved of the burden of said prior indebtedness and lien in the event of the failure or refusal of the holder or holders of said original documents to make surrender of the same pursuant to the court's direction. This is not a matter in itself calling for reversal but for clarification upon the otherwise inevitable retrial of the case.

[14] The appellants' next contention is that the trial court was in error in the insertion in its said judgment of the provision that as to the defendant L. J. Grossman, in the event that the premises embraced in plaintiffs' said mortgage should not upon the sale thereof under the order for the foreclosure of said mortgage produce an amount sufficient to pay the amounts found due to the

plaintiffs and secured thereby, together with the costs and expenses of such foreclosure sale, a deficiency judgment should be docketed for the balance due against said Grossman, and that the said plaintiffs have execution against said defendant Grossman therefor. We think that for several reasons this contention must be sustained. John Landers and his wife, the original makers of said mortgage, and the persons primarily liable for the breaches of the covenants of the lease, the performance of which said mortgage was given to secure, were not made parties to this action. The main breaches in the covenants of said lease which constitute the bases of the plaintiffs' several claims for restitution and damages occurred prior to the date when said defendant Grossman became a transferee of said lease mediately from Landers, and also prior to the time when he became the holder of the Landers' deed of trust and of the obligation or obligations which it was given to secure, and also before said Grossman became the record holder of the title to the premises covered by the plaintiffs' said mortgage. The trial court expressly found that the said defendant Grossman, in each and all of the several transactions by which he became the assignee of said lessor, the transferee of said deed of trust and of the obligation it secured, and the holder of the title to the premises themselves, was at all times acting as the agent of his codefendant, the Chicago Bonding & Surety Company, and not otherwise. Whether or not these latter findings are sustained by the evidence is a matter of no present concern, since the plaintiffs have not assailed them in their appeal, and since the defendants upon their appeal upon the whole record are entitled to claim that they are inconsistent with a judgment against a mere agent while his principal therein is absolved from liability. Whether the plaintiffs would or would not be entitled at the last analysis to a personal deficiency judgment against any other than their original lessor and mortgagor we do not propose, in view of the entangled state of the present record, to decide, but we are satisfied that upon the foregoing findings they were not entitled to a personal deficiency judgment against the appellant Grossman.

There are a number of particulars in respect to alleged discrepancies between the plaintiffs' pleadings and the amount of the judgment awarded them upon particular items of damage, but these will doubtless be rectified upon a retrial, and are not, therefore, worthy of especial treatment in an already long drawn out opinion. There are also a number of respects in which the defendants upon their appeal urge the trial court was in error in its rulings and conclusions, but in the main we think that these are disposed of in dealing with the principal questions presented and most elaborately argued

upon both of these appeals, and which will doubtless be avoided upon a retrial of the cause.

The judgment is reversed.

We concur: MYERS, C. J.; WASTE, J.; LAWLOR, J.; SEAWELL, J.; SHENK, J.; LENNON, J.



197 Cal. 296

RICHLIN v. UNION BANK & TRUST CO. et al. (L. A. 7978.)

(Supreme Court of California. Oct. 29, 1925.)

1. Partnership $\S$ 296(3)—Evidence held to sustain finding that defendant, at time of pledge of contract for purchase of machinery, had notice of plaintiff's claim thereto.

In action for damages for conversion of machinery, contract for purchase of which was pledged by plaintiff's partner to defendant, evidence held to sustain finding that defendant, at time of pledge, had notice of plaintiff's claim.

2. Estoppel $\S$ 75—Plaintiff not estopped from asserting interest in property pledged by partner because allowing partner to hold himself out as owner of property.

In action for damages for conversion of machinery, contract for purchase of which was pledged by plaintiff's partner to defendant, plaintiff held not estopped from asserting his interest in such property as against defendant, by allowing partner to hold himself out to defendant as sole owner of property, in view of Civ. Code, $\S$ 3543, where defendant had knowledge when pledge was made that plaintiff claimed an interest, and no negligence on part of plaintiff was shown.

3. Partnership $\S$ 142(2)—Plaintiff need not anticipate partner's pledging entire partnership assets as security for his own personal indebtedness.

Plaintiff was entitled to presume good faith on part of his partner, and was not required to contemplate that he would pledge entire partnership assets as security for his own personal indebtedness, and not notify pledgee of existence of partnership.

4. Partnership $\S$ 142(2) — Partner cannot pledge firm assets as security for his personal debt to one with due notice of partnership.

Conceding that partner has right to sell or encumber his own interest in partnership property without consent of his copartner, he cannot effectually pledge entire assets of partnership as security for his personal debt to one who had due notice of partnership, under Civ. Code, $\S$ 2991, and of interest of copartner, and thus divest copartner of his interest in the property.

5. Partnership $\S$ 139—Partner may, as agent for partnership, bind it by agreement in matters concerning its business.

Partner has a right, as agent for the partnership, to bind the partnership by oral or

written agreement in matters concerning its business, in view of Civ. Code, $\S$ 2429.

6. Partnership $\S$ 296(3)—Evidence held not to show that partner abandoned firm business to copartner.

Evidence held not to show that partner had abandoned copartnership business to copartner, so that latter had power to make an assignment of partnership property to a creditor under Civ. Code, $\S$ 2430.

7. Partnership $\S$ 151 — Statute refers to "creditor" and "creditors" of partnership, and not those of an individual partner.

Civ. Code, $\S$ 2430, providing that a partner shall not have authority to make an assignment of partnership property to a creditor or to a third person in trust for benefit of a creditor or creditors, unless his copartners have wholly abandoned the business to him, by the use of the terms "creditor" and "creditors" refers to creditor or creditors of the partnership, and not to those of individual partner.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Creditor.]

8. Partnership $\S$ 142(2)—Pledge by partner of his interest in contract for purchase and sale of machinery held not to divest copartner of his interest in the property.

Pledge by partner of his interest in contract for purchase and sale of machinery held ineffectual to divest copartner of his interest in such property, where at time of pledge partner was entitled to nothing under the contract which he had not already received.

In Bank.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by H. Richlin against the Union Bank & Trust Company and another. Judgment for plaintiff, and named defendant appeals. Affirmed.

Isaac Pacht, of Los Angeles (Clare Warne, of Pomona, of counsel), for appellant.

E. F. Gerecht and C. W. Hall, both of Los Angeles, for respondent.

SHENK, J. This is an appeal from a judgment in favor of the plaintiff and against the defendant and appellant bank in the sum of \$2,862.50, together with interest from January 26, 1920. The action is one for the conversion of certain machinery and iron material, in which the plaintiff is alleged to have had an interest to the extent of the amount of the judgment. The facts substantially are as follows: Prior to and at the time of the transactions in question, the defendant D. Polen was engaged in the auction business on Hill street in the city of Los Angeles, under the name of De Luxe Auction Company. One E. C. Eddie was the owner of a considerable quantity of machinery and iron material, including the personal property involved here-

in, and which was located at 707 Antonio street in said city. Polen was negotiating with Eddie for the purchase of said property, with a view of the resale thereof at auction or otherwise, and paid a deposit of \$50 on account of the purchase price of \$6,000. Polen interested the plaintiff in the enterprise, and the two, under date of November 12, 1919, entered into a partnership agreement limited to the purchase and sale of said property. By this agreement the plaintiff agreed to pay the sum of \$3,000 on account of the purchase price. He further agreed to contribute his own labor and the labor of an extra man from the date of the partnership agreement until the property was sold, and was to receive 35 per cent. of the proceeds of sale after all expenses were paid. Polen, in his individual capacity, entered into an agreement of sale with Eddie, and on the following day the plaintiff paid to Polen the sum of \$3,000 in accordance with the partnership agreement. The agreement of sale with Eddie acknowledged payment of \$3,100 by Polen. The balance of \$2,900 on the purchase price was to be paid on or before December 10, 1919. Under the agreement, the purchasers took immediate possession of the property, but it was to remain on the premises at 707 Antonio street until sold. Plaintiff commenced at once to repair and remodel the machinery and material in preparation for its sale, and was in possession of the portion thereof involved in this action until the alleged conversion thereof by the defendant bank. An auction sale was advertised for and took place on or about December 18th, but all of the merchandise was not sold on that day. The sale was stopped, according to the plaintiff's undisputed statement, because in his judgment the goods were not being sold at a satisfactory price. Almost immediately thereafter trouble arose between the partners, and, after negotiations, an accounting and a dissolution of the partnership were agreed upon. It was then agreed that the plaintiff's interest in the merchandise was \$2,862.50, and that he should sell the same, apply the proceeds to the satisfaction of his interest therein, and pay the balance to Polen.

The defendant Polen had been doing business at the defendant bank. On December 3, 1919, his account was overdrawn to the extent of \$1,800. He was called to the bank by one of its officers for consultation, the result of which was that Polen executed to the bank a promissory note for \$2,000 to cover the overdraft, and as security for the payment of said note pledged to the bank all of his interest in the contract of sale between Eddie and himself. This pledge was accomplished by the delivery of said contract to the bank, with an assignment indorsed thereon dated December 3, 1919, and signed "D. Polen," and by the terms of which Polen did "assign and transfer to the Union Bank &

Trust Company of Los Angeles all right, title, and interest" which he had in the "contract with E. C. Eddie." Under date of January 26, 1920, Polen executed to the bank a bill of sale in which he assigned, sold, and set over to the bank all of his "right, title, and interest in and to the personal property, machinery, and junk mentioned and described in that certain agreement heretofore executed between E. C. Eddie and D. Polen, which said agreement was heretofore and on, to wit, the 3d day of November, 1919, assigned by the said D. Polen to the said Union Bank & Trust Company." Under the authority of said bill of sale, and on the date thereof, the remaining portion of said machinery and material to the value of over \$5,000 was removed from the premises at 707 Antonio street and appropriated to the use and benefit of the bank, whereupon this action was brought. In a former action by the plaintiff against these same defendants, and involving the same subject-matter, a default judgment in the sum of \$2,862.50 was entered against the defendant Polen on the 2d day of February, 1921, and said action as against the defendant bank was dismissed without prejudice. In the present action the defendant Polen interposed a plea in bar, in this, that he had been adjudicated a bankrupt by the District Court of the United States in and for the Southern District of California. The plea was sustained, and the court adjudged herein "that plaintiff take nothing as against defendant D. Polen." That portion of the judgment has become final.

The facts above related are without substantial conflict. In its answer, the defendant bank denied the alleged conversion, and, as an affirmative defense, alleged that the defendant Polen did for a valuable consideration to him, paid by the defendant corporation, sell, assign, transfer, and set over to the defendant the said contract for the purchase of said machinery and material; that, in pursuance of said assignment and sale to said corporation, the corporation took possession of said machinery and material or as much as remained and had not been sold by the said D. Polen; that it took the assignment of said contract from Polen in good faith, for a valuable consideration, in due course of business, and without notice of any alleged interest of the plaintiff therein; that the plaintiff permitted the defendant Polen to have possession of said machinery and material, and knowingly suffered and permitted said Polen in his own name to enter into the written contract with said Eddie for the purchase of said chattels and permitted D. Polen to obtain possession thereof in his individual capacity; and that plaintiff likewise permitted and suffered said Polen to hold himself out to said defendant corporation and to the world generally as the sole and exclusive owner of said property. The court found these affirmative allegations of the answer to

be untrue, and it is contended by the defendant bank that said findings are unsupported by the evidence. It is insisted that the evidence shows that the bank took the assignment of the contract for the purchase of the merchandise as a bona fide purchaser for a valuable consideration, and without notice of any claim of the plaintiff.

[1] A review of the evidence shows that said findings were amply supported. At the time the pledge was taken a representative of the bank by the name of Henry Runsten went to the place where the merchandise was located for the particular purpose of making an investigation as to the ownership of the property. There Runsten met Eddie and the plaintiff. Runsten testified that when he arrived he told Eddie that Polen owed the bank some money, and that he had come to find out what title Polen had to the property. Runsten had seen the contract of sale, and inquired of Eddie if it was a "legitimate buy." The plaintiff testified that he did not hear the first part of the conversation between Eddie and Runsten, but that he did hear Runsten ask Eddie if it was a "legitimate buy"; that he then asked Runsten what he meant by that; that Runsten replied that he wanted to buy the goods from Polen, whereupon the plaintiff told him that he could not buy the goods from Polen, that Polen could only sell the goods at auction, and that he (the plaintiff) was a part owner of the property and had paid Polen \$3,000 for his interest; that Runsten then said, "I know Polen, I will see what I can do," and went away. The plaintiff was corroborated by the witness Edelstein, who overheard the conversation. Runsten denied that he had talked with the plaintiff at the time in question, but with this conflict in the evidence this court is, of course, not concerned. The testimony of the plaintiff alone was sufficient to support the finding that the bank at that time had notice of the plaintiff's claim.

[2] It is next contended that the plaintiff is estopped from asserting his interest in the property as against the bank by reason of his alleged negligent acts "in allowing Polen, his alleged partner, to hold himself out to the appellant bank and to the world in general as the sole owner of the property in question." Reliance is placed on section 3543 of the Civil Code, which provides that—

"Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer."

There are two reasons why this section is not available to the defendant bank: First, because under the evidence the said defendant had knowledge on the day the pledge was made by Polen that the plaintiff claimed an interest in the property; and, secondly, no negligence on the part of the plaintiff was shown. It was in evidence and not disputed that Polen's contract with Eddie was signed

the day before plaintiff paid his money to Polen. It does not appear that the plaintiff then had any control over the actions of Polen in executing the contract in his individual capacity.

[3, 4] The appellant also relies on section 2991 of the Civil Code, which is as follows:

"One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it, cannot set up his own title, to defeat a pledge of the property, made by the other, to a pledgee who received the property in good faith, in the ordinary course of business, and for value."

Assuming that the transfer for security of the property in question was effected by the assignment and pledge of December 3d, a subject upon which something more will presently be said, it is not disclosed by the evidence nor by the argument of counsel how or in what way the plaintiff allowed Polen to do anything, or in what respect the plaintiff could prevent Polen from doing what he did do. The plaintiff was entitled to presume good faith on the part of Polen, and was not required to contemplate that Polen would pledge the entire partnership assets as security for his own personal indebtedness and not notify the pledgee of the existence of the partnership. Conceding that Polen had the right to sell or incur his own interest in the partnership property without the consent of the plaintiff, it is clear that he could not effectually pledge the entire assets of the partnership as security for his personal debt to one who had due notice of the partnership and of the interest of the plaintiff and thus divest the plaintiff of his interest in the property.

[5-7] What has just been said would seem to dispose of the third and last contention of the defendant bank, namely, that Polen had the legal right to pledge and transfer the title to said property by reason of his partnership relation to the plaintiff. The right of a partner as agent for the partnership to bind the partnership by oral or written agreement in matters concerning the business of the partnership is, of course, unquestioned. Section 2429, Civ. Code. It is insisted, however, that under the evidence plaintiff had abandoned the copartnership business to Polen, and that the latter therefore had the power to make an assignment of the partnership property to a creditor under section 2430 of the Civil Code, which provides that—

"A partner, as such, has not authority to do any of the following acts, unless his copartners have wholly abandoned the business to him, or are incapable of acting: 1. To make an assignment of the partnership property or any portion thereof to a creditor, or to a third person in trust for the benefit of a creditor or of all creditors. * * *

A sufficient answer to this contention is that the evidence does not support the claim

that the plaintiff abandoned the partnership business to Polen, and it is not claimed, and could not be claimed under the evidence, that the plaintiff was incapable of acting. On the contrary, the record discloses that the plaintiff asserted his interest in the property at all times, both before and after the accounting and remained in possession of the same for the purpose of winding up the business for which the partnership was formed. Furthermore, no authority has been cited which could confirm even the semblance of authority to Polen under said section 2430 and under the evidence in this case to assign the entire partnership assets to his own personal creditor. By the use of the terms "creditor" and "creditors" in the section, it is obvious that the creditor or creditors of the partnership are referred to and not those of an individual partner. The cases cited by the defendant bank have been examined. It is not necessary to review them. None is authority for the defendant bank's position under the facts here presented.

[8] There is another consideration which would also seem to establish beyond doubt that the pledge of Polen to the bank was entirely ineffectual to divest the plaintiff of his interest in the property. The contract between Polen and Eddie acknowledges receipt of \$3,000 on the purchase price of \$6,000. A credit of \$100 was allowed, and Polen agreed to pay the balance of \$2,900 on or before December 10th. There is no provision in the contract that title should remain in Eddie until the balance of the purchase price was paid. The partnership went into immediate possession, prepared the merchandise for resale, and sold a portion of it, presumably conveying good title to their purchasers. Under the contract and the conduct of the parties, it is clear that the title to the property passed to Polen or to the partnership at the time of the payment of the \$3,000 and possession of the goods was taken. Whether title passed to Polen or to the partnership is immaterial, for in either event the contract became executed except as to the obligation of Polen to pay the balance of the purchase price. The assignment to the bank was an assignment of the right, title, and interest of Polen to "the within contract with E. C. Eddie." It did not assign his interest in the property purchased under the contract. His interest in the contract itself could be of no substantial benefit to the assignee, for the reason that all that remained to be done under it was the payment by Polen of the balance of the contract price. At the time of the assignment, Polen was entitled to nothing under the contract of sale, and its assignment by him conveyed nothing. Likewise the pledge agreement which was made a part of the promissory note executed by Polen to the bank is similarly deficient. It provides

that Polen does "hereby assign, pledge, transfer and deposit" with the bank "the following personal property: * * * Agreement of sale with E. C. Eddie covering certain equipment and machinery at 707 Antonio street and evidencing the payment of \$3,000." This agreement of pledge does not purport to hypothecate the property described in the contract of sale, but by its terms pledges and deposits only the written contract under which at that time Polen was entitled to nothing which he had not already received. The bill of sale executed by Polen on the 20th of January, 1920, and pursuant to which the defendant bank on the same day caused possession of the property to be taken in its behalf could not under the circumstances here shown convey to the bank the interest of the plaintiff in said property.

The judgment should therefore be affirmed, and it is so ordered.

We concur: MYERS, C. J.; RICHARDS, J.; SEAWELL, J.; WASTE, J.; LAWLER, J.; LENNON, J.

197 Cal. 290

SHIPPY v. PENINSULA RAPID TRANSIT CO. et al. (S. F. 10996.)

(Supreme Court of California. Oct. 29, 1925.)

1. Trial $\S$ 108, 304—Parties entitled to opportunity to argue cause and have jury instructed thereafter.

Both parties are entitled to opportunity to argue cause and have jury instructed thereafter as to law of case, and it is jury's duty, under court's admonition, to form or express no opinion as to merits of facts or law until case is finally submitted to them.

2. New trial $\S$ 41(3)—Trial $\S$ 108—Judge's action in asking jury whether they were prepared to decide case without argument or instructions held error, and ground for new trial.

Trial court's action in asking jury whether they were prepared to pass on issues of fact and law without argument of counsel or instructions from court held prejudicial error justifying new trial, as requiring them to evince fixed state of mind as to facts and law before argument or instructions.

3. Trial $\S$ 108—Right to argue case not waived by counsel's statement, after 10 jurors signified, in answer to judge's inquiry, that they did not desire to hear argument.

Where plaintiff's counsel stated, before judge inquired of jurors whether they were prepared to pass on issues without argument or instructions, that he thought matters should be argued, he did not waive right to argue case by stating, after 10 jurors had signified that they did not desire to hear argument or instructions, that jury should be instructed as to law of case, nor did his later consent to waive argument cure error.

4. Trial ◊250—Court should not give instructions on contributory negligence, where not put in issue by pleadings or evidence.

Where no issue of contributory negligence was presented by defendants' pleadings or tendered by evidence, and case was not tried on theory that contributory negligence was an issue, court should not have given instructions thereon.

5. Appeal and error ◊1066—Instruction on matter not in issue held not reversible error, in view of new trial granted on other grounds.

Giving instructions on contributory negligence, which was not put in issue by pleadings or evidence, held not reversible error, in view of new trial properly granted for erroneous denial of right to argue case and have jury instructed on law thereof.

In Bank.

Appeal from Superior Court, City and County of San Francisco; H. L. Preston, Judge.

Action by William A. Shippy against the Peninsula Rapid Transit Company and another. Judgment for defendants. From an order granting plaintiff's motion for new trial, defendants appeal. Order affirmed.

John Ralph Wilson, W. G. Bonta, and Morris & Maguire, all of San Francisco, for appellants.

Cyril Appel and Ivores R. Dains, both of San Francisco, for respondent.

RICHARDS, J. This is an appeal from an order granting a motion for a new trial after a verdict in the defendants' favor in an action to recover damages claimed to have been suffered by the plaintiff as the result of a collision between the plaintiff's automobile and a motor bus being operated by the defendants. The facts of the case which formed the basis of said motion and of this appeal are undisputed, and are as follows: The cause came on to trial before a jury. At the conclusion of the taking of evidence in the case the following proceedings were had:

"Mr. Wilson (defendants' counsel): That is all; we are willing to submit it without argument.

"Mr. Appel (plaintiff's counsel): I think it is a matter that ought to be argued at least for a short time.

"The Court: I wish you would pay attention to what I am going to say, and not volunteer any information that I do not want. Now, those jurors in the box who feel reasonably satisfied that they can determine the facts in this case without any argument of counsel, or without instructions from the court, without giving any indication of which way they feel about the matter—the court doesn't want anything of that kind; I don't want to know what your opinion is at all—I simply want to find out if there are any jurors who feel that they have heard the testimony and that they thoroughly understand it, and that they can pass on the issues of fact in this case without any in-

structions from the court, or without any argument of counsel. Now, those—after awhile I am going to ask them to stand up—those that feel that they would like to have argument of counsel and the instructions of the court, and deliberate on the matter, of course, they will sit down. Now, if there are any who feel that they are satisfied as to the facts of this case, they will please signify by standing up.

"Thereupon 10 jurors stood up.

"The Court: Now, gentlemen, do you wish to argue the case?

"Mr. Wilson: We are willing to waive arguments and instructions.

"Mr. Appel: I submit that the jury ought to be instructed as to the law in this case.

"The Court: We will take an adjournment until 2 o'clock.

"Mr. Appel: If the instructions will be short, there is no objection to the case going to the jury.

"The Court: It would not be fair to the jury, it will take some time to read the instructions, and it is now the noon hour.

"Mr. Wilson: It is all right as far as I am concerned if the court wants to let them go at noontime; I am willing to waive any objections to instructions, and let your honor give such instructions as you see fit.

"Mr. Appel: I think the convenience of the jury at this time ought to be consulted.

"A Juror: I have a lunch engagement; I would like to keep it if I could.

"The Court: Then you are excused until two o'clock.

"The court thereupon gave the usual admonition to the jury, and the action was continued for further hearing until 2 o'clock p. m. and at that time the following proceedings took place:

"The Court: It appears to the court that the jurors are all present.

"Mr. Wilson: Yes; your honor.

"Mr. Appel: Yes; your honor.

"Mr. Appel: In accordance with the conversation had with Mr. Wilson and your honor during the noon recess, I would like to have an exception noted to what transpired in the courtroom, and I might say, if your honor please, that, inasmuch as a great number of the jurors have expressed their desire to decide this case without argument, so far as argument is concerned, the plaintiff will waive argument. The only thing I would suggest is that, if they desire the photographs or the exhibits in the case, why, the jurors might take them with them so that they would have them before them.

"The Court: No objection?

"Mr. Wilson: No objection.

"The Court: Note the exception."

The court thereupon instructed the jury and in so doing gave certain instructions upon the subject of contributory negligence which will be hereinafter considered. The jury then retired, and within 13 minutes thereafter returned with a verdict in the defendants' favor. Judgment was entered in accordance with said verdict, and thereafter and in due time the plaintiff served and filed his notice of intention to move for a new trial, specifying all of the statutory

grounds for said motion, supported by the minutes of the court and by the affidavit of plaintiff's said counsel embodying the episode above detailed, and designating the same as an irregularity in the proceedings by the court by which the plaintiff was prevented from having a fair trial. No opposing affidavit was filed. The motion for a new trial came on regularly to be heard before a judge other than the judge who had tried the cause, and was argued and submitted; and the judge hearing said motion thereafter made the order generally granting the plaintiff's motion for a new trial without specifying therein that the same was granted upon the ground of the insufficiency of the evidence to sustain the verdict, and also without making any other specification. The defendants appeal from said order, and urge in support of said appeal that no proper or sufficient ground appeared for the making of said order. The respondent on his part urges that the record discloses two sufficient grounds as the support for said order. They are: First, that the action and conduct of the court in the matter of the proceedings immediately following the close of the evidence in the case and which are above detailed constituted a serious irregularity, and amounted to prejudicial error on the part of the trial court; second, that the trial court committed prejudicial error in giving its said instructions upon the subject of contributory negligence. It is conceded that both of these questions were properly before the judge, who heard and granted the plaintiff's motion for a new trial, and that, if the position of the respondent as to either of said matters is found to be correct, the order granting a new trial must be affirmed.

[1-3] As to the first of these questions we are of the opinion that the action and conduct of the trial judge as above given in detail constituted a serious and prejudicial irregularity occurring during the trial of the cause, and for which a new trial should have been and was properly granted. It is the long-established right of both of the parties thereto to have an opportunity to argue the cause and to have the jury after such argument instructed by the judge of the court as to the law of the case; and it was equally the duty of the jury under the admonition of the court not to form or express an opinion with respect to the merits of either the facts or the law of the case until the case should be finally submitted to them. The action of the trial court in the instant case in inquiring of the jurors whether they were then prepared to pass upon the issues of both fact and law involved in the case without either argument of counsel upon the facts or instructions from the court upon the law of the case amounted in substance to a requirement of the jurors that they evince a fixed state of mind with respect to both the facts and law of the case which they were not entitled

to hold or to express at that stage in the proceedings. Ten of the jurors, however, arose, and in so doing evinced that they were in that fixed state of mind wherein they did not desire to hear either the argument of counsel upon the facts or the instructions of the court as to the law of the case, whereupon the trial judge said to counsel: "Now, gentlemen, do you wish to argue the case?" Prior to the institution of the foregoing inquiry on the part of the trial judge counsel for the plaintiff had stated: "I think it is a matter which should be argued, at least for a short time"; but, after the inquiry of the trial judge as to the views of the jury upon the subject, and the reaction of 10 of their number thereon, the response of counsel for the plaintiff to the above final inquiry of the trial judge was: "I submit that the jury ought to be instructed as to the law of the case." It is urged by the appellants herein that this amounted to a waiver of the right of plaintiff's counsel to argue the case to the jury. We cannot yield concurrence to this view. The trial judge had no right to put upon counsel engaged in a jury trial the stress of such a dilemma, since to insist upon arguing the cause under the circumstances thus improperly created by the action of the trial judge would be to run counter to the expressed desire of the majority of the jurors not to hear argument, and thereby risk losing whatever of favor counsel hoped to have in their eyes; or, on the other hand, to surrender the right of his client to the full benefit of an argument by his counsel of his case. This tacit consent of plaintiff's counsel to waive his right to present an argument in the cause cannot under the stress of such a condition be held to have been freely or properly obtained; nor do we think his later consent to waive argument thus unwillingly obtained would suffice to cure the error; and it must therefore be concluded that the conduct of the trial judge in thus improperly interrogating the jury and in thereby bringing about the unwilling consent of plaintiff's counsel to submit the cause without argument constituted a serious and prejudicial irregularity fully sufficient to justify the granting of plaintiff's motion for a new trial based thereon.

[4, 5] The conclusion we have thus far arrived at renders unnecessary the discussion of the further ground urged by the respondent herein to the effect that the trial court was in error in the giving of certain instructions upon the subject of contributory negligence. It is conceded that the defendants by their pleadings presented no issue upon the subject of the plaintiff's contributory negligence, but, on the other hand, not only expressly refrained from so doing, but that during the trial of the cause no issue as to the contributory negligence of the plaintiff was tendered by the evidence, nor was the case tried upon the theory that the plaintiff's con-

tributory negligence was an issue in the case. In such a state of the record we are of the opinion that the trial court should have refrained from giving the instructions which it did give upon the subject of contributory negligence, although we are not prepared to say that the giving of such instructions would under the circumstances presented in this case constitute reversible error.

The order is affirmed.

We concur: MYERS, C. J.; SHENK, J.; WASTE, J.; SEAWELL, J.; LAWLOR, J.; LENNON, J.

74 Cal. App. 420

HALLINAN v. SUPERIOR COURT IN AND FOR KINGS COUNTY et al. (Civ. 5149.)

(District Court of Appeal, Second District, Division 1, California. Sept. 22, 1925. Hearing Denied by Supreme Court Nov. 19, 1925.)

1. Courts ⇨92—Decision as authority limited by facts on which based.

Decision as authority must be limited and circumscribed by facts on which based.

2. Trial ⇨112—Attorney's right to argue matter arising during trial must be exercised within limits prescribed by court.

Attorney, in trial of action, has certain rights, privileges, and duties to client which cannot be abridged nor denied by court, including right to address court and present argument on questions arising during trial, but such right must be exercised under court's direction and within limits prescribed by court in exercise of its discretion.

3. Contempt ⇨21—Counsel persisting in arguing matter to court, after repeated orders to desist, guilty of "contempt."

Counsel's persistence in arguing matter to court, after latter has repeatedly ordered him to desist, amounts to disorderly behavior toward judge, directly tending to interrupt due course of trial, and disobedience of lawful order of court, within Code Civ. Proc. § 1209, defining such acts as "contempt."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contempt.]

Application by Vincent Hallinan for certiorari to review an order of the Superior Court in and for Kings County and Hon. K. Van Zante, Judge thereof, adjudging petitioner guilty of contempt of court. Writ dismissed.

B. M. Benson and Richard K. Stewart, both of Fresno, for petitioner.

William R. McKay, Dist. Atty., of Hanford, for respondents.

CURTIS, J. Petition for writ of review of an order of the superior court of Kings county adjudging the petitioner guilty of contempt

of court. The petitioner is an attorney, duly licensed to practice law in all the courts of this state. On the 9th day of July, 1925, he was engaged in the trial of a criminal case in said superior court before the respondent judge thereof. In said action he represented one of four defendants who were jointly on trial in said court. The attorneys representing the other defendants in said action were Messrs. Covert, Brown, Pryor, and Russell. A witness by the name of Mrs. Edith Jewett was being examined by Mr. Higgins, representing the prosecution. The commitment shows that the following proceedings were had in said court in the course of said trial, and were the basis upon which said judgment of contempt was made by said court:

"Q. Did you ever have any conversation with Mrs. Brown in regard to Pearl Camp King working and the work she was doing?

"Mr. Hallinan: We object to that as irrelevant, incompetent, and immaterial, and the proper grounds for impeachment have not been laid. Mr. Brown—

"Mr. Higgins: Mrs. Brown.

"Mr. Covert: It is not rebuttal, and does not tend to prove or disprove any issue in the case, and it was not in the presence of the other defendants, and, if it is admitted by the ruling of the court, we request the court to instruct the jury to disregard it as to all other defendants.

"Mr. Hallinan: If the court please, may I be permitted to say how manifestly unfair this is, that the prosecution may start their case all over again, and—

"The Court: Mr. Hallinan, make your objection to the court, and get your ruling on it. We don't want any argument at all.

"Mr. Hallinan: I want to call your honor's attention to the fact—

"The Court: The court knows all about it, and I don't want any talk like that from you.

"Mr. Hallinan: If the court please, I would like an explanation of what your honor means by that kind of talk. I made no talk that is not proper.

"The Court: Mr. Hallinan, if the court calls your attention again to this, you will be adjudged guilty of contempt of court and there will be a penalty following it. I don't want any more remarks following this—

"Mr. Hallinan: But, if the court please—

"The Court: The court adjudges you guilty of contempt of court for continually talking back to the court when you are ordered to desist from talking, and you are ordered to appear in this court room next Saturday morning at 10 o'clock for the pronouncement of judgment.

"Mr. Hallinan: And I want to enter an exception to the court making that statement in the presence of the jury.

"The Court: You are out of order. Proceed.

"Mr. Russell: Can't we make an objection?

"The Court: You can make an objection any time you want to, Mr. Russell.

"Mr. Russell: I think that is all Mr. Hallinan tried to do. He was trying to put in a little argument on the outside—

"The Court: But we don't want any argument.

"Mr. Russell: I want to ask a question. Are

we not going to be allowed to make an objection?

"The Court: You can make your objections.

"Mr. Hallinan: And that is what I did.

"The Court: We don't want any accusations of the court being unfair, or not doing this way or the other.

"Mr. Hallinan: The allegation was—

"The Court: You are out of order.

"Mr. Pryor: If the court please, we object to this testimony on the ground that there is no evidence either denying or affirming any conversation with Mrs. Brown, and they are offering it in rebuttal now, and, if there is any testimony of that sort, it should have been put in when their case was being introduced in chief.

"The Court: The objection is overruled."

From the foregoing statement of the proceedings it appears that petitioner had interposed an objection to a question asked of the witness Mrs. Jewett. He then proceeded to make an argument in support of his objection. The court directed him to make his objection and get a ruling upon it, but that it did not want any further argument. In spite of this statement by the court that no further argument was wanted, petitioner again attempted to proceed with his argument in support of his objection, whereupon the court again informed petitioner that it did not want to hear any argument, and warned petitioner that if he persisted in his argument he would be found guilty of contempt of court. In the face of this second admonition from the court not to proceed with his argument the petitioner again began to address the court in support of his objection, whereupon, the court adjudged him guilty of contempt of court "for continually talking back to the court when you are ordered to desist from talking."

It is contended by petitioner that the order adjudicating him guilty is void, for the reason that the court was without jurisdiction to make such an order. In support of this contention he relies upon the following cases from the appellate courts of this state: *In re Shortridge*, 5 Cal. App. 371, 90 P. 478; *Platnauer v. Superior Court*, 32 Cal. App. 463, 163 P. 237, and *Curran v. Superior Court* (Cal. App.) 236 P. 975.

In the *Shortridge* Case the petitioner therein had been adjudged guilty of contempt of court for interrupting the proceedings of the court by addressing the court after he had been admonished by the court not to do so, and by insisting on talking to the court. The commitment, however, failed to set forth the language used by petitioner which the court held to be contemptuous, or any of the facts occurring in the presence of the court, as required by section 1211 of the Code of Civil Procedure. The court held that—

"The power to punish for contempt, being an arbitrary power, and the facts as recited in the order of commitment being conclusive in such contempt proceeding, the correct rule, in our opinion, is to require the commitment to state

the facts so that this court, on reading the commitment, can determine as to whether or not such facts as a matter of law constitute a contempt of court. When we examine the commitment by the above rule we cannot say as a matter of law that the petitioner was guilty of contempt."

In the case of *Platnauer v. Superior Court*, supra, the petitioner was an attorney at law, and, with another attorney, represented one of the parties to a proceeding then on trial in the court which found him guilty of contempt. The commitment set forth in full the proceedings before the court leading up to the order of the court finding the petitioner guilty of contempt. In substance these facts showed that the court virtually refused to permit the petitioner to participate in the trial then in progress, or to represent his client at said trial. The appellate court, in determining the real question for decision before it, stated it as follows:

"It follows, then, that the whole controversy here reduces itself down to the single and simple question whether it is within the lawful power of a court to deny and foreclose the right of a regularly licensed attorney, regularly employed by a litigant to represent him in the trial of a case, to participate in such trial, even though such attorney might at some time in the progress of the trial of the cause have been guilty of contumacious conduct, and to punish him as for contempt of court if he attempts actively to represent his client in the trial."

In annulling the order of contempt, the court said:

"It does not appear from the facts as they are here disclosed that the petitioner at any time addressed the court in disrespectful language. * * * The alleged contemptuous conduct on the part of the petitioner appears to have consisted entirely in the petitioner's attempt to take part in the pending proceedings after the court had ordered that he should not further participate therein. As above indicated, our conclusion is that in so acting the court transcended its lawful authority, and that the order was wholly beyond the jurisdiction of the court and is therefore void."

[1] In *Curran v. Superior Court*, supra, the facts stated in the commitment showed that the real and only offense committed by the petitioner therein was his refusal to take his seat and to remain seated while he was interrogating a witness. The appellate court held that an order of court adjudging him guilty of contempt for disobeying such order was in excess of its jurisdiction. There may be language in the decision which is susceptible of a construction much more favorable to the position of the petitioner herein, but the decision as an authority must be limited and circumscribed by the facts upon which it is based.

[2, 3] The question involved in this proceeding, in our opinion, is the power of the court to order an attorney to desist from further

argument upon a matter then pending before the court, and, upon said attorney's persistent refusal to comply with the terms of said order, to punish said attorney in contempt for such refusal. It is apparent that this question was not before the court in any of the three cases cited by petitioner and referred to above. We have not been able to find any adjudicated case directly in point. It must be conceded that an attorney engaged in the trial of an action in court has certain rights and privileges, the full exercise of which can neither be abridged nor denied him by the court. He also has certain duties to perform to his client which are beyond the control of the court. Among these rights and duties of the attorney is his right, within reasonable limits, to address the court and to present argument upon questions arising during the progress of the trial. This right to argue a matter before the court, however, is not unlimited. It must be exercised under the direction of the court and within such limits as may be prescribed by the court in the exercise of its discretion to regulate such matters; otherwise an attorney might delay and impede the trial of a case far beyond any legitimate limits. Argument of counsel, upon questions arising during the progress of a trial, is addressed solely to the court, and its object and purpose is to enable the court to have the benefit of the views of counsel upon the questions under discussion in order that the court may be better advised upon such questions before it is called upon to decide them. The court, rather than the attorneys in the case, must be the judge as to the extent and scope of such argument. This must necessarily be so for two reasons. In the first place, the court is primarily responsible for the prompt and orderly dispatch of business pending before it. To permit attorneys in all cases to decide how often and how long they will argue questions arising during the trial would mean that the direction and control of litigation would be taken from the court and transferred to counsel in the case, and would often result in the unwarranted consumption of the time of the court to the great detriment, not only of the parties to the pending litigation, but also of those whose actions are awaiting trial. In the second place, as the argument of counsel is directed to the court alone, the court is in far better position than counsel to decide when it is sufficiently informed as to the subject under consideration. When the court reaches the point that it feels that it is fully advised as to the question under discussion and ready to rule upon the same, and therefore requires no further enlightenment from counsel, it is surely clothed with adequate power and authority to order the argument at an end, and, when necessary, in order to enforce its order, to punish the attorney guilty of its infraction. Under such circumstances, the action of coun-

sel in persisting in arguing a matter to the court, after the court has repeatedly ordered him to desist, amounts to disorderly behavior towards the judge of the court, which directly tends to interrupt the due course of the trial, and is also disobedience of the lawful order of the court. Such acts are defined as contempt by the provisions of section 1209 of the Code of Civil Procedure.

In the proceeding before the respondent court the petitioner herein was informed that he might make any objection he desired, but that the court felt that it was fully advised as to the matters before it and did not desire any argument from counsel, and ordered petitioner not to continue his remarks. The action of petitioner in proceeding with his argument, in the face of this explicit order of the court not to do so, cannot be regarded in any other light than a clear case of contempt of court.

The writ is dismissed.

We concur: CONREY, P. J.; HAHN, Justice pro tem.

74 Cal. App. 427

HALLINAN v. SUPERIOR COURT IN AND FOR KINGS COUNTY et al. (Civ. 5150.)

(District Court of Appeal, Second District, Division 1, California. Sept. 22, 1925. Hearing Denied by Supreme Court Nov. 19, 1925.)

Contempt $\Leftrightarrow$ 26—Attorney's remark, in reply to court's admonition to cease argument, held contempt.

Attorney's remark, in reply to court's admonition to cease argument on objection to question to witness, that, "If I think an objection is proper, I am not going to be frightened either by threat or punishment for contempt," etc., held contempt as attempt to evade, if not directly violate, court's order, in view of fact that court had previously informed him that he might make any objection that he desired.

Application by Vincent Hallinan for certiorari to review and annul an order of the Superior Court in and for Kings County and K. Van Zante, Judge thereof, adjudging petitioner guilty of contempt. Writ dismissed.

B. M. Benson and Richard K. Stewart, both of Fresno, for petitioner.

William R. McKay, Dist. Atty., of Hanford, for respondents.

CURTIS, J. The parties hereto are the same as those in No. 5149, 240 P. 788, this day decided by this court. In the present proceeding the petitioner asks to review and have annulled an order of the respondent court adjudging him guilty of contempt. This order was made during the trial of the same action in which the order considered in No. 5149 was made, and during the same day,

and only a short time after said last named order was made. The proceedings out of which the order involved herein was made by the court, as shown by the commitment herein, were as follows:

"Mr. Higgins: Read the question, Mr. Reporter. (Question read.)

"Mr. Russell: If your honor please, we would also make the objection that any statement made by Mrs. Brown not in the presence of the other defendants is hearsay, and would not be binding on the other defendants. We would like to have the court instruct the jury to that effect.

"The Court: The objection is overruled and motion denied.

"Mr. Russell: To which we except. A. Well, we were dining at the Brown house one evening—

"Mr. Russell: Talk up so we can hear you. A. What is it?

"Mr. Russell: Talk up so that we can hear you. A. We were dining at the Brown home one evening, and just before we sat down to the table, Mrs. Brown said to Pearl, 'Bring in the ice cream.' Well, it looked to me—

"Mr. Hallinan: If the court please, we object to the witness stating what it looked like to her.

"The Court: Yes, that may go out.

"Mr. Higgins: Just state the conversation. A. It was a two-gallon ice cream freezer, packed with salt and ice, and that girl lugged that in, it was all she could do to—

"Mr. Hallinan: We object to the statement that she lugged it in and it was all she could do. She can state she carried it in.

"The Court: The objection is overruled. A. She lugged it in, and I said to Mrs. Brown, 'Oh, that is too heavy for that girl.' She said, 'Pooh, that won't hurt her.'

"Mr. Higgins: Q. Was that all of the conversation at that time? A. At that time, yes.

"Mr. Covert: We move the last answer be stricken out on the ground it is not responsive to the question asked, and on the further ground it is incompetent, irrelevant, and immaterial, in that it is a conversation that was not had in the presence of the other defendants, and for that reason the jury may not consider it as to the other defendants, and upon the further ground that it is not rebuttal of anything adduced in evidence up to this time, either by the prosecution or the defense, and we ask that it be stricken out and the jury instructed to disregard it as to all the defendants, except Mrs. Brown, if the court refuses to strike it out entirely.

"The Court: Motion denied.

"Mr. Higgins: Q. Did you ever, after that time, or at any time, with Mrs. Brown, have a conversation relative to Pearl Camp not going to school and about her working on the ranch?

"Mr. Hallinan: If the court please, we again make the same objection, and I further take an exception that we consider it unfair that the prosecution should be allowed to reopen their case at this time, and we object to the witness being permitted to answer that question on the ground it is improper rebuttal.

"The Court: Mr. Hallinan, the court has warned you not to make statements of that kind.

"Mr. Hallinan: But if the court please—

"The Court: No further talk from you, Mr. Hallinan.

"Mr. Hallinan: If I think an objection is proper, I am not going to be frightened either by threat or punishment for contempt. I am not trying to be unfair with the court, or say anything that I don't think is entirely proper, but, if I think the objection is proper I will say it.

"The Court: The court adjudges you again guilty of contempt for continuing to talk back to the court when you have been ordered to desist from talking."

There is little difference in principle between these two actions. The proceedings set forth above are practically a continuation of those considered in action No. 5149. Practically the same question had been asked the witness Mrs. Jewett in the proceedings involved herein as had been asked her in the prior proceeding. The objections interposed by petitioner to these two questions were in all essentials the same, and petitioner was attempting to make the same argument in support of his objection to the second question that he had made to the first, when he was informed by the court that it did not desire any further argument, and ordered petitioner to cease his argument, or, to put it in the court's language, "No further talk from you, Mr. Hallinan." In reply to this admonition of the court, petitioner stated:

"If I think an objection is proper, I am not going to be frightened, either by threat or punishment for contempt. I am not trying to be unfair with the court, or say anything that I don't think is entirely proper, but, if I think the objection is proper, I will say it."

In view of the fact that the court had not in any manner stated or even intimated that it would not entertain any objection which petitioner might see fit to make, but on the other hand had previously informed petitioner that he might make any objection that he desired, we are unable to construe the above remark of counsel in any other light than as an attempt on his part to evade, if not to directly violate, the previous order of the court.

On account of the similarity of this to the proceeding just decided, we do not think it necessary to further extend this opinion, but, for the reasons set forth in said opinion, as well as for those expressed herein, we are of the opinion that the order of the court adjudging the petitioner guilty of contempt, as hereinbefore set forth, is valid and binding. The writ is therefore dismissed.

We concur: CONREY, P. J.; HAHN, Justice pro tem.

74 Cal. App. 386

**CITY OF SACRAMENTO v. INDUSTRIAL
ACCIDENT COMMISSION OF CALI-
FORNIA et al. (Civ. 3002.)**

(District Court of Appeal, Third District, California. Sept. 17, 1925.)

- 1. Master and servant** ⇨364—Constitutional authority to provide "compensation" for municipal employees held to refer to "wages" and not to workmen's compensation.

Const. art. 11, § 8½, conferring upon the city of Sacramento operating under freeholders' charter, within article 11, §§ 6, 8, authority to provide compensation for its employees or their dependents, *held* to refer to wages and not to workmen's compensation or indemnification payable to dependents under article 20, § 21; the word "compensation," as used in article 11, § 8½, being synonymous with wages.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Compensation; Wages.]

- 2. Master and servant** ⇨364—Municipalities departments of state within Constitution.

Counties and municipalities are departments of state within Const. art. 20, § 21, authorizing the Legislature to provide a system of workmen's compensation binding upon all departments of the state government.

- 3. Master and servant** ⇨364—"Person," in constitutional provision for workmen's compensation, includes municipal corporation.

The word "person" in Const. art. 20, § 21, authorizing the Legislature to provide a system of workmen's compensation and to enforce liability upon all persons, includes municipal corporations.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Person.]

- 4. Master and servant** ⇨364—Workmen's "compensation" matter of public policy distinguished from municipal affairs.

Enactment by Legislature of a system of workmen's compensation for the benefit of injured workmen or their dependents, as authorized by Const. art. 20, § 21, is a matter of public policy of the state, as contradistinguished from municipal affairs within article 11, §§ 6, 8, 8½; "compensation" being used in sense of making amends for losses sustained or the paying of an indemnity or an equivalent, so far as it is possible to do so in money value, to those dependents who have suffered such loss.

Petition for certiorari by the City of Sacramento to review an order of the Industrial Accident Commission, awarding compensation to Eva Streepy for the death of William E. Streepy. Award affirmed.

R. L. Shinn, of Sacramento, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondents.

PLUMMER, J. This matter is before the court upon the petition of the city of Sacra-

mento to review the action of the Industrial Accident Commission of the state of California, awarding compensation to the respondent Eva Streepy on account of the death of her husband occurring while in the employ of the above-named petitioner.

The record before us shows that William E. Streepy and the respondent Eva Streepy were on the 24th day of May, 1924, and prior thereto, husband and wife; that on the 24th of May, 1924, the said William E. Streepy, while in the employ of the city of Sacramento as an electrician, was instantly killed by reason of an electric shock which caused him to fall from a high pole on which he was then working, the neck of said Streepy being broken by coming in contact with the ground below. After all the proceedings provided for to be taken in such cases, the respondent Industrial Accident Commission awarded to the said Eva Streepy the sum of \$5,000; \$100 thereof being allowed for funeral expenses, and the remainder thereof as compensation to be paid at the rate of \$20.83 per week, beginning with the date of the death of the said William E. Streepy, of which amount \$1,083.16 had accrued at the date of the entry of the award made by said commission. No contention is made as to the correctness of the award if jurisdiction to enter the same existed.

The award of the commission is contested upon two grounds: First, that the compensation of all officers and employees of a city is a matter purely within the jurisdiction and control of the city of which such persons may be officers or employees, and, second; that the making of provision for a sum of money to be paid either to an injured employee, or to his widow or family, in the event of his death occasioned by reason of his services to the city, is a purely municipal affair.

[1] In determining the pertinency of these objections or contentions, several sections of the state Constitution must be considered. Section 6 of article 11, as amended in 1914, provides that municipalities operating under freeholders' charters adopted since 1914, or amended to conform thereto, may "make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws." Section 8 of article 11 contains a similar provision. Section 8½ of article 11 of the Constitution specifies that a city charter may provide "the manner in which, the method by which, the times at which, and the terms for which the several county and municipal officers and employees * * * shall be elected or appointed, and for their recall and removal, and their compensation," etc., and section 11 of article 11 of the Constitution further authorizes "any

county, city, town, or township make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws," the last amendment to this section being in 1918. At the same election at which the last of the above-named sections was amended, the proposed amendment to section 21 of article 20 of the state Constitution was also ratified. That section is as follows:

"The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability, and their dependents for death incurred or sustained by the said workmen in the course of their employment, irrespective of the fault of any party. A complete system of workmen's compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workmen and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workmen in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a state compensation insurance fund; full provision for otherwise securing the payment of compensation; and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this state, binding upon all departments of the state government.

"The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an Industrial Accident Commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this state. The Legislature may combine in one statute all the provisions for a complete system of workmen's compensation, as herein defined.

"Nothing contained herein shall be taken or construed to impair or render ineffectual in any measure the creation and existence of the Industrial Accident Commission of this state

or the state compensation insurance fund, the creation and existence of which, with all the functions vested in them, are hereby ratified and confirmed."

By reference to these sections it will be seen that the first question to be determined is the sense in which the word "compensation" is used therein. Section 8½ of article 11 of the state Constitution gives to municipalities full power and authority to provide for the compensation of all officers and employees, from which it is argued that, if the city charter of the city of Sacramento makes any provision for any sum of money to be paid to the family of any deceased officer or employee, then and in that case, section 21 of article 20 does not apply, and the Industrial Accident Commission has no jurisdiction to make an award. In this particular our attention is called to sections 168 and 173 of the city Charter of the city of Sacramento, adopted by the voters of the city of Sacramento, and ratified by the Legislature of the state of California at a later date than the adoption of any of the amendments to the state Constitution to which we have referred. Section 168 of the Charter of the city of Sacramento reads:

"All employees of the city of Sacramento who have served in the city continuously for twenty years in any capacity except as an elective officer or city manager shall be eligible to relief and pension."

Section 173 is as follows:

"The pension board shall provide as follows for the family of any city employee of the class eligible to pensions who may be killed while in the performance of his duty: (1) Should the decedent leave a widow, she shall, as long as she remains unmarried, be paid a pension equal to one-half of the salary paid the decedent at the time of his death. (2) Should the decedent leave no widow, but leave any child or children under the age of sixteen years, or should he leave a widow who shall die and leave his child or children under the age of sixteen years, such child or children collectively shall receive a pension equal to one-half the salary paid to the father at the time of his death, until the youngest child attains the age of sixteen years; provided, that no child shall receive any such pension after attaining the age of sixteen years."

A third subdivision is added which is not material here. Other provisions of the charter relating to pensions for disabled persons are likewise made dependent upon the employee having served the city continuously for a period of 20 years. In the case at bar the employee had served the city but three years and, therefore, no provision has been made for the compensation of his dependents irrespective of the meaning of that word as used in section 8½ of article 11 of the state Constitution, giving to municipalities full power and authority to fix the compensation

of its officers and employees, but, waiving this omission, does the word "compensation," as it appears in section 8½ of article 11, carry the same meaning as does the word "compensation," as used in section 21 of article 20? The mere fact that the same word is used in both instances does not necessitate the conclusion that the same meaning is attached thereto, or that the Legislature or the voters of the state understood the use of the word to mean the same in both instances. The context of the sections must be considered, and the word "compensation" must be read in connection with, not only the words where it appears, but also in reference to the subject-matter of which the section purports to treat. In section 8½ of article 11, the salary and wages of officers and employees constitute the subject-matter, and the authority is there given to fix the salaries and the wages, but, instead of using the two words "salary and wages," the word "compensation" is employed. In section 21 of article 20, the subject-matter being considered is the indemnifying or relieving an injured employee, or his dependents, from becoming objects of public charity. In the one instance, mere salary or wages for services performed constitutes the matter being considered, while in section 21 of article 20 there is no thought whatever of paying an injured employee, or awarding a sum of money to his dependents on account of services being performed by him. It is true that the salary or wages theretofore earned by the injured employee, and of which he was capable of earning, is accepted as the standard for fixing the indemnity as compensation to be awarded to the injured employee, but that does not in any sense convey the idea that compensation is being paid for services rendered or being rendered by the injured employee.

That we are right in this interpretation of the use of the word "compensation" in the different sections is fully sustained by the interpretations which have heretofore been given to this word. In 12 C. J. 229, we find the following legal definitions of the word "compensation":

"An act which a court orders to be done, or money which a court orders to be paid, by a person whose acts or omissions have caused loss or injury to another, in order that thereby the person damaged may receive equal value for his loss, or be made whole in respect of his injury; a consideration; the consideration or price of a privilege purchased; an equivalent in money for a loss sustained; an equivalent given for property taken or for an injury done to another; the giving back an equivalent in either money, which is but the measure of value, or in actual value otherwise conferred; the rendering an equivalent in value or amount; indemnification; making amends; payment of damages; a recompense in value; a recompense given for a thing received; a recompense or reward for some loss, injury, or service, especially when it is given

by statute; remuneration for the injury directly and proximately caused by a breach of contract or duty; remuneration or satisfaction for injury or damage of every description; that return which is given for something else; that which is necessary to restore an injured party to his former position. The term etymologically suggests the image of balancing one thing against another, its primary signification being equivalence, and the secondary and more common meaning something given or obtained as an equivalent.

"As salary or wages. The word also signifies the remuneration or wages given to an employee or officer, but it is not exactly synonymous with 'salary.'"

It thus appears that the use of the word "compensation" in the sense of meaning wages is the last given and also the interpretation which is last given to that word, but, even in this sense, it is used only to signify compensation for services performed; the correct and accurate term being wages, which is the return made for work done or services performed.

We therefore conclude that the word "compensation," as it appears in section 8½ of article 11, is a synonym for the word "wages," as applied to the facts of this case, and refers to the power given the municipality of Sacramento to fix the amount of money, to wit, the \$7 per day that was being paid to the deceased, William E. Streepy, in return for the services that were being performed by him, and has no reference whatever to the compensation or indemnification being made to the widow of William E. Streepy, by reason of his death while in the employ of the city. It is in some measure an attempt to pay an equivalent in money for the losses sustained by her and is not an act on the part of the city either within the meaning or even the letter of section 8½ of article 11 of the state Constitution, when the subject-matter of that section is taken into consideration.

While not directly in point by reason of the difference in the facts involved, the case of *Jackson v. Wilde*, 52 Cal. App. 259, 198 P. 822, draws a very clear distinction between what is meant by the word "compensation" when accurately used and interpreted and the word "salary" when properly employed, and draws the distinction which we are making here between a salary that might be earned under section 8½ of article 11, and a benefit that might be awarded, or that might become due under section 21 of article 20.

Our attention has been called to no authorities directly upon the point involved, but from the foregoing reasoning we conclude that the first contention of the petitioner must be answered in the negative.

[2-4] Is the making of "compensation" to, or the indemnification of, the widow, or to the family, of the deceased employee, or the

awarding of a sum calculated upon the standard of the earning capacity of the deceased a municipal affair? It would serve no useful purpose to enter into a lengthy discussion of just what are municipal affairs. In 18 California Jurisprudence, p. 786, we find several comprehensive definitions, which, in a word, all relate to the internal business of a city such as prosecution for violations of charter provisions, municipal elections, compensation, and removal of public officers, issuing bonds for improvements, erection of municipal buildings, provisions for a municipal pension system, control of almshouses, the matter of opening, widening, and vacating streets, and such like powers, but nowhere do we find any legal definition which extends the meaning of the words "municipal affairs" so as to include the indemnification of dependents on account of the death of an employee, nor do we find that the pension system has been ever interpreted to take the place of a Workmen's Compensation Law. The mere fact that the citizens of a municipality may be vitally interested in making provisions for dependents does not transform a state policy into a municipal affair. The pension system, we think, is really the outgrowth of the idea that public officers and employees are not paid an adequate sum in many instances, and therefore a portion of the salary paid, after the age of disability has been reached, shall be allowed the retired officer or employee to make amends for the failure to pay a sufficient salary or wage in the first instance, and does not come within the theory, purpose, or contemplation of the state Workmen's Compensation Law at all. The school law of the state affects every municipality, but it is nevertheless a state regulation and not a municipal matter. Likewise, it has been held that the Wright Act (St. 1921, p. 79) is a law of the state, and takes precedence over the regulatory power of cities concerning the liquor traffic. The same is true in relation to the Motor Vehicle Act (St. 1915, p. 397; St. 1917, p. 382; St. 1919, p. 191). These questions are so decided in the following cases: *Piper v. Big Pine School Dist.*, 193 Cal. 664, 226 P. 926; *Ex parte Daniels*, 183 Cal. 636, 192 P. 442, 21 A. L. R. 1172; and *In re Mingo*, 190 Cal. 769, 214 P. 850. We might also cite the cases having to do with public utilities in relation to rates of fares, etc., such as the case of *Civic Center Ass'n of L. A. v. R. R. Commission*, 175 Cal. 441, 106 P. 351.

The section of the Constitution upon which the state compensation, insurance, and safety laws are based contains within itself some definite statements which exclude the idea of such matters being relegated to the limited purview, control, or jurisdiction of municipalities. Some of these words in the sec-

tion (article 20, § 21) are: "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workmen's compensation," etc., and to enforce the liability upon all persons. It is needless to add that the word "person" includes a municipality, and then, after setting forth with a great deal of detail the powers to be conferred by legislation upon any commission that might be created, the section contains the following:

"All of which matters are expressly declared to be the social public policy of this state, binding upon all departments of the state government."

We think that plenary power means in this sense unlimited by any other provision of the Constitution relating to the indemnification of either employees or their dependents. That the word "compensation" is used in the sense of making amends for losses sustained, or the paying of an indemnity or an equivalent, so far as it is possible to do so in money value, to those dependents who have suffered such losses. And this is the settled policy of the state, binding upon all the departments thereof, and is not limited in its scope and application by the territorial boundaries of municipalities, but is coextensive with the territorial limits of the state itself, and is just as inclusive as its words purport to be, and therefore, as said in the section "binding upon all departments of the state government." That counties and municipalities are departments of the state government is well settled. *Chico High School Board v. Supervisors*, 118 Cal. 115, 50 P. 275; *Payne & Dewey v. Treadwell*, 16 Cal. 221; *San Francisco v. Canavan*, 42 Cal. 542.

We do not find any conflict in the sections of the state Constitution which we have heretofore set forth, when the words are interpreted according to their true use and meaning, but, if there were such, we think the language of section 21 of article 20 is directed to a specific subject, and has for its purpose the establishment and enforcement of a public policy of the state, and is not limited by any general language that might be found elsewhere in the same instrument, of which section 21 is a part, and especially when that general law is directed to a different subject-matter.

We therefore conclude that the making of compensation to the dependents of employees is a matter of public policy of the state, as contradistinguished from municipal affairs. The second contention of the petitioner must also be answered in the negative.

The award is affirmed.

We concur: FINCH, P. J.; HART, J.

74 Cal. App. 363

BONE v. DWYER et ux. (Civ. 2982.)

(District Court of Appeal, Third District, California. Sept. 11, 1925. Rehearing Denied with Modifications Oct. 10, 1925. Hearing Denied by Supreme Court Nov. 9, 1925.)

1. Judgment ¶712—Judgment and decree held admissible to support wife's claim to premises.

In support of wife's title and right to maintain cross-complaint for premises, judgment and decree prosecuted by wife against husband for maintenance, in which action premises were set aside for her use, and which judgment confirmed title to premises for her support, held admissible, although plaintiff was not party to such action.

2. Husband and wife ¶267(8)—Written assignment of land contract by husband held insufficient to transfer indefeasible interest to premises.

Where husband purchased lots on contract, and before completion of payment transferred his interest in contract to plaintiff, who completed payments and received escrow deed to husband, and thereafter second deed was executed to transferee, in suit to quiet title, wife not having joined in husband's transfer, under Civ. Code, § 172a, had right to maintain or defend her interest or title to premises in same condition as though transfer had not been executed; plaintiff not being entitled to hold under that portion of section 172a which protects purchaser in good faith without knowledge of marriage relation, where record title stands in husband's name.

3. Husband and wife ¶267(1)—Principle involved in transfer of community property by husband without wife's signature is similar to his attempted transfer of homestead.

Principle involved in transfer of community land or interest therein by husband without wife's signature when uncontrolled or limited by good faith and time clauses of Civ. Code, § 172a, is similar to that of his attempted transfer of homestead, which, under section 1243, must be by conveyance joined in by both husband and wife, and acknowledged by them.

4. Husband and wife ¶265—Wife has tangible and enforceable interest in community property.

Under Civ. Code, § 172a, wife's interest in community property is tangible and enforceable interest, and is not dependent on what has been defined as her expectancy therein.

5. Husband and wife ¶262(1)—Interest of husband and wife in lots presumed to be community property.

Where interest of husband and wife in lots was acquired 5 years after adding of section 172a to the Civ. Code by St. 1917, p. 829, and 19 years after relation of husband and wife was alleged to have been created, presumption follows, irrespective of testimony, that their interest in lots was community property.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Edward Bone against P. J. Dwyer and wife. Judgment for plaintiff, and defendant Elizabeth L. Dwyer appeals. Reversed.

A. H. Carpenter, of Stockton, for appellant.

Foltz, Rendon & Wallace, of Stockton, for respondent.

PLUMMER, J. On the 19th day of October, 1923, the plaintiff commenced this action to quiet title to lots numbered 162 and 172 of Burkett Acres Community, according to the official map thereof on record, etc., situate in San Joaquin county. The plaintiff had judgment and the defendant Elizabeth L. Dwyer appeals. The complaint alleges that ever since the 2d day of September, 1903, the defendants P. J. Dwyer and Elizabeth L. Dwyer have been and now are husband and wife. It appears from the record in this case that on or about the 15th day of July, 1922, an agreement of purchase and sale was entered into between Mrs. Maria E. Lindahl, a widow, the then owner of said lots, and P. J. Dwyer, one of the defendants herein, whereby it was agreed that upon payment of the sum of \$1,100, and the assuming by the purchaser of a lien upon said premises in the sum of \$1,400, created by a deed of trust theretofore executed by the owner of said lots, the said Mrs. Lindahl would convey to the said P. J. Dwyer the premises hereinbefore described; that at the time of the execution of said agreement for the purchase and sale of said premises, there was also executed and placed in escrow with one W. C. Ramsey a grant, bargain, and sale deed of said premises conveying the same by the said Mrs. Lindahl to the said Dwyer. By the terms of the agreement of sale \$500 was paid in cash and \$600 to be paid as follows: \$50 a month until the full sum of \$600 should have been paid and that upon the payment of said remaining \$600, in the manner provided for, the deed left in escrow with W. C. Ramsey was to be delivered to the defendant P. J. Dwyer. It further appears that the said P. J. Dwyer thereafter paid the further sum of \$150, leaving an unpaid balance of said purchase price of the sum of \$450. If further appears that at a subsequent time, the exact date of which does not appear in the transcript, the said P. J. Dwyer assigned and transferred his interest in said agreement to the plaintiff, Edward Bone. It does not appear from the transcript in just what form this assignment or transfer was made by the said P. J. Dwyer to the plaintiff, Edward Bone, or the consideration, if any, paid therefor, but it does appear without any contradiction that his wife, Elizabeth L. Dwyer, was not a party thereto and did not join in any transfer, assignment, or conveyance of said contract or of any interest therein, or of any inter-

est in and to the real estate hereinbefore described. After the assignment to him by the defendant P. J. Dwyer, the plaintiff completed the payment of the sum of \$450 to Maria E. Lindahl, whereupon the deed delivered in escrow, purporting to convey the described premises to the defendant P. J. Dwyer was delivered to the plaintiff, or rather to the plaintiff's wife, and was by the plaintiff filed for record in the county recorder's office of the county of San Joaquin on the 15th day of August, 1923. This deed was recorded by the plaintiff under the impression that it conveyed the premises to himself. Thereafter, and upon the discovery that the grantee named in said deed was the defendant P. J. Dwyer, a subsequent deed was executed by the said Maria E. Lindahl purporting to convey the same premises to the plaintiff, Edward Bone, and this deed was recorded at the request of the plaintiff in the office of the county recorder of San Joaquin on the 11th day of October, 1923. After these transactions had been had, the plaintiff instituted this action to quiet his title thereto and cancel the deed executed by Maria E. Lindahl to the defendant P. J. Dwyer, the court entered a decree and judgment to that effect.

[1, 2] Upon the trial of the action the defendant P. J. Dwyer disclaimed all interest in the premises, the defendant Elizabeth L. Dwyer, by answer and cross-complaint, alleged ownership in and to the said premises and prayed a judgment and decree of the court establishing her rights and title therein. Upon the trial of the action the defendant, in support of her title and the right to maintain her action to said premises, sought to introduce a judgment and decree of the superior court of San Joaquin county prosecuted by herself against her husband, P. J. Dwyer, for maintenance, and in which action the said premises had been set aside absolutely for the uses and purposes of said Elizabeth L. Dwyer, and which judgment purported to grant and confirm to said Elizabeth L. Dwyer the title to said premises for her maintenance and support, subject only to the deed of trust heretofore referred to in this opinion. The admission of this judgment and decree in evidence was objected to on the ground that the plaintiff was not a party to the action. The court sustained this objection. The judgment and decree in question was clearly admissible for the purpose of supporting the claim of Elizabeth L. Dwyer to said premises, and also in support of her title to maintain an action for the possession thereof, and to have her title thereto, if any, quieted. The theory upon which the action was tried, as indicated by the statement of counsel for plaintiff and by the findings and judgment of the court, was that the defendant Elizabeth L. Dwyer had no claim to said premises other than by

first showing that the defendant P. J. Dwyer had obtained a title thereto, or owned an interest therein, and that, as he had assigned all of his interest, there was nothing upon which the defendant Elizabeth L. Dwyer could predicate any claim or title to said premises. In following this theory counsel and court appear to have overlooked entirely the provisions of section 172a of the Civil Code. That section was added by the statutes of 1917 (St. 1917, p. 829), and at the time of the transactions hereinbefore had, and prior to the amendment thereof in 1925 (St. 1925, p. 84), which is immaterial here, is as follows:

"The husband has the management and control of the community real property but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or incumbered; provided, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or incumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate."

By the terms of that section, which, as applied both to the pleadings and the facts in this case, must be read as though there were no proviso clause therein, or limitation of time as to the maintenance of an action by the appellant, the original conveyance or transfer by the defendant P. J. Dwyer to the plaintiff, Edward Bone, in whatever form or words it was made, or purported to be made, was wholly insufficient to assign, transfer, or convey to the plaintiff an indefeasible interest in and to said contract, or the real property therein described. Under the facts of this case, the wife, not having joined her husband in the execution of the transfer and conveyance, under the terms of the section to which we have referred, left the right of the wife to maintain or defend her interest or title to the premises in the same condition as though the instrument had not been executed. It appears from the testimony that the instrument by which it was attempted to convey the title to the premises by P. J. Dwyer to the plaintiff, Edward Bone, has been destroyed, and the testimony in relation to its terms is so indefinite that nothing further can be concluded than that there was a written agreement concerning the purchase and sale of said premises, the execution of a deed to be left in escrow, and a subsequent attempted conveyance or assignment to the plaintiff by the defendant P. J. Dwyer. This agreement was not recorded, and no knowledge of the attempted transfer or conveyance or assignment executed by the defendant P.

J. Dwyer was ever brought home to the knowledge of the defendant Elizabeth L. Dwyer. It further appears from the testimony that all the right, title, and interest of the defendant P. J. Dwyer and Elizabeth L. Dwyer in and to said contract, and in and to the said premises, was community property. The plaintiff's complaint also alleged the fact of the existence of the marriage relation between P. J. Dwyer and Elizabeth L. Dwyer as dating from the year 1903. There is nothing in the record which shows that the plaintiff is entitled to hold under that portion of section 172a, Civil Code, which protects a purchaser or incumbrancer, in good faith, without knowledge of the marriage relation, where the record title to the premises stands in the name of the husband. The pleadings negative such claim. It is thus apparent that this case comes within the terms of section 172a, Civil Code, as though it ended with the word "provided." The case of *Rice v. McCarthy* (Cal. App.) 239 P. 56, had to do with the transfer of real property, where the good-faith clause of said section was involved, and in such cases the section explicitly provides that the lease, contract, mortgage, or deed shall be presumed to be valid. In the case at bar, there is absolutely no such presumption mentioned in the section as applied to the facts contained in the record. The law applicable to the facts of this case, as set forth in section 172a of the Civil Code, is:

"The husband has the management and control of the community real property but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or incumbered."

[3] The principle involved in the transfer of community real property, or of any interest therein, by the husband, without the signature of the wife when uncontrolled or limited by the good-faith and time clauses of the section, is similar to that involved in the attempted transfer by the husband of property covered by a homestead. Section 1243, Civil Code, provides the manner in which such property may be conveyed. The husband and wife must both join in the conveyance and must both acknowledge the same. *MacLeod v. Moran*, 153 Cal. 97, 94 P. 604, also reported on second appeal in 11 Cal. App. 622, 105 P. 932. Prior to its amendment the state of Idaho had a statute (Comp. Stats. § 4666), which provided that a transfer or assignment of any interest in community real estate occupied as a home or residence must be signed and acknowledged by both husband and wife in order to convey the same. That an instrument wanting the signature or acknowledgment of the wife conveys no such interest was so held in the following cases: *McKinney v. Merritt*, 35 Idaho, 600, 208 P. 244; *Kohny v.*

Dunbar, 21 Idaho, 258, 121 P. 544, 39 L. R. A. (N. S.) 1107, Ann. Cas. 1913D, 492; *Myers v. Eby*, 33 Idaho, 266, 193 P. 77, 12 A. L. R. 535.

Since the decision rendered in the above cases, section 4666 of the Compiled Statutes of Idaho 1919, has been amended to read as follows:

"The husband has the management and control of the community property * * * but he cannot sell, convey or incumber the community real estate unless the wife join with him in executing and acknowledging the deed or other instrument of conveyance, by which the real estate is sold, conveyed or incumbered."

[4] Following the terms of the statute as amended, the Supreme Court, in *Hart v. Turner*, 39 Idaho, 50, 226 P. 282, decision rendered May 5, 1924, has held a contract for the sale of community real property not signed and acknowledged by both husband and wife is invalid. The wording of the Idaho statute, as amended, is identical with the substance of that portion of section 172a of the Civil Code applicable to this cause. It is true that the Supreme Court of Idaho has held that the wife has an ownership in the community property, while in this state it is held that the interest of the wife in such property is in the nature of an expectancy, but this definition of the wife's interest cannot be held to limit the effect, or bar the right of the wife to defend an action wherein her rights to the premises are called in question, or to maintain an action for the enforcement of the same. Any other interpretation would read section 172a, Civil Code, out of the Codes. Whatever the wife's interest may be, we hold that under the section it is a tangible, enforceable interest, and is not dependent upon the maturity of what has been defined as her expectancy in community property.

The good-faith provision and the time limit set forth in section 172a, Civil Code, not being involved in this action, it is immaterial to a determination herein whether the last clause be read as evidencing an intent of the Legislature that all cases involving a transfer of community real property by an instrument unsigned by the wife shall be held as voidable only, or whether it is only a limit of time in which the wife may maintain her rights. Whether interpreted as meaning void ab initio or voidable only, the testimony set forth in the record shows that the appellant was entitled to findings in her favor.

[5] It further appears from the record that the interest of the defendants in and to said lots was acquired approximately 5 years after the adding of section 172a of the Civil Code, and also approximately 19 years after the relation of husband and wife is alleged to have been created, and therefore the presumption necessarily follows, irrespective of the testimony, that the interest of the de-

pendants in and to the two lots was community property. It may be added that there was nothing in the record to show that the community property which entered into the part payment of the lots made by the defendant Dwyer was acquired by him prior to the adoption of said section 172a, Civil Code. It follows from what we have said that the findings of the court that the plaintiff was the owner of the premises involved in said action, and that the defendant Elizabeth L. Dwyer had no right, title, claim, or interest therein, are not supported by the evidence.

The judgment of the trial court must be and the same is hereby reversed.

The petition for rehearing is denied.

We concur: FINCH, P. J.; HART, J.

74 Cal. App. 402

PEOPLE v. JANSSEN et al. (Cr. 1222.)

(District Court of Appeal, Second District, Division 2, California. Sept. 21, 1925.)

1. Criminal law ☞511(2)—Evidence corroborating accomplice must tend to connect defendant with offense charged.

Evidence, required by Pen. Code, § 1111, to corroborate accomplices' testimony, must of itself, without aid of accomplices' testimony, connect or tend to connect defendant with commission of offense charged.

2. Criminal law ☞511(2)—Evidence corroborating accomplice must do more than raise grave suspicion.

While evidence corroborating accomplice must tend at least slightly to implicate defendant in commission of crime, it must do more than merely raise grave suspicion, and conviction on proof of circumstances consistent with accused's innocence, when taken separately or collectively, will be set aside.

3. Criminal law ☞511(4) — Proof of opportunity to commit crime insufficient corroboration of accomplice.

Proof of opportunity to commit crime is insufficient corroboration of accomplice.

4. Criminal law ☞511(1)—Testimony of accomplices held insufficiently corroborated to sustain conviction.

Evidence held insufficient to corroborate testimony of accomplices and sustain conviction of extortion.

5. Criminal law ☞1159(5)—Conviction on accomplices' testimony, not substantially corroborated by other evidence, cannot stand.

While appellate court will not disturb verdict of jury, whose peculiar province it is to weigh evidence and determine credibility of witnesses, where there is substantial conflict in evidence, judicial department may not ignore rule established by Legislature in Pen. Code, § 1111, that accomplices' testimony must be substantially corroborated to justify conviction.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

H. S. Janssen and J. D. Joiner were convicted of extortion, and defendant Joiner appeals. Reversed.

W. E. Abraham, of Brawley, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. The appellant, Joiner, and one Janssen were jointly charged with the crime of extortion. Joiner, who, with his codefendant, was found guilty as charged, appeals from the judgment of conviction and from an order denying his motion for a new trial.

The sole point upon which appellant relies for a reversal is that the only evidence tending to connect him with the crime was that of three accomplices, D. E. Edwards, Jim Chadwick, and G. W. Tucker, whose testimony was not corroborated as required by section 1111 of the Penal Code. That section, so far as applicable, reads:

"A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

The facts attending the immediate commission of the crime, as distinguished from appellant's alleged connection therewith, are practically undisputed and are substantially these: About midnight of September 1, 1924, Edwards, Chadwick, and Tucker went to the house of a Japanese who was living on a ranch about 4½ miles from the town of Brawley, in Imperial county, which had been leased to him by the defendant Janssen. Representing themselves to be officers who had come to search the place for contraband liquor, two of the three men drew pistols and pointed them at the Japanese. The three then demanded that the Japanese take them to the place where the liquor was hid, telling him that they would take the liquor to headquarters, but that, if he would give to each of them the sum of \$200, they would release him. Overcome by fear, the Japanese gave the men a watch and \$100 in cash, promising to raise the balance the following day. In addition to the money and the watch, the pseudo officers took away about 30 gallons of whisky from a still which they found under a haystack on the place. On September 9, 1924, Edwards, Chadwick, and Tucker were arrested. Later they were charged with the crime of extortion. They pleaded guilty, and were serving their sentences at the time of the trial of Janssen and Joiner.

It is not claimed that either appellant or Janssen accompanied Edwards, Chadwick, and Tucker to the ranch of the Japanese. The three who admitted their complicity in the perpetration of the extortion testified that early in the evening of September 1st, while seated in an automobile on one of the public streets of Brawley, Janssen proposed to them that they be deputized to make a raid upon the still; that, during this conversation, Joiner, who was a deputy marshal of Brawley, was standing on the street not far away; that Janssen called to Joiner to come over; that the latter did as requested, and was introduced by Janssen to the three, who later confessed their part in the extortion; that, shortly after he was thus introduced to the three men, Joiner said he would deputize them to raid the still; that soon after this Janssen and Joiner departed, and, presently returning, Joiner gave the three alleged accomplices two guns and a badge; that Joiner then left the spot where the automobile was standing; and that later Edwards, Chadwick and Tucker "staged the raid," as already narrated. A badge was found on Chadwick's sweater after his arrest. None of the three confessed culprits saw Joiner again until about the time of their arrest a week later. The foregoing is the sum and substance of the testimony given by the three men respecting Joiner's connection with the crime.

The only evidence which, independently of that given by the three alleged accomplices, tends in anywise to connect Joiner with the commission of the crime is substantially as follows: Upon three different occasions during the month preceding the extortion Janssen endeavored to persuade one William O'Brien, the constable of Brawley township, to join him in a pretended raid on a still which Janssen informed O'Brien was located on a ranch which he had leased to a Japanese. Through the information thus imparted to him, O'Brien, by searching the records of the county recorder's office, was able to locate the land on which the still was situated. Late in the afternoon of the day following the "raid" by Edwards, Chadwick, and Tucker, O'Brien, accompanied by a deputy marshal of Brawley, the chief of police of that town, the undersheriff of Imperial county, and the defendant Joiner, left Brawley in an automobile and rode to the ranch for the purpose of conducting a search for the still. At that time O'Brien knew nothing of the exploit of Edwards, Chadwick, and Tucker on the preceding night. He testified that he did not learn of it until 6 days later. Shortly before the officers departed from Brawley to search for the still, Joiner, who was then in the city hall, overheard O'Brien and the others talking about making a raid, and asked O'Brien if he might accompany them. Permission to do so was given him. Thus it was that Joiner came to be one of

the party led by O'Brien to the home of the Japanese. Arriving at the ranch, three of the officers left the automobile and conducted a search for the still. Joiner and O'Brien remained seated in the car. After a lapse of some time, Joiner turned to O'Brien and said, "I expect I ought to have gone up there; I am a bear at that underground stuff." O'Brien testified that up to that time he had not told Joiner that the still on the premises then being raided was underground. However, the officers had taken with them an iron rod known as a "booze prong" or "joy prong," used by officers when searching for liquor underground.

On the 9th of September, after the arrest of Edwards, and while he was being taken to jail, Joiner was seen talking to Janssen on one of the streets of Brawley. O'Brien testified that he saw the two talking to each other several times just prior to the arrest of Edwards, and also several times on the same evening following the arrest.

The badge which was found on Chadwick's sweater following his arrest was not of the kind generally used in Imperial county by peace officers. The sheriff of Cochise county, Ariz., testified that Joiner formerly lived in that county, where he had been a deputy sheriff, that at that time various kinds of badges were used by the deputy sheriffs of Cochise county, and that he had seen in that county badges similar to the one found on Chadwick's sweater. An examination of the badge with a magnifying glass disclosed on the reverse side the letter "J," scratched on the metal near the top, and also the letters "NM" at the bottom.

The chief of police of Brawley testified that at the time when Edwards, Chadwick, and Tucker extorted the money from the Japanese he kept extra "guns" in a drawer of his desk in his office at the city hall, and that Joiner had a key to the office. The witness further testified, however, that he at no time missed any of the weapons.

[1] The corroborative evidence necessary to meet the requirements of section 1111 of the Penal Code must of itself, and without the aid of the testimony of the accomplice, connect or tend to connect the defendant with the commission of the offense charged. *People v. Robbins*, 171 Cal. 466, 154 P. 317. In *People v. Morton*, 139 Cal. 724, 73 P. 611, the Supreme Court quoted with approval from *Welden v. State*, 10 Tex. App. 400, as follows:

"We suggest this mode as a proper test: Eliminate from the case the evidence of the accomplice, and then examine the evidence of the other witness or witnesses with the view to ascertain if there be inculpatory evidence—evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no inculpatory evidence, there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him."

And again, on the same page, our Supreme Court says:

"In New York, under the same Code provision (Code Crim. Proc. § 399), it was said: 'The corroboration, however strong in all other respects, must point to the connection of the defendant with the commission of the crime to be of any avail.' *People v. Ryland*, 28 Hun. [N. Y.] 568, 570."

[2] While the corroborative evidence must tend in some slight degree, at least, to implicate the defendant in the commission of the crime, more is required of it than merely to raise a grave suspicion. The rule as to the extent of corroborating evidence necessary to support the testimony of an accomplice is well stated in 12 Cyc. at page 456, quoted with approval by our Supreme Court in *People v. Robbins*, supra:

"It is necessary that the evidence corroborating an accomplice shall connect or tend to connect the defendant with the commission of the crime. Corroborative evidence is insufficient where it merely casts a grave suspicion upon the accused. It must not only show the commission of the offense and the circumstances thereof, but must also implicate the accused in it. * * * But where the circumstances when proved, taken separately or collectively, are consistent with the innocence of the accused, there is no corroboration, and a verdict of conviction thereon will be set aside."

In that case the court further said (171 Cal. 471 [154 P. 319]):

"* * * The corroborative evidence required to convict the defendant in addition to that of the accomplice is not sufficient if it merely tends to raise a suspicion of the guilt of the accused. * * * Mere suspicion, as has been shown, will not suffice as corroborative evidence; and where the evidence relied upon as corroborative of the accomplice is, as in the present case, only such as to raise a suspicion of the guilt of the defendant, the verdict must be set aside."

[3] Nor is proof of opportunity to commit the crime of itself sufficient corroboration. "The fact that the defendant had an opportunity to commit it," says the court in *People v. Robbins* (p. 470 [154 P. 319]), "is of no particular significance as far as corroboration is concerned. Of course, the opportunity of the defendant to commit the particular crime for which he is on trial may always be shown in connection with other facts to establish his guilt; but we know of no rule which holds that mere opportunity to commit a crime is an incriminating corroborating circumstance." Again, on page 476 (154 P. 321):

"The proofs of mere suspicious circumstances and of opportunity to commit a crime are never sufficient to justify a conviction upon the testimony of an accomplice. *People v. Thompson*, 50 Cal. 480; *People v. Smith*, 98 Cal. 218,

33 P. 58; *People v. Koenig*, 99 Cal. 574, 576, 34 P. 238; *State v. Willis*, 9 Iowa, 582; *People v. Morton*, 139 Cal. 725, 73 P. 609."

[4] Tested by these well-established rules, the conclusion is irresistible that the circumstances narrated by those witnesses who had no connection with the crime are not sufficient, singly or collectively, to constitute that corroboration which in the eyes of the law will support a verdict founded primarily upon the testimony of accomplices. The fact that appellant, a peace officer, was seen upon several occasions upon the streets of Brawley in conversation with Janssen shortly prior to and after the "raid" on the still by the three confessed culprits hardly rises to the dignity of a merely suspicious circumstance. It has no inculpatory value whatever.

Nor can we perceive any inculpatory evidence in the circumstance that appellant, when seated in the automobile with O'Brien while the other officers were conducting a search for the still, exclaimed, "I expect I ought to have gone up there; I am a bear at that underground stuff." Because O'Brien testified that he had not told appellant that the still was underground, respondent argues that at the time when appellant made this statement he could not have known that the officers were searching for an underground still unless he previously had learned from Janssen or from some one of the three confessed culprits that the still operated by the Japanese was concealed underground; wherefore it is argued that the exclamation was the unguarded outburst of a guilty knowledge. The argument is inconclusive. Even though O'Brien did not tell appellant that the expedition was to search for an underground still, the other officers who accompanied appellant and O'Brien doubtless had been informed of the nature of the proposed search. It is not at all improbable that from remarks dropped by some one of the officers other than O'Brien, while the party was on its way to the ranch, appellant concluded that the still of which they were in quest was one which was concealed underground. Moreover, as a peace officer charged with the duty to ferret out crime, appellant doubtless knew the purpose of the "booze prong" which the officers brought with them, and from the circumstance of its presence he may well have concluded that the search was to be made for an underground still. In short, if we import to the exclamation made by appellant in the presence of O'Brien the greatest possible significance, it does no more than raise a mere suspicion. Indeed, it seems to be as consistent with innocence as with guilt.

The circumstance that the badge found on Chadwick's sweater was of a kind similar to those which were used in Cochise county when appellant was a deputy sheriff in that county no more tends to connect him with the crime for which he was on trial than it would

to raise a suspicion against hundreds of other persons. There is nothing in the evidence to indicate that badges of the kind found on Chadwick were used only in Cochise county, Ariz. For aught that appears to the contrary, they may have been in use in many parts of the United States where appellant never resided. In fact, the letters "NM," scratched on the reverse side of the badge, have some tendency to show that the badge had been used in and was brought from the state of New Mexico—a state in which appellant has not been shown ever to have resided, and where it may have been accessible to innumerable persons. The fact that the letter "J" was etched on the reverse side of the badge has no inculpatory significance. It does not tend to connect appellant with the crime. The star may have been the property of any one of a host of persons the initial letter of whose names is "J." It may have belonged, for example, to any one of the multitude who constitute the Jones family. See *People v. Ames*, 39 Cal. 403, and particularly the remarks of the court on page 405.

No significance inimical to the presumption of appellant's innocence can be attached to the fact that he possessed a key to the office in which the chief of police kept extra "guns." There is no pretense that any of these guns was ever taken by appellant. None was ever missed. At best this evidence only shows that appellant had an opportunity to take one or more of such weapons for the purpose of supplying the three accomplices with firearms. But the fact that appellant had an opportunity to commit the crime is of no particular significance, so far as corroboration is concerned.

[5] For the foregoing reasons we are impelled to the conclusion that the evidence is insufficient to support the verdict. It is, of course, true that, where there is a substantial conflict in the evidence, this court will not disturb the verdict of the jury, whose peculiar province it is to weigh the evidence and to determine the credibility of the witnesses. But, in the present instance, the evidence in support of the testimony of the accomplices is so attenuated that it does not rise to the dignity of corroboration. The Legislature, acting within the scope of its authority, has provided that, to justify the conviction of a defendant, there must be substantial corroboration of the testimony of an accomplice. The lawmaking body doubtless had a good reason for this rule of evidence, and based it on what it conceived to be a sound public policy. The judicial department may not ignore the rule without unwarrantably invading the rights of the accused.

The judgment and the order denying a new trial are reversed.

We concur: WORKS, J.; CRAIG, J.

74 Cal. App. 401

PEOPLE v. LABORWITS. (Cr. 1221.)

(District Court of Appeal, Second District, Division 1, California. Sept. 21, 1925.)

Criminal law §982, 1147—Denial of leave to file application for probation not reviewable.

Under Pen. Code, § 1203, admission of one convicted of crime to probation rests entirely in trial court's discretion, and his denial of leave to file application therefor cannot be reviewed by appellate court.

Appeal from Superior Court, Los Angeles County, Edwin F. Hahn, Judge.

Morris Laborwits pleaded guilty of forgery, and, before judgment, asked leave to file application for probation. From order denying leave, he appeals. Affirmed.

Stanley Visel, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CURTIS, J. The indictment against appellant contained six counts; each charging him with the crime of forgery. Appellant pleaded guilty to the charge contained in count 1, and the other five counts were ordered off the calendar. Thereupon, and before judgment, appellant asked leave to file an application for probation, which was denied by the court.

The only point made by appellant on this appeal is that there was an abuse of the trial court's discretion in refusing to allow the defendant the privilege of filing an application for probation. A similar question was before the appellate court in the case of *People v. Dunlop*, 27 Cal. App. 460, 150 P. 389, wherein the court held that the action of the trial court in refusing to hear such an application was not reviewable on appeal. The court, on page 470 (150 P. 393) of its opinion, declared the law as follows:

"The action of the court in refusing to entertain an application by the defendant for probation after his conviction or of taking testimony or the report of the probation officer of the court with a view to admitting the accused to probation cannot be reviewed. The matter of admitting a person convicted of crime to probation rests entirely in the discretion of the trial court, as does likewise the question whether any proceedings shall be entertained by the court to that end. Pen. Code, § 1203."

We are in accord with the appellate court in its construction of section 1203 of the Penal Code, and upon the authority of this case the judgment is affirmed.

I concur: CONREY, P. J.

197 Cal. 306

PEOPLE v. GILBERG. (Cr. 2793.)(Supreme Court of California. Oct. 29, 1925.
Rehearing Denied Nov. 27, 1925.)**1. Criminal law §48—"Shell shock" defined.**

"Shell shock" is not a distinct type of nervous disorder, but is a condition produced on certain organisms by sudden fear, or by highly exciting causes; it is a form of neurosis; it is not settled, general insanity, but a functional nervous disease, and not due to organic changes.

2. Criminal law §625—Existence of "doubt" as to sanity within statute, authorizing investigation of accused's sanity, defined.

Existence of a doubt as to the sanity of accused within Pen. Code, § 1368, which authorizes the court pending the action to submit accused's sanity to jury when doubt arises as to whether accused is sane, means any doubt that may be created in mind of trial court, arising from a consideration of all the facts and circumstances which situation may disclose.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Doubt.]

3. Criminal law §625—"Doubt" as to accused's sanity, must be founded on substantial grounds to justify dismissal of jury or suspension of trial to determine question of sanity.

Doubt of trial court as to accused's sanity, within Pen. Code, § 1368, must be founded on substantial grounds to justify dismissal of jury or suspension of trial to determine question of accused's sanity; that is, there must exist reason to believe that claim of insanity made on behalf of accused is genuine and not simulated.

4. Criminal law §48—When Insanity is available as a defense stated.

For insanity to be available as a defense to crime, it must be shown by a preponderance of evidence that accused did not know the nature or the quality of the act which he committed, or, if he did know, that he did not know that it was wrong to commit it.

5. Criminal law §51—Moral insanity does not excuse commission of crime.

Moral insanity, as distinguished from mental derangement, does not excuse commission of crime.

6. Criminal law §331—Burden of proof is on accused to show insanity.

Burden of proof is on accused or person asserting his insanity to establish its existence by preponderance of evidence.

7. Criminal law §570(1)—Insanity held not shown.

Accused *held* to have failed to meet burden imposed on him to establish his alleged insanity.

8. Criminal law §625—Whether mental condition of accused was assumed or real held province of trial court to determine.

Whether mental condition of accused, as exhibited by him during trial, was assumed, as claimed by state expert witnesses, or real, as claimed by defense, *held* province of trial court to determine, in exercise of sound discretion.

9. Criminal law §625—Refusal of trial court to submit specially to jury issue of accused's insanity held not abuse of discretion.

Refusal of trial court to submit specially to jury issue of accused's insanity, within Pen. Code, § 1368, no motion for such submission having been made, *held* not abuse of discretion.

10. Criminal law §625—Whether doubt sufficient to require trial court to submit issue of accused's insanity is question resting largely within discretion of trial court.

Question whether doubt sufficient to require trial court to submit issue of accused's insanity, pursuant to Pen. Code, § 1368, is one resting largely within discretion of trial court, similar to discretion conferred by Code Civ. Proc. § 1870, subd. 10, in passing upon competency of witnesses.

11. Criminal law §570(3)—Judgment committing person to state hospital for care and treatment of insane is not final upon question of criminal responsibility.

Judgment committing person to state hospital for care and treatment of insane is not final and conclusive upon question of criminal responsibility or the ability of a person so committed to conduct his defense in a rational manner.

12. Criminal law §981(1)—Insanity, not permanent or habitual, affords no presumption of its existence two weeks prior to its discovery.

Where insanity of defendant, as discovered at state hospital two weeks after his trial, was not permanent or habitual, no presumption could be indulged that it had an existence two

weeks prior to defendant's commitment to the hospital.

13. Criminal law §981(1)—Trial court's conclusion, before pronouncing judgment, that accused was then sane, held not abuse of discretion.

Trial court's conclusion, before pronouncing judgment on accused, returned to court as sane, after confinement less than 30 days in state hospital, that accused was then sane, based in part upon replies of accused to inquiries made by court pursuant to Pen. Code, § 1192a, *held* not abuse of discretion.

In Bank.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Samuel Gilberg was convicted of having committed a lewd and lascivious act on a female child, in violation of Pen. Code, § 288, and he appeals. Affirmed.

E. Guy Ryker, of Oakland, for appellant.

U. S. Webb, Atty. Gen., Wm. F. Cleary, Deputy Atty. Gen., and Earle Warren, Dist. Atty., and Chas. Wade Snook and J. F. Coakley, Deputy Dist. Attys., all of Oakland, for the People.

SEAWELL, J. The defendant was charged by an information filed in the superior court of Alameda county, by the district attorney of said county, with the crime of committing a lewd and lascivious act upon the body of a female child of the age of 11 years, who is specifically described in said information, in violation of section 288, Penal Code, defining crimes against children. Upon a second trial he was convicted of the offense charged in the information. An appeal was taken from the judgment of conviction and an order denying a new trial to the District Court of Appeal, First District, Division 1, and the judgment and order were reversed by that court on the ground that the trial court had abused the discretion vested in it by omitting to suspend the trial and submit the issue of the defendant's sanity to a jury upon the claim made by defendant's counsel that a doubt had arisen as to the sanity of the defendant. A petition having been filed by the Attorney General for a hearing by this court, an order was made transferring said cause to this court for hearing and determination. The only questions presented or argued upon the appeal go to the mental condition of the defendant both at the time he committed said offense and at the time of the trial of said cause. The section of the Penal Code under which defendant claims that it became the imperative duty of the trial court to have halted the trial and submitted the issue of sanity to a jury provides as follows:

"If at any time during the pendency of an action up to and including the time when defendant is brought up for judgment on conviction a doubt arises as to the sanity of the defendant,

the court must order the question as to his sanity to be submitted to a jury; and the trial or the pronouncing of the judgment must be suspended until the question is determined by their verdict, and the trial jury may be discharged or retained, according to the discretion of the court, during the pendency of the issue of insanity." Pen. Code, § 1368.

The judge who presided at the second trial also presided at the preceding trial, which resulted in a disagreement of the jury as to defendant's guilt and he was therefore given ample time and opportunity to observe the conduct and appearance of the defendant through two trials and upon other occasions when the accused was before him on matters preliminary and incidental to the crime charged. Besides, the record indicates that the defendant became a witness in his own behalf at the first trial, and related his life history, and furnished all information that was deemed by counsel necessary to form a basis for the claim that the accused was insane at the time he committed the crime. It does not appear that any suggestion was made during the first trial that the defendant was then incapacitated from making his defense. His mental state at the time of the second trial depended upon his mental condition existing at that particular time. The court had been made acquainted with the appearance and the history of his prior mental condition from a number of sources. The conduct and manner of the defendant when upon the witness stand, and which gave occasion for the request that a recess be taken and the trial continued to give counsel an opportunity to show that the defendant, as put by him, was in "no mental shape to go ahead with the trial," was before the court for scrutiny.

[1] The defendant had served first in the Canadian and latterly in the American army in the World War. He received no battlefield wounds, but claims to have suffered an injury by falling into a "funk-hole." It appears that he spent considerable time during his enlistment, both overseas and in this country, as a patient in hospitals, under treatment for "shell shock." "Shell shock" is not a distinct type of nervous disorder, but a condition produced upon certain organisms by sudden fear or by highly exciting causes. It is a form of neurosis. It is not settled, general insanity, but, according to the testimony of the expert offered by the defense, a functional nervous disease, and not due to organic changes.

The defendant was partially examined as a witness on Friday, April 11, 1924, and withdrawn to make way for expert evidence as to his present mental condition. The request for a recess of court was made on the following Monday. When the defendant was first upon the stand his answers to questions were responsive and coherent and his memory fairly good. It was after experts had been called

on his behalf, who related in his presence with minute detail the symptoms of "shell shock" and epilepsy and the effect of each upon the nervous organism, as manifested by the external actions of those thus affected, that the defendant, upon resuming the witness stand, seemed to pass from a rational state into a state of faulty memory and finally into a state of apparent unconsciousness and collapse which caused a temporary cessation of the trial.

[2, 3] The existence of a doubt as to the sanity of the defendant means, of course, any doubt that may be created in the mind of the trial court arising from a consideration of all the facts and circumstances which the situation may disclose, and he may, upon his own motion, in the exercise of a sound discretion, submit the question of the defendant's sanity to the determination of a jury. Such a doubt must be supported by facts and circumstances of a substantial character. This right does not arise merely because the defendant asserts insanity, however baseless the claim may be. To justify the dismissal of the jury or the suspension of a trial the court must entertain a doubt founded upon substantial grounds. In other words, there must exist reason to believe that the claim of insanity made on behalf of the accused is genuine and not simulated as a means of defeating or delaying the law's penalties in cases where all other means of evading punishment would seem hopeless. *People v. Fountain*, 170 Cal. 460, 150 P. 341, is in point. There a motion was made for a continuance, coupled with a request to call a jury to try the sanity of the defendant, which was noticed to be heard on the day set for trial. The motion and request was also based on an affidavit of one of the counsel for the defendant that he had conversed with the defendant for an hour on each of two occasions, and he believed him to be insane, and that counsel was informed that the defendant was then an escapee from an asylum in the state of Iowa. The motion was denied. This court, in considering the meaning of section 1368, Penal Code, and its application to the question of the existence of "a doubt" touching the insanity of the accused, said:

"The doubt referred to in section 1368 of the Penal Code, upon the existence of which a trial of the present sanity of a defendant must be had is a doubt arising in the mind of the court having the defendant in charge. *People v. Hettick*, 126 Cal. 425 (58 P. 918). Counsel for appellant assume that a doubt of the sanity of defendant must legally have been engendered in the mind of the court on the affidavit of counsel expressing his belief that defendant was then insane, coupled with the further averment of the escape of defendant from an asylum in Iowa to which he had been committed some 28 years before. But the court was not constrained to entertain this doubt simply because counsel entertained such a belief proceeding from some conversations with defendant or the suggestion

of a previous commitment and escape. All that was presented on the hearing of the motion was this affidavit of counsel. There was no evidence, oral or documentary, introduced on the subject. But opposed to these matters stated in the affidavit of counsel for defendant, as is said in *People v. Kirby*, 15 Cal. App. 264-269 (114 P. 794, 796): 'It is fair to assume that the trial court had ample opportunity to, and did, as was its duty, observe and note the defendant's mental condition from time to time, and in particular on the date when his present insanity was suggested. The knowledge thus acquired may have contributed largely toward rebutting any possible inference of present legal insanity which might have been deduced from the facts stated in the affidavit. Section 1368 of the Penal Code contemplates that the doubt referred to therein must arise in the mind of the court having a defendant in charge (*People v. Hettick*, 126 Cal. 425 [58 P. 918]; *Webber v. Commonwealth*, 119 Pa. 223 [13 A. 427, 4 Am. St. Rep. 634]); and in the absence of such a doubt the court is not required to submit the question of the defendant's present insanity to a jury in advance of the trial (*People v. Geiger*, 116 Cal. 440 [48 P. 389]).'

See, also, *People v. Keyes*, 178 Cal. 794, 175 P. 6.

A denial of the motion and request was held not to be erroneous. The facts of that case presented stronger reasons for the submission of the issue of defendant's sanity to a jury than are to be found in the instant case. Here, no specific request was made to submit the issue of defendant's sanity to a jury, and the motion for a continuance came after the defendant had put in a part of his case. No affidavit was here made or presented by counsel as in the case above cited to the effect that the defendant, in the opinion of counsel, was insane, or that counsel was unable to converse with his client or obtain from him information necessary to the presentation of his defense or to otherwise guard his rights.

The facts of the case necessary to an understanding of the points presented, may be briefly stated: Mrs. Eva Foley, a widow and the mother of the girl upon whom the offense was committed, resided at San Leandro, Alameda county. Three daughters resided with her. The defendant, who was about 30 years of age, married the eldest daughter when she was of the age of about 16 years. Shortly after marriage, he and his wife made their home with the mother of his wife. A separate room was assigned to them. The other children shared bedroom space with the mother. The daughter upon whom the offense was committed slept alone on a cot placed near the door, which opened from the bedroom into a hallway. The defendant, on the early morning of November 30, 1923, at about the hour of 4 o'clock, left the room which he, his wife, and his infant child, of the age of about 2 months, were occupying, entered the room in which the 11 year old

child was sleeping, and, without awakening the mother or any other member of the family, committed a lewd and lascivious act upon the body of said female child.

That the defendant committed the offense charged there seems to be no serious dispute. He was accused by the mother, to whom the child in a trembling and frightened condition made immediate complaint. A warrant was issued for his arrest within a few hours after the commission of the offense, and he eluded the officer by concealing himself in the basement of his mother-in-law's house. Knowing that the officer was in search of him, he attempted to persuade the mother of the child to have the charge which had been lodged against him dismissed. He admitted his indecent conduct upon the body of the child to both the mother and the city marshal of San Leandro. In addition thereto, the linen upon which the child was sleeping was examined by a bacteriologist, and human male spermatozoa stains were found upon the sheets. The commission by the defendant of the lewd and lascivious act, as charged, was established by the evidence beyond all reasonable doubt.

[4] It must be accepted as a fact, found by the jury, that the defendant was responsible to the law for his act. There is absolutely no substantial evidence in the record that even tends to show that the defendant was affected by any kind or degree of insanity which the law recognizes as an excuse for the commission of interdicted acts, either at the time of, or prior to, the commission of the crime. For insanity to be available as a defense to crime it must be shown by a preponderance of the evidence that the accused did not know the nature or the quality of the act which he committed, or, if he did know the nature and quality of the act, that he did not know that it was wrong to commit it. The kind and degree of insanity available as a defense to crime has many times been defined by the decisions of this court. Before it may be available as a defense—

"It must appear that the defendant, when the act was committed, was so deranged and diseased mentally that he was not conscious of the wrongful nature of the act committed. If he has reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, knowledge and consciousness that what he is doing is wrong and criminal and will subject him to punishment, he must be held responsible for his conduct. Although he may be laboring under partial insanity—as, for instance, suffering from some insane delusion or hallucination—still if he understands the nature and character of his action and its consequences—if he has knowledge that it is wrong and criminal, and that if he does the act he will do wrong, such partial insanity or the existence of such delusion or hallucination is not sufficient to relieve him from responsibility for his criminal acts." *People v. Willard*, 150 Cal. 543, 89 P. 124; *People v. McCarthy*, 115 Cal. 255, 46 P. 1073.

[5] The conduct of the defendant, instantly following the commission of the crime and at all times thereafter, conclusively shows that he was conscious of doing wrong, and that he appreciated the nature and the quality of the act at the time he committed it. Added to what we have already said, it may be proper to observe that:

"In our courts of law, there is no such doctrine established or recognized as moral insanity distinguished from mental derangement, as an excuse for crime, and as an exemption from punishment therefor. There is no such type of insanity recognized in our courts as, for instance, that a person may steal your property, burn your dwelling, murder or attempt to murder you, and know at the time that the deed is a criminal act, and wrong in itself, and deserves punishment, having the ability to correctly reason on the subject, and yet be held guiltless and not punishable, on the ground solely, of a perversion of the moral sense." *People v. McCarthy*, supra.

[6] The burden of proof is always upon the defendant, or upon the person who asserts the insanity of another, to establish its existence by a preponderance of evidence. This universal rule is applicable to the issue of mental unsoundness or irresponsibility in every case in which it may possibly arise, and it has been—

"the established rule in this state practically since its earliest history, repeatedly affirmed by this court, so that it cannot be considered as open to further question. It was first established as the correct rule to be applied in this state in *People v. Myers*, 20 Cal. 518, and has been adhered to ever since. * * *

(The citation of many cases follows.)

[7] Under the evidence in this case it is unnecessary to further pursue the question of the defendant's responsibility to the law at the time he committed the crime. He signally failed to meet the burden which the law imposed upon him.

[8] This brings us to a consideration of whether or not the court abused its discretion by omitting to suspend the trial and submit the question whether or not the defendant was then sane. Defendant's counsel did not at any time make a request or motion that the jury be discharged, or that the trial be suspended and the question of sanity be submitted to a jury as provided by section 1368, Penal Code. He seemed to prefer that the jury in whose presence the episode earlier mentioned occurred be retained to pass upon the question of insanity as it affected the defendant's legal responsibility at the time he committed the offense, and requested a continuance to give him time to prepare a defense upon the theory of insanity. The court did, however, excuse the jury and took medical testimony as to the then mental condition of the accused. The defense offered three medical witnesses who had had more or less experience with nervous diseases, including epilepsy and

so-called "shell shock" effects, as to the defendant's mental condition, and the people offered two. No alienist on either side was willing to give it as his opinion that the defendant was affected with epilepsy. In fact, neither the history of the case nor the symptoms which distinctly mark well-recognized types of epilepsy were exhibited by defendant at the times he was thought to be passing through some sort of nervous disturbance. Medical experts testified that he appeared upon two or three occasions to have been in a state of nervous tremor resembling epilepsy, which they diagnosed as a disturbance superinduced by "shell shock." They had also seen him at times when they believed him to have been in a stupor. There was also evidence as to a reduction of 10 points in his blood pressure, and his pulse was 100 as against 80 or 90 when in the condition described by one of the experts as a stupor. Other conditions and symptoms were described, but, as the defendant's condition at the trial was, at best, temporary, and not permanent or settled insanity, it is not necessary to go further into details. No claim was made that he was a victim of settled or general insanity, or that he lapsed into unconsciousness for any very considerable period of time. Prior and subsequent to his war experience defendant had been a sailor, had worked as a carpenter, and had performed general labor. He was actively employed at the time he committed the offense.

The testimony of the experts called on behalf of the defendant which may be said to give color to the claim that the accused was insane at the trial is somewhat lacking in positiveness and definiteness as to the nature of the nervous trouble from which the accused was suffering, and also as to the effect of the disturbances upon his mental faculties as affecting responsibility for his acts, and is attended with considerable speculation. As we understand them, none claimed that the accused was in a state of continuous unconsciousness or incapacity. The defendant had but two paroxysms so far as the observations of the experts went, and reason and consciousness returned after the effects of the spells passed away. Both occurred after the defendant's arrest and during his incarceration in jail. As against the experts called by the defense, the people called two. One was an alienist of many years' experience in both public and private institutions for the care and treatment of the insane. He had conversed with the accused at length upon the subject of the offense with which he was charged, and had made close observation of him, and was present in the courtroom at the time he lapsed into a "spell" while testifying. He went to the aid of the accused, examined him, and applied several mental tests. His testimony is that in his opinion it was a clear case of malingering or feigning insanity. He stated positively that the defendant

did not exhibit a single symptom of epilepsy or any other mental disorder. He was of the opinion that the accused was not then insane and never had been insane. The reasons for his opinion were stated at great length. The second expert called by the people was familiar with the form of nervous disorders commonly called "shell shock" cases. His testimony corroborated the theory advanced by the first. Thus it will be seen that a sharp conflict was created as to the mental soundness of the accused. Aside from expert testimony, there was much other evidence in the case. The appearance and actions of the accused, the testimony given by him and his manner upon the stand, as well as the testimony of other witnesses touching his mental condition, were all before the court. With the aid which the foregoing opportunities afforded, it was the province of the trial court, in the exercise of a sound discretion, to determine whether the mental condition as exhibited by the defendant was assumed or real.

[9, 10] We have examined the evidence with care, and entertain no doubt but that the conclusion reached by the trial court to the effect that the defendant was at all times sane is amply supported by the record, and it did not abuse its discretion by refusing to submit that issue specially to a jury. The question of whether a doubt sufficient to require the trial court to submit the issue of the sanity of a defendant to a jury during trial is one that must always rest largely within the discretion of the trial court. On principle, the question is not unlike the discretion which the law reposes in a court when it is called upon to pass upon the competency of witnesses to testify as to the sanity of persons generally, under section 1870, subd. 10, Code of Civil Procedure. This question arose in *People v. McCarthy*, supra, on the claim made by the defendant that the court had abused its discretion in permitting certain persons to testify as to the mental condition of the accused on the theory that they were within the section which permits "intimate acquaintances" to give their opinions with respect to the mental sanity in all cases where that question is an issue. Speaking to the question of judicial discretion this court said:

"In the determination of this question, as in that of any other fact from oral evidence, he [court], of necessity, must be conceded to be the best judge of what the evidence shows, since he has before him many elements of fact which cannot be transmitted to paper, but which enable him to more correctly weigh the evidence, and exercise a wiser discrimination as to what it shows than one who reads but a naked statement of the evidence, without the presence of the witness. And so it has been held, and wisely, that the trial judge is to be accorded wide discretion and latitude in this respect; and his ruling will not be disturbed except where the evidence is so lacking as to leave no just room for question that the discretion has been im-

properly exercised. *People v. Pico*, 62 Cal. 53; *Estate of Carpenter*, 94 Cal. 414, 29 P. 1101; *People v. Lane*, 101 Cal. 516, 36 P. 16; *People v. Schmitt*, 106 Cal. 52, 39 P. 204."

Counsel has cited as an authority in this case, to the point that the trial court abused its discretion. *People v. West*, 25 Cal. App. 369, 143 P. 793. It is not necessary for us to comment on what is said in that case as to the effect of judgments and commitments of persons to hospitals for the care and treatment of the insane. The effect of such judgments was fully discussed by this court in *People v. Willard*, 150 Cal. 543, 89 P. 124; and we have no disposition to depart from the rules there announced. But nothing is said in *People v. West*, supra, that helps appellant. The facts before the court in that case are so widely different from the facts of the instant case as to make extended discussion unnecessary. In that case *West*, who was serving a sentence for the commission of a crime at San Quentin, was, by an authorized board, adjudged insane and committed to a state hospital. Shortly after his arrival at the hospital, he and another inmate took the life of a fellow inmate. Both were charged with homicide. Before the trial the defendants regularly moved the court that the question of their present sanity be submitted to a jury as provided by section 1368, Penal Code. In support of said motion the defense introduced and read the affidavit of one of their counsel. From the affidavit it appeared that both defendants were under commitment to the hospital as insane persons and were being treated as such. It was also averred by said counsel that both he and his associates—

"have each made efforts to secure from the said defendants some statement concerning the crime charged in the information; that said defendants refuse to say anything about the facts or circumstances of the offense, and act as though suffering from delusions of some character; that affiant therefore alleges that it is his opinion that both of these defendants are mentally insane; and that neither of them is mentally competent to make a just and rational defense to the charge made against them."

It was further represented by counsel, in a statement to the Court of Appeal, that the defendants "continued in such a state of mental derangement that attorneys appointed by the court to defend them could obtain no assistance from the defendants in the conduct of their case." In the instant case no suggestion was made to submit the question of defendant's sanity to a jury until the people had closed its case and the defendant had examined two witnesses on the second trial. But the most material difference between the two cases consists in the fact that the defendant in the instant case was *not under commitment to a state hospital*, and his attorney did not make an affidavit that he was unable to obtain assistance from him or information necessary to enable him to properly present

his defense. The information which forms the basis of the expert witnesses' opinions shows that they rested largely upon the personal history of the defendant, which, unquestionably, was furnished by him. Besides, the record is convincing as to his ability to give ample aid to his counsel. In the face of the record before us the affidavit made in the West Case could not have been made in the instant case. With all of the elements which controlled the decision in the West Case absent in the instant case, and there being no corresponding elements present, no grounds remain which would support a finding that the trial court abused its discretion by omitting to submit the issue of sanity to a jury.

[11-13] Upon the defendant being called before the court for sentence, some 12 days after his conviction, his counsel requested that before the pronouncement of judgment the question of his insanity be submitted to a jury. The court yielded to this request, and two days thereafter a jury returned a verdict pronouncing him insane and a proper person for care and treatment at a state hospital. He was detained at the hospital for a period less than 30 days, and returned to the court as restored to sanity. The physician at the hospital believed him to be insane during the first 4 or 5 days after he was received into the hospital, and pronounced his ailment "psychoneurosis, hysterical attacks." Defendant did not give any information as to himself, and when he did answer questions he employed monosyllabic words. He was in a "stuporous state." He constantly twitched his mouth or "blinked his eyes." The physician said that if the defendant exhibited at the trial the same symptoms which he exhibited upon the first days of his confinement at the hospital he "would say that he was insane." The testimony of the expert excluded epilepsy, or settled insanity, or dementia. No delusions were shown to exist at any time. The treatment the defendant received at the hospital was continuous bathing. Also a spinal puncture was made to draw fluid from the spine. On the next day thereafter defendant cleared up and remarked: "I am out of my dream or stupor. I have waked up." The attendant further testified that his nervous trouble was transitory, and by the symptoms which he exhibited while under his care he was unable to say what his mental condition was during the trial, or two weeks prior to his admission at the hospital, or at any other time prior thereto. A judgment committing a person to a state hospital for the care and treatment of the insane is not final and conclusive upon the question of criminal responsibility, or the ability of a person so committed to conduct his defense in a rational manner. This rule is unequivocally announced in *People v. Willard*, supra,

and in *Re Buchanan*, 129 Cal. 330, 61 P. 1120, 50 L. R. A. 378. It is sufficient to say, in the light of the testimony of the attending physician, that, as the alleged insanity of defendant was not permanent or habitual, no presumption can be indulged that it had an existence two weeks prior to his commitment. *People v. Keyes*, 178 Cal. 794, 175 P. 6.

At the time it pronounced judgment upon the defendant the court expressed a belief that he was sane at the time the postponement was requested, and also at the time he appeared and asked for a submission of the question of his sanity to a jury, but that he yielded to the request merely out of an abundance of caution. Before judgment was pronounced the court made inquiry of the defendant for the information touching his birth, age, parentage, domestic relations, habits, avocation, and such facts as would tend to indicate the causes of his criminal character, as required by the provisions of section 1192a of the Penal Code, and the defendant's replies in furnishing said information were as apt, intelligent, and coherent as might be expected of a person of average, normal mind.

We are of the opinion that the trial court did not abuse its discretion.

The judgment and order appealed from are affirmed.

We concur: MYERS, C. J.; RICHARDS, J.; SHENK, J.; WASTE, J.; LAWLOR, J.

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POLLAK et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR NAPA COUNTY et al. (S. F. 11560.)

(Supreme Court of California. Nov. 3, 1925.)

1. Depositions ⚡57—Defendants residing in county of suit may be required to testify at place in another county in obedience to subpoena from superior court of latter county.

Under Code Civ. Proc. § 1986, subd. 3, as amended in 1907 (St. 1907, p. 730), and sections 1989, 2021, defendants residing in county wherein action is pending may be required to testify by deposition at place in another county within 50 miles of their residence, in obedience to subpoena issued by order of judge of superior court of latter county.

2. Depositions ⚡2—Statute authorizing depositions and proceedings thereunder must be liberally construed, though in derogation of common law.

While authority to take and manner of taking depositions is controlled by statute, and such right is mere privilege in derogation of common law, such statute and proceedings thereunder must be liberally construed, to effect its objects and promote justice, in view of Code Civ. Proc. § 4.

3. Constitutional law ☞70(3)—Evils resulting from statutes cannot be remedied by judiciary.

Any evils flowing from Code Civ. Proc. § 1986, subd. 3, and sections 1989, 2021, permitting party to action to compel other party to testify by deposition outside county in which he resides, though action is pending therein, if place be within 50 miles of his residence, present legislative problem, cannot be judicially remedied.

4. Depositions ☞57—Good faith of application to take depositions outside county of defendants' residence not considered on certiorari to annul order directing issuance of subpoenas.

Good faith of application to take defendants' depositions outside county in which they reside and action is pending, but within 50 miles of their residence, as authorized by Code Civ. Proc. § 1986, subd. 3, and sections 1989, 2021, cannot be considered on certiorari to annul order directing issuance of subpoena.

5. Depositions ☞57—Power of superior court judge to order issuance of subpoena to take defendants' depositions outside county of their residence not limited to cases where depositions are to be used in action pending in superior court.

Power of superior court, or judge thereof, under Code Civ. Proc. § 1986, subd. 3, to order issuance of subpoenas to take depositions of defendants outside county of their residence, though action is pending in latter county, is not limited to cases where depositions are to be used in action pending in superior court, especially as means of producing evidence in all courts are embodied in same chapters of Code (Code Civ. Proc. §§ 1981–1997), except that section 919 limits territorial effect of subpoena issued by justice of the peace to any part of county.

In Bank.

Application by Ben Pollak and another, doing business as Pollak Bros., for certiorari to review an order of the Superior Court of California in and for Napa County; Percy S. King, Judge, directing issuance of subpoenas. Writ discharged, and order affirmed.

E. L. Webber, of Napa, for petitioners.

D. L. Beard and L. A. Maynard, both of Napa, for respondents.

KNIGHT, Justice pro tem. Petitioners seek by this proceeding in certiorari to have annulled an order made by the superior court in and for the county of Napa, directing the clerk of that court to issue a subpoena requiring petitioners, who are residents of the city and county of San Francisco, to appear as witnesses and to give their depositions before a notary public in the city of Napa, in an action brought by Keig Shoe Company, Inc., against petitioners, in the justice's court of the city and county of San Francisco.

It appears from the record that said Keig Shoe Company sued petitioners first in the justice's court of Napa township, Napa coun-

ty, to collect an indebtedness claimed to be due. The summons in that action was quashed on motion of petitioners, but the action was not dismissed. Soon thereafter said company filed another complaint against petitioners, on the same cause of action, in the justices' court of the city and county of San Francisco, and, after obtaining service of the summons, gave notice pursuant to section 2031 of the Code of Civil Procedure that petitioners' depositions would be taken before a notary public in the city of Napa, whose office, petitioners concede, is situated less than 50 miles distant from the respective residences of petitioners. Thereupon said Keig Shoe Company applied for and obtained from Hon. Percy S. King, judge of the superior court in and for Napa county, an order made pursuant to subdivision 3 of section 1986 of the Code of Civil Procedure, directing the clerk of that court to issue subpoenas requiring the attendance of petitioners as witnesses at the time and place, and before the notary public, specified in said notice. The clerk of said court issued a subpoena accordingly, which was afterwards served upon petitioners in the city and county of San Francisco. Thereafter petitioners moved said superior court to set aside its order directing the issuance of said subpoena, but said motion was denied. This proceeding in certiorari was then instituted by petitioners for the purpose of having said order annulled.

[1] Petitioners contend that, inasmuch as they were residents of the city and county of San Francisco, wherein the action was pending, and therefore available as witnesses therein, to testify either at the trial of said action or before an officer upon taking of depositions, said superior court of Napa county was without jurisdiction to require them to appear as witnesses before a notary public in Napa county, even though the distance from their respective residences to the place where said depositions were to be taken be less than 50 miles. The question presented, therefore, is the jurisdictional one of whether or not it was within the power of said superior court of Napa county, under the circumstances hereinabove set forth, to make said order directing the issuance of said subpoenas.

That portion of subdivision 3 of said section 1986, which forms the basis for the granting of the order herein complained of, declares that a subpoena issued in accordance therewith, requiring the attendance of a witness before an officer upon the taking of a deposition, "must be issued by the clerk of the superior court of the county wherein the attendance is required upon the order of such court or of a judge thereof, which order may be made ex parte." In the case of *Scott v. Shields*, 8 Cal. App. 12, 96 P. 385, in

dealing with an apparent conflict which arose between certain provisions of said section 1986, as a result of an amendment added thereto in 1907 (St. 1907, p. 730), it was held to be proper for a judge of a superior court, upon the request of a plaintiff, in an action pending in another county, to grant an order directing the clerk to issue a subpoena requiring a witness to attend before a notary public for the taking of the deposition of said witness to be used in said action, and that, if the witness refused to answer, it was mandatory upon said judge, under whose direction the subpoena issued, to compel said witness to answer and to complete his deposition.

The only limitation placed upon the territorial force and effect of a subpoena issued out of a court of record is found in section 1989 of said Code, which reads as follows:

"A witness is not obliged to attend as a witness before any court, judge, justice, or any other officer, out of the county in which he resides, unless the distance be less than fifty miles from his place of residence to the place of trial."

And in the case of *Merrill v. Superior Court*, 33 Cal. App. 55, 164 P. 340, it was expressly held that a subpoena issued by the clerk of the superior court, pursuant to the provisions of said subdivision 3 of said section 1986, as amended in 1907, had the same territorial force and effect as a subpoena issued by the clerk requiring the attendance before the court, and "may require the attendance of a witness even though he resides outside the county but within the fifty-mile limit."

Assuming, therefore, that said Keig Shoe Company, as the plaintiff in said justice's court action, has the authority to take the depositions of petitioners as the defendants in the action, in the city of Napa, it is apparent, in view of the law as interpreted in the two cases above cited, that the judge of the superior court of Napa county was authorized by said subdivision 3 of section 1986 of said Code to grant the order for said subpoena, and that the subpoena issued pursuant to said order carried sufficient territorial force and effect to require the attendance of petitioners as witnesses outside of the county in which they resided, the distance being less than 50 miles from the place of their respective residences to the place where they were required to attend.

But the instant case differs in its facts from the case of *Merrill v. Superior Court*, supra, in this: There it was legally impossible to obtain the attendance of the witness at the trial of the action, owing to the fact that the action was pending in the superior court of San Bernardino county and the witness resided in the county of Alameda, a distance much farther than 50 miles from the place of trial; consequently, under an order

made pursuant to said subdivision 3 of section 1986 of said Code, by the superior court of the city and county of San Francisco, plaintiff sought to take the deposition of said witness before a notary public in the city and county of San Francisco, which was outside of the county in which the witness resided, but within a distance of 50 miles of his residence. The proceeding was sustained. In the case at bar the witnesses whose testimony is sought to be taken in Napa county reside in San Francisco, at the very place of trial, and are available therein as witnesses at any time. In view of that situation the question arises as to whether or not a party to an action, in any event, may require the attendance of a witness outside of the county in which he resides and where in the action is pending, for the purpose of giving a deposition, even though the place where such witness is required to attend be less than 50 miles from his place of residence.

[2] In regard to this latter question it may be stated generally that the authority to take depositions in all cases, and the manner in which they shall be taken, is controlled by statute. *Burns v. Superior Court*, 140 Cal. 1, 73 P. 597. While it was formerly held that the statute granting the right to take depositions, being a mere privilege conferred by statute in derogation of the common law, must be strictly pursued, such rule is now without force in this state, by virtue of section 4 of the Code of Civil Procedure, which distinctly declares that the rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the Code, and that its provisions and all proceedings under it are to be liberally construed with a view to effect its objects and to promote justice. *Bolinger v. Bollinger*, 153 Cal. 190, 94 P. 770.

Subdivision 1 of section 2021 of said Code, under the authority of which the depositions herein are sought to be taken provides:

"The testimony of a witness in this state may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant, and in a special proceeding after a question of fact has arisen therein, in the following cases: 1. When the witness is a party to the action or proceeding or an officer or member of a corporation which is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended.
* * *

It will be observed that neither in the subdivision last above quoted, nor in the remainder of the Code section of which it is made a part, nor elsewhere in the law, is there any clause circumscribing the territorial limits within which, or any provision specifying the county wherein, depositions shall be taken, except those set forth in said section 1989 of said Code, which have already

been adverted to. Therefore, in view of the broad language of said section 2021 of said Code, it would seem that authority is granted to take depositions in any county, irrespective of the place where the witness resides or the place wherein the action is pending, provided only the distance between the place of residence of said witness and the place where his deposition shall be taken be less than 50 miles. The witnesses in the proceeding before us reside at the immediate place of trial, and therefore are brought clearly within the 50-mile exception noted in said section 1989, and hence are obliged to attend as witnesses outside the county in which they reside.

[3] Petitioners have intimated that if no restrictions, other than those contained in said section 1989, be placed upon the scope of said section 2021, in regard to the county wherein depositions shall be taken, the provisions of the latter section will likely be abused because, as the matter now stands, a party to an action may, under the guise of taking a deposition, harass and inconvenience the other party to the action (or, for that matter, any witness whose status is alleged to come within the provisions of said section 2021) by compelling him to attend as a witness outside of the county in which he resides, even though it be the same county wherein the action is pending, provided only it be within the 50-mile limit of the residence of said witness. But, on the other hand, bearing in mind the established policy of the law permitting litigating parties the fullest opportunity to produce evidence in support of the truth of the matter at issue, it may be argued in favor of the present status of the law that it allows oral examination of a witness in a county other than in the one in which he resides, when such examination becomes necessary in connection with either public or private records or files, which cannot be produced conveniently or perhaps at all in the county in which the witness resides, but which are available within a distance of 50 miles of his residence, or, in case of territorial remoteness of residence of a witness which makes it impossible or extremely inconvenient to obtain his deposition in the county in which he resides, it permits his deposition to be taken outside of the county of his residence if the distance be within 50 miles of his residence. However that may be, if any evils do flow from the present state of the law, a legislative problem is presented, the remedy for the correction of which cannot be judicially supplied.

[4] The question of the good faith of the application herein to take the depositions also involves a matter that cannot be considered by this court in this proceeding. As already pointed out, said Keig Shoe Company, in attempting to take the depositions in Napa county, was proceeding within the scope of the statute, and it was therefore within the power of the Napa county court to grant the order for the issuance of the subpoena.

[5] Finally, it is contended by petitioners that the power granted a superior court, or the judge thereof, under said subdivision 3 of said section 1986, may be exercised only when the depositions sought to be taken are to be used in an action pending in the superior court. We find no merit in the point. The language of said subdivision sufficiently answers the contention made. It is general in its terms, contains no limitations whatever, and makes no distinction as to the nature of the actions, or as to the courts in which the depositions shall be used; furthermore, said subdivision 3 is made part of a Code section which expressly applies to the production of evidence before all courts. It will also be noted that, in dealing with the subject of production of evidence, the Code does not attempt to prescribe separate means or manner of production of evidence for courts of different or inferior jurisdictions; the matter is treated in one subject, and is embodied in the same chapters of the Code (chapters 1 and 2, title 3, part 4, Code Civ. Proc.), except that section 919 of said Code limits the territorial effect of a subpoena issued by a justice of the peace "to any part of the county," and in regard to the latter section, in view of the limitation placed therein upon the territorial effect of such a subpoena, it is plain to be seen that, if it be held that subdivision 3 of said Code section 1986, upon which the order herein is predicated, is not available for the purpose of producing evidence in actions commenced or pending in the justice's court, parties to such actions will be wholly deprived of all legal means of producing evidence which may be found beyond the territorial limits of the county in which said justice's court is situated. We are satisfied that such condition was not contemplated or intended by the law.

The writ is discharged and the order is affirmed.

We concur: MYERS, C. J.; RICHARDS, J.; WASTE, J.; LAWLOR, J.; SEAWELL, J.; LENNON, J.

197 Cal. 306

ROCHA v. ROCHA et al. (L. A. 8037.)

(Supreme Court of California. Nov. 3, 1925.)

1. Jury $\S$ 14(9)—Act held not to grant jury trial in actions wherein jury not theretofore available.

Code Civ. Proc. $\S$ 738, which merely enlarged class of cases in which equitable relief could be sought in actions to quiet title, did not grant right of trial by jury in actions wherein jury was not theretofore available, nor deny jury trial where right thereto formerly existed.

2. Jury $\S$ 14(6)—Action to set aside deeds on ground of fraud held of purely equitable cognizance, and jury trial properly denied.

Relative to right to jury trial, action to set aside and cancel deed on ground of fraud of grantee held not to have been brought under Code Civ. Proc. $\S$ 738, but was one of purely equitable cognizance; fact that defendants in answer prayed that their title be quieted as against plaintiff's asserted claim not affecting nature of action.

3. Estoppel $\S$ 70(1)—Defendant not estopped from claiming that property was not part of estate.

Husband executed declaration of homestead on community property in 1898, and died in 1908, survived by widow, who deeded property to her son, the defendant. To clear title, defendant, in 1916, filed letters of administration in father's estate. Held, that failure of defendant to assert title in probate proceedings did not estop him from claiming thereafter that property was not part of estate, notwithstanding that on death of husband title to it vested immediately in surviving widow under Civ. Code, $\S$ 1265 (Code Civ. Proc. $\S$ 1474); proceedings in probate under section 1465 et seq. not being adverse to widow's interest, and effect thereof was, in view of Civ. Code, $\S$ 1106, to feed title of her grantee.

4. Evidence $\S$ 230(3)—Acts and declarations of grantor in disparagement of title held inadmissible when made in absence of grantee.

Acts and declarations of grantor, made after parting with title and in disparagement thereof, are inadmissible when made in absence of grantee.

5. Evidence $\S$ 230(4)—Force of executed conveyance not impeached or impaired by declarations of grantor.

Force of an executed conveyance cannot be impeached or impaired by alleged declarations of grantor, made after execution to prove that it was in fact a mortgage; such declarations being inadmissible as defeating or impairing title of grantee.

6. Evidence $\S$ 119(1)—Questions as to grantor's mental and physical condition, if part of res gestæ, held proper as shedding light on condition of her mind.

On issue of lack of mental capacity of mother to execute deed to son, questions as to her mental and physical condition at time of such

execution, if part of res gestæ, would be proper as to condition of her mind.

7. Appeal and error $\S$ 1011(1)—Supreme Court cannot substitute judgment for that of trial court on conflicting evidence.

Despite fact that there may be substantial evidence in record on which contrary findings would find support, the Supreme Court is not at liberty to substitute its judgment for that of trial court on such conflicting evidence.

8. Deeds $\S$ 196(2)—Presumption that son did not take advantage of mother in deed from latter held not to obtain, where mother had independent advice.

Where mother deeded property to son, notwithstanding confidential relationship existed between them at time of deed, presumption does not obtain that son took advantage of his mother and profited thereby, where mother had independent advice and acted not only on her own volition, but with full comprehension of her act.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Antonio Rocha, a minor, by his guardian ad litem, Trinidad K. Talamantes, against Antonio Rocha and others. Judgment for defendants, and plaintiff appeals. Affirmed.

J. J. Wilson and A. E. Hamilton, both of Los Angeles (Gerald F. H. Delmas, of counsel), for appellant.

J. Wiseman Macdonald, of Los Angeles, for respondents.

SHENK, J. For many years Antonio Jose Rocha and Ventura L. de Rocha, husband and wife, were the owners as community property of 10 acres of land in the Rancho Rincon de Los Bueyes in Los Angeles county. On December 1, 1898, the husband executed a declaration of homestead on said property and caused the same to be duly recorded. He died on January 23, 1908. Surviving him were the widow, four daughters, and a son, Antonio Rocha, one of the defendants in this action. Another son, Bernardino Rocha, father of the plaintiff herein, predeceased his father. Trinidad K. Talamantes, the guardian ad litem herein, is the mother of the plaintiff and the surviving wife of Bernardino. The defendant Concepcion R. de Higuera is one of the daughters of Antonio Jose and Ventura L. de Rocha and the defendant Bernardo de Higuera is her husband. After the death of Antonio Jose Rocha, his surviving widow occupied the homestead premises in company with her son Antonio. The other children had married and established their homes elsewhere. Antonio remained single, devoted his time to the cultivation of said property and to the care of his mother. On March 3, 1910, the mother conveyed said property by grant deed to her son

Antonio. The consideration therein recited was love and affection, support and maintenance given by the grantee to the grantor for many years past, and other good and valuable considerations. Antonio had expended money in the care and development of said property, and had advanced about \$800 on account of funeral expenses incident to the death of members of his mother's family, which expenses he was in no wise legally bound to pay. At the time of the execution of said deed, the reasonable market value of the property was about \$200 an acre. Within a year after its execution, Antonio expended approximately \$1,600 in the further development of the property. He also paid the taxes levied on said property from the time he received said deed.

About the middle of June, 1916, the defendant Rocha desired to obtain a loan on said property, but discovered that the title was not clear, for the reason that no proceedings had been taken to show of record that the title to said homestead had vested in his mother as the surviving spouse. He consulted an attorney, who advised him of the proper procedure to clear the title. To that end, and under the guidance and direction of his attorney, under date of July 5, 1916, he filed a petition for letters of administration in the matter of the estate of his father. In this petition he set forth the next of kin and heirs at law of the decedent, including the plaintiff in this action. Letters of administration were duly granted, and on August 30, 1916, defendant Rocha filed an inventory and appraisal wherein he alleged that the estate of said decedent consisted wholly of the said real property and was of the value of \$1,750. Proceedings were thereafter duly taken by the defendant Rocha to have the recorded homestead set apart, and the same was on September 18, 1916, set apart by the court to the surviving widow. On the next day she executed a second grant deed to the defendant Rocha, conveying to him the same property. Said defendant then obtained a bank loan. The promissory note and mortgage securing the same were thereafter purchased from the bank by the defendants de Higuera at a time when the bank was insisting upon payment of the indebtedness.

Ventura L. de Rocha died on November 27, 1917. On June 2, 1922, plaintiff, then 19 years of age, brought this action as an heir at law of the deceased. The complaint is in two counts. In the first count it is alleged that, at the time of the death of her husband, Ventura L. de Rocha was of advanced years and could neither read, write, nor understand the English language; that she began to decline in bodily health and to wane in mental vigor, and had become afflicted with a cancerous growth on her left ankle; that by the year 1910 she was infirm in body and feeble in mind, and was confined to her bed

a greater portion of the time; that she was unable to care for herself or transact business of any nature; that during that period she reposed great trust and confidence in her son Antonio, and intrusted to him the entire care and management of her property; that "the defendant Antonio Rocha, well knowing the feeble condition of the said Ventura L. de Rocha, both as to body and mind, and of her dependence upon him, both for bodily care and for the management of her business affairs, and with intent to willfully deceive, mislead, and defraud her, did present a document to the said Ventura L. de Rocha for her signature, representing to her that the said document was security for money loaned and advanced to her by him, the said Antonio Rocha, in the past and to secure future advances to be made by him for her support and for the maintenance of her said property; that the document was in effect a mortgage, and that upon her death the said * * * property would pass to her children, charged only with the amounts so advanced; that, relying upon the statements made and the representations as aforesaid, and without reading or having the said instrument read to her, and being at the said time sick and bedridden and feeble in mind and body, and placing the highest confidence in the love, affection, and integrity of her son, the said defendant herein, and believing the said document to be security for money advanced and to be advanced, the said Ventura L. de Rocha did on or about the 3d day of March, 1910, execute the said document by placing her mark thereupon"; that the statements made by the said defendant to his mother respecting the character and purport of said document were false, were known by the said defendant to be false, and were willfully made by him to her for the purpose of acquiring said property from her in fee, and with intent thereby to deceive his mother; and that she was deceived thereby. The plaintiff prayed that the said deed be set aside and canceled; that the property be declared to be the estate of Ventura L. de Rocha, deceased, and subject to administration as such; that all claims of any and all of the defendants adverse to the interests of said estate and the heirs at law thereof be declared to be invalid; that the said deed be produced in court for cancellation and for costs. The second count alleges similar fraud; also deceit, misrepresentation, and undue influence as to the deed executed by Ventura L. de Rocha on September 19, 1916, and as to said deed the same relief is sought. It is further alleged that the defendants de Higuera acquired their mortgage interest in said premises with full knowledge of said alleged fraud, deceit, and undue influence, and that such interest is subject to any and all equities thereby created. The defendants denied the alleged fraud,

deceit, misrepresentation, and undue influence, denied that the said deeds were executed for security only, and prayed that their title be quieted as against the plaintiff. From a judgment in favor of the defendants, the plaintiff appeals.

[1] Preliminarily the plaintiff demanded a trial by jury. The application was denied, and this is the first point urged for reversal. The plaintiff seeks to bring himself within the rule laid down in *Donahue v. Meister*, 88 Cal. 121, 25 P. 1096, 22 Am. St. Rep. 283. That was an action under section 738 of the Code of Civil Procedure. The complaint was in the usual form to quiet title to a certain quartz mining claim, and contained the averment of possession on the part of the plaintiff. The answer alleged the defendant's right of possession to a portion of the claim and lawful possession thereof until unlawful dispossession and ouster by plaintiff. The defendant prayed that he be restored to his possession of the portion of the claim in controversy. The defendant demanded a jury trial "on the issues raised by defendant's said averments of prior possession and ouster." Trial by jury was denied by the trial court on the ground that the case was a proceeding in equity. It was held on appeal that the issues raised by the answer were triable at law at the time the present Constitution was adopted, that either party had the right to have such issues tried by a jury, and that the enactment of section 738 did not and could not deprive a litigant of such right. In speaking of the effect of that section, the court said:

"The Code confers equitable rights so far as it grants the power to maintain the action at all, and the decree is in form equitable, but if it has to deal with ordinary common-law rights clearly cognizable in courts of law, it is to that extent an action at law."

The court was at pains to limit the scope of the decision to the particular facts presented, saying:

"It is decided here only that, where the answer shows that the defendant was rightfully in possession, and was ousted by plaintiff and wrongfully kept out of possession, upon the trial of those issues the defendant is entitled to a jury trial." *Donahue v. Meister*, supra, 129 (25 P. 1098).

[2] The plaintiff seems to take the position that in all actions under said section 738 a trial by jury is available to either party as a matter of right, and that the present action is of such a character. The position is untenable: First, because section 738 merely enlarged the class of cases in which equitable relief could be sought in actions to quiet title. *Castro v. Barry*, 79 Cal. 443, 446, 21 P. 946; *Crocker v. Carpenter*, 98 Cal. 418, 33 P. 271. That section did not purport to grant the right of trial by jury in actions wherein a jury was not theretofore available, nor did

it purport to deny a jury trial where a right to a jury formerly existed. The amendment of 1895 (St. 1895, p. 72) made this plain when it provided that—

"Nothing herein contained shall be construed to deprive a party of the right to a jury trial in any case where, by the law, such right is now given."

And, secondly, the plaintiff's position cannot be maintained for the reason that the present action is not one brought under said section 738. It is an action to set aside and cancel written instruments on the ground of fraud, an action of purely equitable cognizance. *Mesenburg v. Dunn*, 125 Cal. 222, 57 P. 887; 2 Cal. Jur. 758. No issues at law were raised either by the complaint or by the answer. The fact that the defendants in their answer prayed that their title be quieted as against any claim asserted by the plaintiff does not affect the nature of the action as one in equity. In fact, it calls for equitable relief. Nor is the character of the action changed by reason of the fact that the Higuerras, husband and wife, are parties defendant. It is alleged that they claim an interest as mortgagees in the property described in said deeds, and that their interest was acquired with full knowledge of the alleged fraud of the defendant Rocha, and it is prayed that whatever claims they have adverse to the alleged rights of the plaintiff be declared to be of no force or effect. The relief sought against them is likewise equitable in its nature.

The case of *De Arellanes v. Arellanes*, 151 Cal. 443, 90 P. 1059, is peculiarly in point in support of the defendants' position both as to the facts and as to the law. There the plaintiff and appellant was a woman of advanced years who could neither read, write, nor understand the English language. She had four married daughters and two grown sons, one being the defendant in said action. The defendant was the only child who remained with his parents on the ranch property involved in said action. The plaintiff reposed implicit trust and confidence in the defendant, and had even given him a general power of attorney. The plaintiff executed a grant deed in his favor for the expressed consideration of \$1, and covering about 2,000 acres of land. Before the execution of the deed, the defendant had managed the plaintiff's properties for many years. Plaintiff brought an action to set aside the deed on the ground of alleged fraudulent representations on the part of defendant in procuring her signature to said deed and for an accounting. The defendant denied the allegations of fraud. This issue was submitted to a jury which found in favor of the plaintiff. Disregarding the findings of the jury, the trial court made its own findings in favor of the defendant and entered judgment accordingly. On appeal by the plaintiff, it was contended that

the trial court was bound by the findings of the jury, but this court said:

"In actions of this character a party is not entitled to a jury as a matter of right, and if a jury be called in it simply acts in an advisory capacity; the court being compelled to make findings of its own, and in so doing it is free to adopt or reject the findings of the jury as it deems proper. In determining whether the findings of the trial court are sustained by the evidence, it is immaterial that such findings are contrary to the findings of the jury."

In that action, as in this, the crucial point was whether the plaintiff was entitled to a jury as a matter of right. If, in an action to set aside a deed on the ground of fraud and for an accounting, issues were presented purely of equitable cognizance, and the court was not bound by the findings of the jury, it would necessarily follow that the court could properly deny to the plaintiff a trial by jury in the first instance. The present action was to set aside deeds on the ground of fraud and the surrender of the same for cancellation. The pleadings present issues solely for the determination of the chancellor. See 15 Cal. Jur. 333, and cases cited. The jury trial was therefore properly denied.

[3] When the defendant Rocha, on July 5, 1916, filed his petition for letters of administration in the matter of the estate of his father for the purpose of clearing the title, he alleged therein that the decedent left estate in Los Angeles county consisting solely of the real property involved herein, and in the inventory and appraisal filed by him he described said property as constituting the estate of the deceased. It is contended by the plaintiff that the exclusive remedy of defendant Rocha was to assert his title in the probate proceeding, and, failing to do so, he is now estopped from claiming that the said property was not a part of said estate. It is also claimed that, as it has been held that a court record imports absolute verity, the defendant Rocha will not now be permitted to assert that the allegations contained in his petition for letters of administration and in his inventory and appraisal did not truly state the facts. The purpose of the probate proceeding was to clear the title so that a mortgage loan might be obtained on the property. This could only be done by showing of record that the homestead was vested in the surviving spouse. It was undoubtedly true that upon the death of her husband in 1908, the title of the homestead vested as a matter of law immediately in the surviving widow under sections 1265 of the Civil Code and 1474 of the Code of Civil Procedure, but as a practical matter the title of record still remained in the deceased husband, and it was necessary to employ the means provided by law to cause the record to conform to the fact; otherwise the title could not be certi-

fied as clear for the protection or satisfaction of the proposed mortgagee. As the law stood at the time the said probate proceedings were initiated, a proceeding under section 1723 of the Code of Civil Procedure, to have the homestead set aside to the surviving spouse, may have been rightly considered somewhat uncertain in its effect on all parties interested. See *Hansen v. Union Savings Bank*, 148 Cal. 157, 82 P. 768; *King v. Pauly*, 159 Cal. 549, 115 P. 210, Ann. Cas. 1912C, 1244. The safe course was therefore selected; namely, to have the estate of the deceased husband of record administered upon, and during the course of the administration to have said homestead set apart to the surviving spouse under sections 1465 et seq. of the Code of Civil Procedure. The proceedings in probate were in nowise adverse to the interest of the surviving widow. They were really in her favor, and the effect thereof was to feed the title of her grantee. Civ. Code, § 1106; *Cecil v. Gray*, 170 Cal. 137, 148 P. 935; 9 Cal. Jur. 275. The execution of the second grant deed in 1916 added nothing to the title which had theretofore passed, but appears to have been executed as a matter of precaution. Clearly the elements of estoppel were not present in the conduct of the defendant Rocha. He asserted his right to the property from the time he received the deed in 1910. He paid the taxes and cultivated or leased the property from that time on. The making of that deed was a matter of family knowledge and comment from a time shortly after its execution. There was no concealment on the part of said defendant, and the heirs of the widow were not prejudiced by the allegations referred to. He was therefore not estopped thereby. *Dean v. Parker*, 88 Cal. 283, 26 P. 91; *Bollinger v. Wright*, 143 Cal. 292, 297, 76 P. 1108.

[4] The plaintiff takes exception to numerous rulings on the admission and exclusion of evidence during the course of the trial. These objections fall within rather well-defined groups. The first group has to do with evidence wherein the plaintiff sought to prove certain declarations of the grantor, made after she executed the deed of 1910, and in disparagement of it, and not made in the presence of defendant Rocha.

[5] The ruling of the court in excluding such evidence was in conformity with the well-settled rule of law that the acts and declarations of a grantor, made after he has parted with title to property and in disparagement of it, are inadmissible when made in the absence of the grantee. There are of course exceptions to that rule. The plaintiff undertakes to bring himself within the exceptions approved in *Williams v. Kidd*, 170 Cal. 631, 151 P. 1, Ann. Cas. 1916E, 703, where the issue was whether delivery of the deed had actually taken place with the intention to pass title, and it was held that the declara-

tions of Williams, the grantor, made during the time the defendant Kidd was the depository of the deed, were admissible as bearing on the issue of delivery. But here no question of delivery was involved. The real question was whether the document signed and delivered on March 3, 1910, was a deed or a mortgage. It was in form a grant deed, and plaintiff sought, by offering the declarations of the grantor, made after its execution, to prove that it was in fact a mortgage. The force of an executed conveyance cannot be impeached or impaired by such declarations. *Bias v. Reed*, 169 Cal. 33, 145 P. 516; *Marple v. Jackson*, 184 Cal. 411, 193 P. 940.

The plaintiff cites *Bell v. Pleasant*, 145 Cal. 410, and relies on certain language found on page 418, 78 P. 957, 104 Am. St. Rep. 61, but that case is not authority for plaintiff's position. The plaintiff in that action was contending that a deed to the defendant Mary E. Pleasant, absolute in form, was in effect a mortgage. The defendant Solomon was a grantee of the defendant Pleasant, and it was held that the trial court did not err in admitting in evidence the declarations of the grantor Pleasant, made to the plaintiff at the time of, and subsequent to, the execution of the deed. A cursory reading of that decision might indicate that its general language would be authority for plaintiff's position, but an examination of the record discloses that the declarations there received in evidence were not in disparagement but in support of Solomon's title. They were therefore in the nature of declarations against interest and clearly admissible. In the present case the declarations of the grantor, sought to be proved, would have tended to defeat or impair the title of her grantee, and were properly excluded. *Steinberger v. Young*, 175 Cal. 81, 165 P. 432.

[6] The next group of exceptions refers to rulings of the trial court, striking out answers or portions of answers of certain witnesses as not responsive to the questions propounded and sustaining objections to certain questions which called for the opinion or conclusion of witnesses. These objections are numerous, and separate consideration of them would unduly prolong this discussion. Each has been considered in the light of the record. The answers stricken out were clearly irresponsible and were properly stricken. The questions to which objections were sustained, on the ground that they called for the opinion or conclusion of witnesses, had to do generally with matters affecting the mental status of Ventura L. de Rocha before and after the deed of March 3, 1910, was executed. On an issue of lack of mental capacity to execute the deed, questions as to her mental and physical condition at the time of such execution, if part of the *res gestæ*, would be proper as tending to throw light on the condition of her mind. *Estate of Snowball*, 157

Cal. 301, 107 P. 598; *Estate of Ricks*, 160 Cal. 467, 117 P. 539; *Estate of Anderson*, 185 Cal. 700, 198 P. 407. It is not contended herein that the deceased was totally lacking in mental capacity to execute said deed, but it is insisted that, because of her advanced years and physical debility, she was the more likely to yield to the influence of her son and be subject to the alleged fraudulent conduct on his part. It may be assumed that on that theory her mental and physical condition at the time of the execution of the deed was a matter of proper investigation and disclosure (*Estate of Ricks*, 160 Cal. 450, 466, 117 P. 532), but an inspection of the record shows that the court did not foreclose the plaintiff from legitimate examination on that subject.

[7] The trial court made findings on all the issues presented by the pleadings. The plaintiff specifies some twelve or more instances wherein it is claimed that the evidence was insufficient to support them. The plaintiff concedes the rule that this court can only set aside findings of a trial judge where it appears there is no substantial evidence to support them, and that the credit to be given a witness is solely a question for the trial court, except where, in the light of undisputed facts, the testimony is so inherently improbable or incapable of belief as to constitute no evidence at all. With this rule in mind, the record has been examined with the view of determining whether the findings complained of are supported. Without discussing them in detail, it may be said that all of the findings mentioned are supported, either by undisputed evidence, or by substantial evidence, where a conflict appears. True, as is often the case, there is substantial evidence in the record upon which contrary findings would find support, but we are not at liberty to substitute our judgment for that of the trial court on such conflicting evidence.

[8] It is insisted that the evidence shows without conflict that a confidential relationship existed between defendant Rocha and his mother at the time of the execution of said deeds, and that therefore it will be presumed that the son took advantage of his mother and is now seeking to profit thereby. It is conceded by the plaintiff that this presumption does not obtain where it appears that a person alleged to have been overreached had independent advice and acted, not only of his own volition, but with full comprehension of the results of his acts. Prior to the execution of the deed of March 3, 1910, the grantor consulted with an old-time family friend, who was the godfather of the defendant Rocha. His advice was sought by the deceased as to the best course to pursue to reimburse the defendant Rocha for moneys expended and for assistance and support past and future. This friend of the family was the agent of neither party, and tendered his advice freely, and it was after consultation with

him on numerous occasions, and pursuant to suggestions made by him, that the deed was executed. He was a witness at the trial. He testified that the purpose of the deed was for security only, but in this he was contradicted by other witnesses. The record sufficiently shows that the deceased grantor had independent advice and acted with full comprehension of the effect of her action.

No other points require consideration.

The judgment is affirmed.

We concur: MYERS, C. J.; RICHARDS, J.; WASTE, J.; SEAWELL, J.; LENNON, J.; LAWLOR, J.

197 Cal. 384

LEE v. SILVA et al. (S. F. 10849.)

(Supreme Court of California. Oct. 30, 1925.)

1. Municipal corporations $\S$ 565—Purchaser under contract entitled to notice of foreclosure of street assessment lien as it is not "action in rem."

Purchaser of lot under contract is not bound by judgment foreclosing street assessment lien without having been given notice thereof, notwithstanding St. 1911, pp. 746, 766, §§ 27, 79, such proceeding not being an "action in rem" which proceeds only against property seized and sought to be held for satisfaction of asserted charge against property without regard to title of individual claimants.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, In rem.]

2. Municipal corporations $\S$ 558—Foreclosure street assessment lien "action quasi in rem."

Under St. 1911, p. 746, § 27, foreclosure of street assessment lien is an "action quasi in rem," since, while it subjects property to satisfaction of lien, it also requires that owner of property be made party that he may appear and protect his interest.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series. Quasi in Rem.]

3. Municipal corporations $\S$ 558—Change in statute controlling street assessment liens held not to have changed action from one quasi in rem to proceeding strictly in rem.

St. 1911, pp. 746, 766, §§ 27, 79, changing St. 1862, p. 391, § 17, covering and controlling street assessment liens, held not to have transformed action foreclosing street assessment lien from one quasi in rem to proceeding strictly in rem, nor permit judgment in action to function as foreclosure of rights of persons not joined or appearing as defendants, who may have had an interest in property subjected to lien.

4. Constitutional law $\S$ 290(3)—Unless notice of foreclosure in street assessment lien is given owner of property, judgment for its sale would deprive him of his property without due process of law.

Unless notice of proceeding to foreclose street assessment lien is given to owner of

res, and opportunity afforded him to defend, judgment for its sale would have effect to deprive him of his property without due process of law.

5. Lis pendens $\S$ 1—Purpose of lis pendens is to notify all persons of pendency of an action.

Purpose of lis pendens is merely to furnish means of notifying all persons of pendency of an action, and thereby to bind any person who may acquire an interest in property subsequent to institution of action by any judgment which may be secured in action affecting property.

6. Lis pendens $\S$ 25(5)—Purchaser under executory contract of purchase made before institution of action not affected by subsequent lis pendens.

Purchaser under executory contract of purchase made before institution of action affecting land is prior purchaser, whose rights therein are not subject to subsequent lis pendens, even though payment of purchase price was not completed.

7. Trusts $\S$ 257—Cestui que trust is necessary party in actions by stranger to trust affecting subject-matter of trust.

Cestui que trust in action by or against the trustee, or by stranger against trust, affecting subject-matter of trust, as distinguished from actions instituted in opposition to trust for purpose of declaring trust nullity, is necessary party.

8. Judgment $\S$ 660½—Holder of contract for purchase of real property is not bound by judgment foreclosing street assessment lien, where notice was not served on him.

In action to quiet title by successor to contract of purchase, whose predecessor had not been given notice of foreclosure of street assessment lien, held, that predecessor, not having been given notice, was not bound by judgment foreclosure, and successor, standing in shoes of predecessor in interest, could not be bound by such judgment.

In Bank.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action by Nancy E. Lee against Jack M. Silva and wife, R. D. Beals, Anson S. Bilger, and the Oakland Paving Company. From a judgment for plaintiff, defendants, except Silva and wife, appeal. Affirmed.

Johnson & Shaw, of Oakland, for appellants.

P. A. Fontaine, of Oakland, for respondent.

LENNON, J. This action was instituted by the plaintiff to quiet her title to a certain lot of land, situate in the city of Oakland, of which she claimed to be the owner in fee, and which the appealing defendants claim under a sheriff's deed, made pursuant to a judgment foreclosing a lien of a street assessment levied upon the property. Appellants, answering the plaintiff's complaint, denied

plaintiff's ownership, and affirmatively alleged that defendants Jack M. Silva and Ellen J. Silva, his wife, were the owners of the land, and that defendants R. D. Beals and Anson S. Bilger were the owners and holders of a deed of trust covering said land which secured the payment of certain indebtedness of said Silva and his wife to defendant Oakland Paving Company. The facts of the case are conceded to be these:

On August 11, 1908, while the legal title to the land in controversy was vested in Mrs. M. A. Cornelius, she entered into a conditional contract of sale and purchase with G. H. and C. F. Lee whereby she agreed to convey to them the land in suit for a specified purchase price, which was to be paid in stipulated monthly installments. This contract was recorded on November 20, 1911. Subsequent thereto, on May 1, 1912, proceedings were duly instituted under the Improvement Act of 1911 (Stats. 1911, p. 730), for the improvement of the street fronting on the land in suit. The said land was assessed in the sum of \$21.52 for the making of said improvements. On October 3, 1914, Mrs. M. A. Cornelius died testate, and one A. W. Cornelius was duly appointed executor of her last will and testament. Subsequently, on April 15, 1915, the Oakland Paving Company commenced an action to foreclose its lien for said street assessment, but did not join either G. H. or C. F. Lee therein, nor did they appear in the action. At the time said foreclosure action was commenced, notice of the pendency thereof was duly recorded. Thereafter C. F. Lee assigned all his interest in the contract for the sale of said land to said G. H. Lee, and this contract was duly recorded October 21, 1915. A. W. Cornelius, as executor, on July 1, 1916, conveyed said land to said G. H. Lee by a deed executed and delivered by virtue of and pursuant to the terms of the pre-existing conditional contract of sale. This deed was recorded July 3, 1916. In March, 1917, said G. H. Lee conveyed to the plaintiff herein, Nancy E. Lee, said land. Subsequent to this conveyance, but before the recordation thereof, judgment was entered in the foreclosure suit in favor of the paving company and against the defendants named in that action. Pursuant to said judgment the sheriff conveyed said land to the paving company by deed dated August 29, 1919. Thereafter the paving company conveyed the land to the Silvas, who executed their deed of trust, covering the property in suit, as security for their promissory note to said company for a loan of \$2,000, which debt remains unpaid. The paving company and the trustees under this deed of trust, R. D. Beals and Anson S. Bilger, are the appellants herein.

Upon the foregoing facts the trial court entered judgment in favor of the plaintiff, quieting her title to the land against all of the defendants to the action.

In support of the appeal the principal point urged by the appellants is that the action foreclosing the assessment lien was a proceeding in rem, and that, since the provisions of the Improvement Act of 1911, §§ 27 and 29 (Stats. 1911, pp. 746 and 766), require only the legal owner to be made a party to the foreclosure action, the rights and interests of all other persons in the property were necessarily adjudicated and concluded by the judgment in that proceeding, and that, therefore, the plaintiff's predecessor in interest, G. H. Lee, even though he was not joined in the action and did not appear therein, was bound by the judgment, and that the plaintiff is in no better position than he is. Respondent, on the other hand, in support of the judgment, contends that the action to foreclose the street assessment lien was not strictly a proceeding in rem, and that, therefore, her predecessor in interest was, in order to be bound by the judgment, a necessary party to the foreclosure action, which gave birth to the sheriff's deed, under which appellants claim title to the lot in suit, and, not having been made a party to the action, and not appearing therein, was not bound by the judgment.

[1, 2] The latter contention, we think, must be sustained. It has been the rule of law in this state, firmly fixed by a series of decisions, that a proceeding to foreclose a street assessment lien is not strictly a proceeding in rem. Strictly speaking, an action in rem proceeds only against property seized and sought to be held for the satisfaction of an asserted charge against property without regard to the title of individual claimants to the property. Jurisdiction to thus deal with the property is acquired, in the first instance, by the seizure of the property and of the subsequent proceedings for the satisfaction of the asserted claim against the property by a general notice to all the world of the fact of seizure and the pendency of the action, which notice suffices to make the claimants to the property parties to the action with the result that the judgment, when rendered, will comprehend all persons, and conclude as well, the status of the property upon which the judgment operates. *Bartero v. Real Estate Savings Bank*, 10 Mo. App. 76; *Freeman v. Alderson*, 119 U. S. 185, 7 S. Ct. 165, 30 L. Ed. 372; *Woodruff v. Taylor*, 20 Vt. 19; *Waple's Proceedings in Rem*, p. 328. There are, however, proceedings in law, which, while substantially proceedings in rem, to the extent that they seek to subject particular property to the satisfaction of an asserted claim, nevertheless, assume some of the characteristics of an action in personam, and are, therefore, properly classed as actions quasi in rem. *Freeman v. Alderson*, supra; *Galpin v. Page*, 3 Sawy. 93, 124, Fed. Cas. No. 5,206; *Gassert v. Strong*, 38 Mont. 18, 98 P. 497; *Kelso v. Blackburn*, 3 Leigh (Va.) 299.

A perusal of the statute, pursuant to the provisions of which the foreclosure suit in controversy in the present action was instituted (Stats. 1911, p. 746, § 27), indicates, we think, that such action falls within the category of actions quasi in rem. Clearly, by the very terms of the statute immediately under consideration, the action, while subjecting the property to the satisfaction of a street assessment lien, is a mixed one because it also carries the characteristics of an action in personam, to the extent that the owner of the property is required to be made a party to the end that he may appear and protect his interest in the property (5 McQuillin on Municipal Corporations, p. 4535, § 2131; Wood v. Brady, 68 Cal. 78, 5 P. 623, 8 P. 599; Wood v. Curran, 99 Cal. 137, 33 P. 774; Page v. W. W. Chase Co., 145 Cal. 578, 79 P. 278; Taylor v. Palmer, 31 Cal. 241; Holt Mfg. Co. v. Collins, 154 Cal. 273, 97 P. 516; 1 Corp. Jur. 929).

[3, 4] It may, perhaps, be conceded that one of the earlier statutes of this state (Stats. 1862, p. 391, § 17), covering and controlling street assessment liens, required the foreclosure action to be instituted against the owner of the property, and made him personally liable for the assessment, and that the later statutes dealing with the same subject-matter do not provide for the personal liability of the owner. It does not follow, however, that by the change, if any, in the statutes the action to foreclose a street assessment lien was transformed from one quasi in rem to a proceeding strictly in rem. Nor did such change in the statute operate to permit the judgment in the action to function as a foreclosure of the rights of persons not joined or appearing as defendants in the action who may have had an interest in the property subjected to the lien. The case of Phelan v. Dunne, 72 Cal. 229, 13 P. 662, does not, as appellants assert, so hold. The only question decided in that case was to the effect that only the heirs and devisees, and not the personal representatives of a deceased owner of property, subjected to the lien of a street assessment, are necessary parties to the foreclosure action. And the court expressly refrained from deciding the question of whether or not persons, other than the heirs or devisees of the deceased owner, having an interest in the property, were proper parties, whose rights under the provisions of the statute of 1872 (Stats. 1871-72, p. 816, § 13), declaring who may sue and be sued, might be foreclosed of their interest in the property without joining them as defendants in the action. The act of 1911 (Stats. 1911, p. 746, § 27), under which the foreclosure action in question here was instituted, provides, as did the act of 1872, that "the contractor or his assignee may sue, in his own name, the owner of the land, lots, or portions of lots, assessed, * * *" and section 79 of the

act of 1911 (Stats. 1911, p. 766) defines, as did the act of 1872, the "owner," for the purposes of the act, to be "the person owning the fee, or the person in whom, on the day the action is commenced, appears the legal title to the lots and lands, by deeds duly recorded. * * *" The act of 1911, in so far as concerns its provisions relating to who may sue and be sued, and the definition of owner therein, is but a composite reiteration and reenactment of the earlier improvement acts, and this court, in construing identical provisions found in the act of 1872, held, in Wood v. Curran, supra, upon the authority of Wood v. Brady, supra, that the action therein provided for the foreclosure of a street assessment lien was "not strictly a proceeding in rem." The precise phraseology in the act of 1872 designating the persons who may sue and be sued found its way into the Vrooman Act (Stats. 1885, p. 157, § 12), and this court necessarily considering the purport of that provision, held, in effect, in Page v. W. W. Chase Co., 145 Cal. 578, 79 P. 278, that the foreclosure of a street assessment lien was not strictly a proceeding in rem. It would seem, therefore, that an action to foreclose a street assessment lien, pursuant to the provisions of the statute of 1911, is to-day just what it always has been held by this court to be, under the earlier and similar statutes, an action quasi in rem, and "not a proceeding wherein a judgment for the sale of the property will bind the entire world, or affect the interest therein of any owner except those who are made parties defendant in the action. There can be no proceeding in rem except it be authorized by statute, and in such a proceeding the res which is to be affected thereby is the defendant, and must be brought before the court either by seizure or by publication of notice. Unless notice of the proceeding is in some form given to the owner of the res and an opportunity afforded him to defend the same, a judgment for its sale would have the effect to deprive him of his property without due process of law." Page v. W. W. Chase Co., supra; Wood v. Curran, supra; Wood v. Brady, supra.

The rule thus enunciated was not abrogated by the later cases of Woodill, etc., v. Young, 180 Cal. 667, 182 P. 422, 5 A. L. R. 1296, and Barber Asphalt Co. v. Armstrong, 48 Cal. App. 70, 191 P. 954. These two cases do not refer to the earlier cases, which, either expressly or in effect, declare the foreclosure of a street assessment lien to be a proceeding quasi in rem, and it cannot be correctly concluded that the earlier cases were, even by implication, overruled by anything decided or declared in the two last cases referred to. The court was not called upon in the Woodill Case to determine whether or not the rights of persons not made parties to the action, and not appearing therein, were bound

by the judgment. The only question involved and decided in that case was that of the asserted priority of two conflicting street assessment liens. The precise question decided was that the relative priority of conflicting street assessment liens must be determined by the reverse order of their creation; that is to say, the lien last imposed in point of time is paramount to all such other like liens. In arriving at its conclusion the court declared, in effect, that street assessment liens were akin to those created by the imposition of general taxes to the extent that, in both instances, the taxing power operated, not upon any specific interest in the land, but upon the land itself, that is, the res, and therefore, aside from any express requirement of the statute to that effect, the tax last levied and imposed as a lien upon the property "is superior and paramount to the lien of all other taxes, claims, or titles." The paramountcy of the lien last imposed is made so, apparently, to effectuate a public purpose of promoting public improvements, which might otherwise be impeded, if not altogether thwarted, by the delay ordinarily incidental to the satisfaction of prior liens. While the Woodill Case does declare in terms that the foreclosure of a street assessment lien is a proceeding in rem, nevertheless, that declaration, when considered in connection with the only question decided by the court and in the light of the earlier decisions, which were not referred to, obviously because a discussion of them was not necessary to a decision of the case then in hand, must be taken to mean no more than that, inasmuch as the measure of satisfaction of the lien is limited to the value of the property involved in the suit, the proceeding is quasi in rem, or, as was said by Mr. Justice Harrison in *Page v. W. W. Chase Co.*, supra:

"An action for the foreclosure of the lien of a street assessment is not a proceeding in rem, * * * except in the sense that the amount of the lien can be collected only out of the amount of the property involved in the action."

So considered, there is nothing in the Woodill Case which in any wise conflicts with the rule enunciated in the earlier decisions; nor does the case of *Barber Asphalt Co. v. Armstrong*, supra, express a contrary view, for it is founded practically upon the authority of the Woodill Case, and its reasoning and result must be limited to the question there decided which was precisely the question presented in the Woodill Case.

[5, 6] It is argued that the plaintiff's predecessor in interest was a purchaser pendente lite because the executor of the last will and testament of Mrs. Martha A. Cornelius did not execute a conveyance of the property in suit to him in keeping with the consummation of contract of purchase and sale until long after the filing of the lis pendens in the ac-

tion for the foreclosure of the street assessment lien; and that therefore plaintiff's predecessor in interest was bound by the judgment in the foreclosure action, and the plaintiff, standing in his shoes, is likewise bound by that judgment. The purpose of a lis pendens is merely to furnish a means of notifying all persons of the pendency of an action, and thereby to bind any person who may acquire an interest in property, subsequent to the institution of the action, by any judgment which may be secured in the action affecting the property. It is the rule, generally, that a person having acquired a contractual interest in land, even though the contract be executory in its nature, prior to the institution of an action affecting the land, must be made a party to the action, and, if not so made, a party will retain the right to clothe his equity with the legal title as if no action had been instituted, and this is so even though such person does not complete the payment of the purchase price of the land nor receive a conveyance of the legal title thereto until after the institution and during the pendency of the action. The effect of this rule is that the purchaser under an executory contract of purchase and sale made before the institution of an action affecting the land is a prior purchaser, whose rights therein are not subjected to a subsequent lis pendens. *Trimble v. Boothby*, 14 Ohio, 109, 45 Am. Dec. 526; *Dodge v. Clark* (C. C. A.) 268 F. 784; 25 Cyc. 1482; 17 Ruling Case Law, p. 1028. The contract by which plaintiff's predecessor in interest purchased the property in suit from Martha E. Cornelius, the former owner, was entered and recorded in the recorder's office of the county of Alameda, where the foreclosure action was instituted, more than four years prior to the institution of that action and the filing of the lis pendens therein. Accordingly the whole world had notice that by the contract of purchase plaintiff's predecessor in interest had acquired, conditionally, the property in suit.

[7] It is contended that at the time the action for the foreclosure of the street assessment lien was instituted there existed, by virtue of the conditional contract of purchase and sale, the relationship of trustee and cestui que trust between the holder of the legal title, who was made a party defendant in the action, and plaintiff's predecessor in interest, and that as a consequence the latter was bound by the judgment against the trustee, even though he was not joined and did not appear as a defendant in the action and had no notice of the pendency thereof save by the filing of the lis pendens. Conceding the existence, under the facts of the instant case, of the trust relationship contended for, nevertheless, the cestui que trust, or beneficiary, under the well-established rule in actions by or against the trustee or by a stranger to the trust affecting the subject-matter

of the trust, as distinguished from actions instituted in opposition to the trust for the purpose of declaring the trust a nullity, is a necessary party. *Day v. Wetherby*, 29 Wis. 363; *Beckwith v. Laing*, 66 W. Va. 246, 66 S. E. 354; 2 *Perry on Trusts*, p. 1430, § 873; 2 *Beach on Trusts*, pp. 1728-1730, §§ 754, 755; 1 *Freeman on Judgments*, p. 1075, § 500; *Pomeroy*, Code Rem. (4th Ed.) p. 348, § 253.

The cases and authorities cited by appellants in support of the proposition that a judgment against a trustee is binding upon the cestui que trust have no application to the facts of the instant case, and deal only with the exception to the general rule, which has application to actions instituted to destroy the trust or to those cases where the trustee is empowered, either expressly or impliedly, to represent his beneficiaries in all things relating to their common interest in the trust property.

The case of *Archbishop v. Shipman*, 79 Cal. 288, 21 P. 830, so strongly relied upon to support appellants' contention in this behalf, was an action to enjoin the enforcement of a decree for the sale of certain real estate for the satisfaction of a street assessment. An injunction was sought upon the ground that plaintiff, in his capacity as a corporation sole, was the owner of the property at the time of the institution of the action for the foreclosure of the assessment lien, and, not having been made a party in his corporate capacity in that action, the judgment therein as against him was void. The court expressly declared that the only question necessary to a decision of the case was whether or not the finding of the trial court that the plaintiff was the owner of the assessed property at the time of the institution of the action in foreclosure and the rendition of the judgment therein was sustained by the evidence. The conclusion ultimately reached was that the evidence was wholly insufficient to sustain the finding of corporate ownership, and, incidentally, that no showing was made in keeping with the allegations of the complaint of any equitable ground "for restraining the enforcement of the judgment against the parties against whom it had been rendered" (*Page v. W. W. Chase Co.*, supra), and for that reason the case was reversed. This conclusion was reached notwithstanding the conceded facts of the case that as a matter of record J. S. Alemany was the owner of the legal title to the property, and that it appeared from the parol testimony in the case that he held the legal title as a trustee for the use and benefit of the Roman Catholic Church. The court declared:

"That these facts alone would not entitle the plaintiff to enjoin the sale, but it must show that it had, subsequent to the deed, [which conveyed the property to said Alemany individually and not as Archbishop], become the owner of

the legal title to the property, and that the appellants had notice of the fact at the time of the proceeding to enforce the street assessment."

Thus it would seem that the court's discussion of the case which led up to the only question presented and decided in the case may be said to sustain plaintiff's contention, to the effect that the cestui que trust is not bound by a judgment against his trustee in an action affecting the trust property, where, as in the instant case, the interest of the cestui que trust is made known to the party instituting the action against the trust property.

[8] The judgment in the foreclosure action in controversy here bound only the parties thereto. *Wood v. Brady*, 68 Cal. 79, 5 P. 623, 8 P. 599; *Wood v. Curran*, 99 Cal. 140, 33 P. 774; *Page v. W. W. Chase Co.*, 145 Cal. 578, 79 P. 278; *Holt Mfg. Co. v. Collins*, 154 Cal. 273, 97 P. 516. The plaintiff's predecessor in interest, not being a party to the foreclosure action, was not bound by the judgment therein, and the plaintiff, standing in the shoes of her predecessor in interest, likewise could not be bound by the said judgment.

Judgment affirmed.

We concur: MYERS, C. J.; WASTE, J.; LAWLOR, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

74 Cal. App. 415

PEOPLE v. GRAVES. (Cr. 1247.)

(District Court of Appeal, Second District, Division 1, California. Sept. 22, 1925. Rehearing Denied Oct. 15, 1925. Hearing Denied by Supreme Court Nov. 19, 1925.)

1. Municipal corporations ☞707—Act requiring automobile driver to stop after collision inapplicable to one ignorant of collision.

Provisions of Motor Vehicle Act, § 141, requiring driver of automobile striking person to stop, render assistance, etc., do not apply to one ignorant of fact that automobile had struck another person.

2. Criminal law ☞1172(1)—Instruction as to duty of driver of automobile striking person held not injurious to defendant, though susceptible of construction as applying to driver without knowledge of having struck person.

Instruction that it is duty of driver of automobile striking person to stop, render assistance, etc., "in all cases," held not injurious to one charged with violation of Motor Vehicle Act, § 141, requiring such acts, even if susceptible of construction as applying to driver who had no knowledge of having struck person.

3. Municipal corporations ☞707—Bottle of wine thrown from automobile held admissible in trial for failure to stop after collision.

In trial for failure to stop, render assistance, etc., after striking person with automobile, bottle of wine, which witnesses testified was thrown from defendant's machine shortly after accident, *held* admissible to show condition of defendant and his companions at time, and corroborate other evidence that they had indulged freely in intoxicating liquors just before collision.

4. Criminal law ☞1120(1)—Error in excluding testimony not considered, where record does not disclose such exclusion.

Alleged error in refusing to permit defendant to prove his general reputation as law-abiding citizen in community in which he resided cannot be considered, where record does not disclose such refusal.

5. Municipal corporations ☞707—Conviction of failure to stop automobile after collision held warranted.

Evidence *held* sufficient to warrant conviction of violating Motor Vehicle Act, § 141, by failure to stop, render assistance, and furnish information, after striking person with automobile.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

R. O. Graves was convicted of failure to stop, render assistance, and furnish information required by law, after striking person with automobile, and he appeals. Affirmed.

Claude A. Shutt, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

CURTIS, J. [1] The appellant was found guilty of the violation of section 141 of the Motor Vehicle Act (St. 1923, p. 562). The court instructed the jury as follows:

"The duty imposed upon a driver of an automobile which strikes a person to stop, render assistance, and furnish the information required by the law, is a duty which he must perform in all cases, and it is immaterial whether such accident was caused by the carelessness of such driver, the carelessness of the person struck, or of both, or was an unavoidable accident. Such duty arises whenever such a collision occurs."

[2] Appellant objects to this instruction on account of the presence therein of the words "in all cases," and claims that in giving this instruction the court instructed the jury that it was the duty of the driver of an automobile which strikes a person to stop and perform the acts enumerated in the above section of the Motor Vehicle Act, even though he had no knowledge that he had struck such person. While the instruction is no broader than the section itself, it is in-

conceivable to us that the Legislature ever intended to make the provisions of this section applicable to a person who was ignorant of the fact that the automobile which he was driving had struck another person. And it is with equal difficulty that we can bring our minds to believe that any jury would convict an accused of the violation of the provisions of said section, without being assured to a certainty that he had actual knowledge that his machine had struck a person, or had collided with another automobile, even under an instruction of the court as broad as that given in this case. If we conceded that the instruction is susceptible of the construction claimed for it by appellant, we are unable to believe that the jury so construed it or based their verdict upon any such construction. We are therefore of the opinion that the appellant was not in any way injured by the giving of this instruction.

[3] It is next contended that the court erred in admitting in evidence a bottle of wine, which, some of the witnesses testified, had been thrown from appellant's machine shortly after the accident. There was ample evidence to show that the appellant, and the other occupants of the machine in which he was riding at the time of the accident, had indulged freely in intoxicating liquors just prior to the collision. This evidence was proper to show the condition of appellant and his companions at the time their machine struck the deceased, and the admission of the bottle of wine, thrown from appellant's car, simply corroborated the other evidence upon this subject, and was therefore proper.

The two companions of appellant in the machine, who it may be conceded were accomplices, gave testimony tending to show that appellant had aided and abetted in the commission of the crime charged. There was also evidence that the appellant admitted this fact to one of the officers shortly after his arrest. This evidence was sufficient to warrant a verdict of conviction. *People v. Richardson*, 161 Cal. 552, 563, 120 P. 20; *People v. Snyder* (Cal. Sup.) 239 P. 705.

[4] The further point is made by appellant that the court erred in refusing to permit him to prove his general reputation as a law-abiding citizen in the community in which he resided. The record does not disclose that the court made any such refusal.

[5] Finally, the appellant contends that the evidence is not sufficient to justify the verdict of conviction. The evidence shows that the appellant and two companions were riding in an automobile, a Ford coupé, the property of appellant, on the day of the collision. We may concede, for the purpose of this decision, that appellant was not driving the machine at the time it struck the deceased, or at any time thereafter. There was ample evidence to show that the three occupants

of the car were all occupying its one seat, and that appellant was sitting at the extreme right end of the seat, the farthest removed from the driver. There is a conflict in the evidence as to which of the other two occupants of the car was driving, but that is not material in this action. The machine was being driven westerly on Main street in the city of Alhambra, and, when near the corner of Main and Raymond streets, the driver attempted to turn the car into Raymond street, and in so doing ran the machine upon the sidewalk at the southwest corner of said streets, hitting one David Fraser, who was standing on the sidewalk about 2 feet from the curb, inflicting upon him injuries from the effect of which he died shortly thereafter. As the car struck Fraser it carried him from the sidewalk to the street, a distance of about 27 feet, where he fell from the car to the street. The car was then driven, at a rate of speed estimated by some of the witnesses to be at least 40 miles per hour, from the place where the accident occurred, and no attempt was made to stop or render assistance to Fraser or to otherwise comply with the provisions of the law applicable in such cases. The accident occurred in broad daylight, at about 5 o'clock in the afternoon. Each of the two occupants of the car, other than appellant, testified that shortly after the accident the appellant said, "Drive like hell." There was also evidence from one of the officers that the appellant admitted to him that he had said to the occupants of the car shortly after striking Fraser, "Drive like hell; they can't get our number." This evidence shows beyond any question that there was a flagrant violation of the provisions of section 141 of the Motor Vehicle Act, and that appellant aided and abetted in the commission of said crime, by advising and counseling the driver of the machine to drive rapidly from the scene of the collision without rendering any assistance to the person struck or in any other way complying with the provisions of said section.

It is true appellant testified that he did not know that the machine had struck Fraser, but we can hardly see how this was probable. The fact that the accident occurred in broad daylight, and that the body of Fraser was carried by the machine, a small Ford coupé, some 27 feet from where he was struck, before it fell from the machine to the street, and the further fact that appellant advised the driver to drive rapidly away from the scene of the accident, so that the number of the machine could not be obtained, point strongly to the conclusion that the appellant knew that his machine had struck and injured Fraser at the time he advised their hasty departure from the scene of the accident without any offer to render assistance to the person whom they had injured.

The evidence in our opinion was sufficient to sustain the verdict.

The judgment and order denying a new trial are therefore affirmed.

We concur: CONREY, P. J.; HAHN, Justice pro tem.

74 Cal. App. 411

BENTON v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.
(Civ. 5356.)

(District Court of Appeal, First District, Division 1, California. Sept. 22, 1925.)

1. Master and servant 419—Commission cannot award additional compensation for increased disability after expiration of time for rehearing following denial of relief for same disability.

Continuing jurisdiction of Industrial Accident Commission, under Workmen's Compensation Act, §§ 11(c), 20(d), to award additional compensation for increased disability, does not authorize it to entertain supplementary applications, complaining of same disability for which it has once denied relief, after expiration of time for rehearing.

2. Master and servant 419—Employer not estopped from claiming benefit of order denying additional compensation by failure to plead it in bar.

Employer is not estopped from claiming benefit of final order of Industrial Accident Commission, denying additional compensation for increased disability, by failure to plead it in bar to subsequent petition complaining of same disability, entire record of case, including all former orders or awards, being necessarily before commission.

3. Evidence 43(2)—Industrial Accident Commission may judicially notice former decision in case.

Industrial Accident Commission may judicially notice its former decision in same case.

4. Evidence 1—Judicial notice based on convenience and expediency.

Judicial notice is based upon convenience and expediency.

5. Evidence 1—Boards and special tribunals in nature of courts may take judicial notice of certain matters.

Boards and special tribunals, such as Industrial Accident Commission, in nature of courts, whose findings are in nature of judgments, as well as courts of record, may take judicial notice of certain matters.

Application by John R. Benton for certiorari to review an order of the Industrial Accident Commission of California denying petition for rehearing of application for additional compensation for further disability arising from injury sustained in course of employment by the Southern California Edison Company. Order affirmed.

Emil G. Buehrer, of San Francisco, for petitioner.

Warren H. Pillsbury, of San Francisco, for Industrial Accident Commission.

TYLER, P. J. Petition for writ of review for the purpose of determining the lawfulness of an order of the Industrial Accident Commission denying petitioner a rehearing of his application for additional compensation for an alleged new and further disability arising from an injury sustained in the course of his employment. The injury was suffered by the applicant on January 29, 1923, while employed by defendant Southern California Edison Company as a steel sharpener, and it consisted of the crushing of his right hand by a machine. At the time of said employment petitioner was self-insured, and both employer and employee were subject to the provisions of the Workmen's Compensation Insurance and Safety Act of 1917 (St. 1917, p. 831), and acts amendatory thereof.

Upon his original application for compensation petitioner was, on November 1, 1923, awarded \$20.83 a week for a period of 58 weeks, amounting to the sum of \$1,208.14. On November 7, 1923, he filed a petition for rehearing, claiming that injury to his index and middle fingers had been overlooked and should have been included in the allowance. This petition was granted and a final decision was entered on December 27, 1923, increasing the compensation allowance to payments for 86 weeks, amounting in all to the sum of \$1,791.38. No petition for a rehearing was filed, and this decision became final.

A year later, on December 2, 1924, a petition for a further increase of his allowance was filed by him upon the ground that the muscles and nerves of his right forearm, shoulder, and neck had become involved as a result of his original injury.

The assistant medical director of the Commission filed a report upon the application in which he stated that he could see no anatomical reason why petitioner should suffer the pain he complained of, but suggested to the Commission that he be examined by a nerve specialist. The Commission adopted the suggestion, and the specialist appointed filed his report. From these reports the Commission found that the condition from which applicant complained was not proximately caused by the injury sustained by him on January 29, 1923, and additional allowance was denied. This decision was entered February 2, 1925, and was allowed to become final by petitioner failing to apply for a rehearing.

On March 19, 1925, petitioner again filed an application reciting that the original injury had caused new and further disability. Attached to this application were several medical reports. These reports had to do with

the same complaint of pain in the right forearm and shoulder that had been passed upon the month previous. Accordingly the Commission, on April 21, 1925, dismissed the petition for want of jurisdiction upon the ground of *res adjudicata*. A petition for rehearing was denied, whereupon the applicant filed this petition for a writ of review.

[1] It is here claimed by petitioner that the order of respondent Commission in dismissing his petition for want of jurisdiction is erroneous and void, and should be annulled and set aside for the reason that, under section 11(c) and section 20(d) of the Workmen's Compensation Act, an applicant has the right to institute proceedings for the collection of compensation within 245 weeks after the date of injury upon the ground that the original injury has caused new and further disability; the jurisdiction of the Commission, in such cases, being a continuing one at all times within such period.

There is no question but that the Commission has jurisdiction to award additional compensation by supplementary proceedings where disability has increased since the original decision. The last two supplementary proceedings, however, dealt with the identical cause of complaint, viz. distress and pain suffered by applicant in the right forearm and shoulder.

The decision of the Commission, on February 2, 1925, upon the petition of December 2, 1924, and which was permitted to become final, disposed effectually of this claim. Where the time has expired for a rehearing, the power to amend or alter awards is limited to cases where the application is based upon new facts arising since the making of the award. If there are none, the Commission has no jurisdiction to entertain the petition. The continuing jurisdiction given to the Commission under the sections cited does not authorize the Commission to entertain supplementary applications for the identical complaint where relief has once been denied. The determination by the Commission of that issue is final in the same manner as the original decision where there has been no change in the disability or injury. There must be some end to litigation. *Hindes v. Industrial Acc. Comm.* (Cal. App.) 239 P. 339.

[2] The further contention is made that, even conceding the order of the Commission on February 2, 1925, to be final, still, respondent California Edison Company not having pleaded it in bar to the petition filed subsequently on March 19, 1925, it is estopped from claiming the benefit thereof. There is no merit in this contention. The rule invoked has no application to a situation of this character.

[3-5] In the determination of the question as to whether an applicant is entitled to have an award amended, the entire record of the

case, including all former orders or awards, must of necessity be before the Commission in order that it may properly pass upon the application. The order dismissing the petition in question recites on its face that the record of the former awards was before it and the proceeding was dismissed for the reason that it appeared therefrom that the Commission was without jurisdiction to entertain the application. Then, too, the Commission may judicially notice its former decision in the same case. *Sewell v. Price*, 164 Cal. 265, 273, 128 P. 407; *Harron v. Harron*, 128 Cal. 303, 305, 60 P. 932. Judicial notice is based upon convenience and expediency. To take judicial notice and apply it to the decision of a case is a right which appertains to every court of justice, from the lowest to the highest. The application of the doctrine of judicial notice is not confined to courts of record. Certain boards and special tribunals, which are not strictly courts, but which partake of their nature and the findings which partake of the nature of judgments, may take judicial notice of certain matters. 23 Corpus Jur. p. 172; *Anderson v. Board of Dental Examiners*, 27 Cal. App. 336, 149 P. 1006.

The order denying the petition for further compensation is affirmed.

We concur: CASHIN, J.; KNIGHT, J.

74 Cal. App. 431

HELPLING v. HELPLING. (Civ. 5249.)

(District Court of Appeal, First District, Division 2, California. Sept. 24, 1925.)

1. Divorce ⇨213, 225—Allowance in prior separate maintenance suit no bar to allowance in present suit pendente lite and attorney's fees.

Where defendant in divorce suit had previously obtained judgment in a separate maintenance suit of \$50 per month for 24 months, which judgment had been satisfied by payment, such decree did not bar order in present action requiring payment of \$50 per month pendente lite and attorney's fees, since plaintiff was not required to pay twice for same period of time.

2. Divorce ⇨214(3), 226—Evidence held to justify order for attorney's fees and alimony pendente lite.

Evidence held to sustain order allowing \$50 per month pendente lite and attorney's fees.

3. Divorce ⇨286—Discretion as to alimony pendente lite and attorney's fees not reviewed, except where no support for order.

Discretion of trial court as to alimony pendente lite and attorney's fees will not be interfered with, unless no support whatever appears for the order made.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Suit by Osmond T. Helpling against Margaret J. Helpling for divorce. From an order requiring plaintiff to pay for support pendente lite, counsel fees, and costs, plaintiff appeals. Affirmed.

Louis J. Euler, of Los Angeles, for appellant.

Schweitzer & Hutton, of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal from an order of the superior court of Los Angeles county requiring plaintiff, in a divorce action, to pay to the defendant \$50 a month for her support pendente lite, \$250 for counsel fees, and \$50 for costs.

It is contended that the order appealed from is improper because in 1918 Margaret J. Helpling, the defendant herein, brought an action against her husband, Osmond T. Helpling, the plaintiff herein, seeking separate maintenance, which was granted her by judgment entered upon a stipulation of the parties and providing for the payment to her of \$50 a month "for a period of 24 months and no more," and \$50 for attorney's fees in that action. This judgment was fully satisfied by payment as directed therein, and was introduced in evidence in the instant case, the position being taken that it settled all property rights and questions of alimony between the parties forever. However, upon a showing that defendant herein was earning \$125 a month, but was heavily in debt for expenses incurred by reason of ill health, and had no money or property to meet the expenses incident to the present action, the court made the order appealed from, providing means whereby the present action might be defended.

[1] Appellant relies upon the cases of *Sheppard v. Sheppard*, 161 Cal. 348, 350, 119 P. 402, and *Smith v. Smith*, 147 Cal. 145, 81 P. 411. These cases do not sustain his position. *Sheppard v. Sheppard* presented a situation where the appeal was from an order allowing \$50 a month to the wife for separate maintenance. An additional order was made allowing \$50 a month during the pendency of the appeal for the support of the wife. This order was also appealed from, and the Supreme Court pointed out that for the period pending the appeal there were two valid, enforceable orders in effect, each providing for the payment of the full amount asked by the wife for her support; that payment had actually been enforced under the first order; and that affirmance of the second order would result in a double payment of an amount adequate for the support of the wife and the payment of twice the amount for which she had asked. It was be-

cause of these special circumstances that the second order was reversed, but the Supreme Court said:

"It cannot be disputed, in view of the authorities, that the trial court was authorized to provide for the support and maintenance of defendant by plaintiff pending the determination of the appeal from the judgment, and to this end to make an order directing plaintiff to pay defendant such sums as were reasonably necessary for that purpose. [Citing cases.] And the fact that such support and maintenance for the period of time covered by the order sought was already provided for by the maintenance judgment did not compel the absolute denial of the motion. Execution of the judgment was stayed by the appeal therefrom and the stay-bond given on such appeal, and consequently there was no enforceable judgment or order providing for her support and maintenance during the pendency of the appeal. Then, too, the appeal from the judgment might result in a reversal, in which event it might result that defendant would never receive anything for her support and maintenance during the period of the pendency of the appeal, although clearly, under the authorities, she was entitled to such support and maintenance pending the appeal."

The court then states that the effect of the order for alimony pendente lite, without qualification, was that, if the maintenance judgment was affirmed, and the husband required to pay the amount stated therein, he would be required to pay \$100 a month instead of \$50, the amount asked by the wife, and the amount found necessary for her support. The remedy for this inequitable situation is suggested in the following language of the decision:

"We are satisfied that it was the duty of the trial court in making this order, with the facts as to the maintenance judgment before it, to have protected plaintiff against the possibility of being compelled, by reason of the affirmance of such judgment or the dismissal of the appeal therefrom, to pay twice for any period of time the amount deemed necessary by the court for the support and maintenance of defendant during such period of time. To that much plaintiff was clearly entitled, and in so far as the order made fails to give such protection, it was erroneous, and, as has developed, most prejudicial to plaintiff."

No similar situation was presented in the instant case. Under the authority of the case last cited, the existence of the decree for separate maintenance did not require the denial of a motion for alimony pendente lite in the divorce action; but the former should have been taken into consideration in reaching an equitable order regarding the latter. The facts with reference to the decree for separate maintenance in this case were that the wife was no longer receiving money thereunder; that it provided for maintenance only for 24 months, and payments thereunder had ceased about two years be-

fore the order for support pendente lite was made. The plaintiff was, therefore, not required to pay twice for the same period of time, and the order under consideration is not at all in conflict with the Sheppard Case. Neither is it in conflict with the case of *Smith v. Smith*, supra. In that case the court said:

"As, thus, no matter what dispute upon the subject may have existed, there was in law, when the decree for alimony in the divorce case was made, a valid enforceable maintenance decree in defendant's favor for a hundred dollars a month for her support, the real effect of the alimony order was to give defendant an additional hundred dollars per month; in other words, under two separate and distinct orders require plaintiff to pay for the same purpose the same amount per month."

We see, therefore, that the two cases relied upon by appellant contain language which would exclude from the operation of their ruling a situation such as the present one where the defendant was entitled to receive nothing under the separate maintenance decree at the time the order complained of was made.

The broad discretionary power vested in the courts to allow alimony pendente lite, costs, and counsel fees in divorce actions is for the purpose of making sure that a wife shall not be without support and legal assistance in proper cases so that she may prosecute or defend such actions. *Newman v. Freitas*, 129 Cal. 283, 292, 61 P. 907, 50 L. R. A. 548. That purpose is served when an enforceable decree for separate maintenance is providing the means for the wife's support and legal assistance; but it is not served when that decree has expired by its own limitation some time before the divorce action is brought, as in the instant case. In such a case, the reason for the discretionary power exists, and here the court has found the necessity for its exercise to exist also. The latter finding brings us to the second contention of appellant, which is that the facts of the case do not justify a finding that the defendant is in need of financial assistance to defend the divorce action, or for her support while it is pending.

[2, 3] The record recites that the defendant testified "that her income at present was \$125 per month; that she was heavily in debt for expenses incurred by reason of ill health and had no money or property to meet the expenses of attorney's fees in this case." This is sufficient. We are reluctant to interfere with the exercise of the discretion of the trial court in a matter of this kind, and will never do so unless the record presents no support whatever for the order made. As was said in the case of *McCahan v. McCahan*, 47 Cal. App. 173, 190 P. 458:

"The courts of this state have consistently recognized and upheld the broad discretionary power vested in the trial judges, by the above

section of the code [Civ. Code, § 137] in these matters."

The order appealed from is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

74 Cal. App. 396

KIER SINGH v. BASANT SINGH.
(Civ. 2910.)

(District Court of Appeal, Third District, California. Sept. 18, 1925.)

1. Appeal and error ⇨ 1011(1)—Where testimony in direct conflict, implied findings of court are conclusive.

Where testimony is in direct conflict as to whether sums due plaintiff were paid, implied findings of court from judgment for plaintiff is conclusive.

2. Bills and notes ⇨ 518(1) — Evidence that plaintiff received no money on checks, if believed, sufficient to overcome adverse inference from his indorsements.

Evidence that plaintiff received no money on checks drawn in favor of defendant and indorsed by plaintiff, if believed by court, is sufficient to overcome any inference against plaintiff which otherwise might be drawn from indorsements.

3. Partnership ⇨ 108, 322—Evidence pertaining to partnership not admissible where no showing of settlement of partnership, and where all partners were not parties.

In action for money due, where defendant filed cross-complaint for net share of profits of partnership appropriated by plaintiff, there was no error in excluding evidence pertaining to partnership where there was no evidence to show that partnership affairs had been settled, and if not settled amounts due several partners could not be determined in present action, as some of partners were not made parties, nor could defendant be credited with value of his products used in partnership, since this was not a personal indebtedness of plaintiff, but of partnership.

4. New trial ⇨ 150(3) — Not warranted for newly discovered evidence if it could have been discovered and produced at trial.

A new trial cannot be granted for newly discovered evidence, where there was no showing that it could not have been readily discovered and produced at trial as required by Code Civ. Proc. § 657, subd. 4, and reasonable inference from affidavits was that evidence could have been so discovered.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Kier Singh against Basant Singh for money due, with counterclaims by defendant. Judgment against plaintiff on second and fifth causes of action and for him

on other counts, and defendant appeals. Affirmed.

W. E. Davies, of Marysville, for appellant.
Orrin J. Lowell, of Auburn, for respondent.

FINCH, P. J. The complaint herein states eight separate causes of action against defendant for moneys alleged to be due from him to plaintiff. The answer specifically denies all the items of such alleged indebtedness. The defendant also filed a cross-complaint against the plaintiff, alleging that—

"On or about the year 1921, plaintiff and defendant were engaged as copartners in raising a crop of rice on the Krehe Bros. ranch near Live Oak, and after the expenses thereof had been paid the net share of this defendant amounted to the sum of \$1,020, * * * which said sum was collected by the plaintiff herein and appropriated by him to his own use, * * * and the whole of said sum of \$1,020 is still due, owing and unpaid from plaintiff to defendant."

For a further cross-complaint the defendant alleged that the plaintiff was indebted to him in the sum of \$400 for "moneys advanced to and for the use of said plaintiff." Findings were waived and judgment was entered against plaintiff on the second and fifth causes of action stated in the complaint and in his favor on the other counts. Defendant has appealed from the judgment on a bill of exceptions.

Much of appellant's argument is devoted to the weight of the evidence, a question with which this court has nothing to do. It will be sufficient in this respect to ascertain whether there is substantial evidence which fairly supports the judgment.

[1] The first count is for the sum of \$142.77 alleged to have been paid by plaintiff for defendant. Admittedly the money was so paid by plaintiff. Plaintiff testified that the money had not been repaid. Defendant testified that he had paid the same to plaintiff. The third count is for board alleged to be due plaintiff from defendant. Plaintiff testified that no part thereof had been paid, and defendant testified that he had paid the amount thereof. The fourth count is for "money, goods, wares and merchandise amounting to \$256.55." Plaintiff testified that he furnished the same to defendant, and defendant testified to the contrary. The sixth and seventh counts are for sums alleged to be due upon defendant's promissory notes. Plaintiff testified that he loaned defendant the amounts represented by the notes and that the defendant executed such notes. Plaintiff's testimony in this respect was corroborated by other witnesses. The defendant denied that he received such sums of money or executed the notes. The eighth count is for a small sum alleged to have been paid for de-

fendant at his request. Plaintiff testified that he made such payment, and defendant stated nothing to the contrary. The implied findings of the trial court on the foregoing conflicting evidence are clearly conclusive.

[2] Four checks, drawn in favor of defendant for \$226, \$108, \$100, and \$100, respectively, and indorsed on the backs thereof with the name of defendant in Hindu characters, underneath which appears the name of the plaintiff, were admitted in evidence. The defendant testified that he "did not receive any money from them," but delivered them to the plaintiff. The plaintiff testified relative to these checks as follows:

"Each one of these checks has my signature on it as the last indorser. I did not receive the money for any of these checks; I simply indorsed them for the purpose of enabling defendant, Basant Singh, to cash them. I indorsed some of the checks at the request of Basant Singh and some at the request of the bank, but no money was given to me. I never received any of the money nor handled any of it whatever."

While the plaintiff's indorsements upon the checks were circumstances against him, his explanation, if believed by the trial court, was sufficient to overcome any inference which otherwise might be drawn from such indorsements.

[3] Appellant contends that the court erred in sustaining plaintiff's objection to his testimony offered in support of the first cross-complaint and in striking out certain parts of his testimony relative thereto. Such testimony and ruling are set out in the bill of exceptions as follows:

"In 1920 and 1921, I was in partnership with Kier Singh and other Hindus in raising rice. During the year 1921, I was working for Silva-Bergholdt Company in Placer county, and from February to September, 1921, I gave all my checks which I received from the Silva-Bergholdt Company for labor to Kier Singh, which was to be applied as my share of the expenses of raising the rice crop. I also had 150 sacks of seed rice in the Lincoln warehouse in February or March, 1921, the market price of which was about \$2 a sack and which I gave to Kier Singh for the purpose of sowing that season. The rice was to be raised on 120 acres of the Krehe Bros. ranch near Live Oak, Sutter county, and my share was 20 acres, or one-sixth of the crop. The crop amounted to 3,000 sacks and was stored in the warehouse at Live Oak. I received nothing of my share of this crop. Here the court sustained an objection to the introduction of testimony pertaining to this partnership on the ground that it was the subject of a suit for an accounting and ordered the testimony stricken out."

The question to which objection was sustained does not appear in the record. The cross-complaint was for the defendant's net share of the profits of the partnership, alleged to have been received by plaintiff and appropriated to his own use. It does not appear that the defendant offered to prove that allegation, but the inference from his testimony is that his partners, including others who are not parties to this action, had failed to account to him for his share of the profits. If the partnership affairs had been settled, and if the plaintiff received defendant's share of the net profits thereof, as alleged in the cross-complaint, the defendant should have offered evidence to prove those facts. If the partnership affairs had not been settled, as may be inferred from defendant's testimony, then it is clear that the amounts due the several partners, if any, could not be determined in this action to which some of them are not parties. If there was any error in the ruling of the court, the bill of exceptions fails to show it. Appellant contends that he should have been credited with the value of the seed rice which he testified he furnished "for the purpose of sowing that season," the season of 1921. The answer is that the value of the seed rice was a partnership affair, proper to be considered in an accounting between the partners, but not a personal indebtedness of the plaintiff to be offset against the latter's demands stated in the complaint. Such accounting might show that nothing is due defendant thereunder.

[4] The defendant moved for a new trial, one ground of his motion being that of newly discovered evidence. Appellant urges that a new trial should have been granted on that ground. The facts set out in the affidavits presented in support of the motion are wholly insufficient to warrant a retrial of the case. Even if such facts were otherwise sufficient, there was no showing whatever that they could not have been readily discovered and produced at the trial, and it is a reasonable inference from the facts stated in the affidavits that they could have been so discovered and produced. The showing necessary to warrant a new trial on the ground urged is clearly prescribed by section 657, subdivision 4, of the Code of Civil Procedure, as follows:

"Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial."

The judgment is affirmed.

We concur: PLUMMER, J.; HART, J.

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rates chargeable, unless changed by statute, and purported modification of rates contained in letters sent to commission more than six months after modification had been terminated by one company, but not filed with commission, was ineffective, and, notwithstanding that such company had been charging and receiving less than regular authorized rates, it could revert to legal rate without sanction of commission.

2. Electricity ☞11—Special contract for electric power must be filed with commission.

Contract between plaintiff wholesaler and defendant retailer of electric energy, relating to rates charged defendant, is required to be filed with Railroad Commission, though special and not available to general public since Public Utilities Act 1915, § 14 (b), providing that all contracts which in any manner affect or relate to rates shall be so filed.

3. Electricity ☞11—Modification of contract held illegal "device," remitting portion of legal charges.

Where rates in contract between electric power companies filed with Railroad Commission were only legal rates chargeable, subsequent letters between parties modifying terms of original contract, so as to render energy charge less than originally provided, is a "device" remitting a portion of legal charge, in contravention of Public Utilities Act 1915, § 17 (b).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Device.]

4. Electricity ☞11—Failure to file modified contract held not to prevent recovery on contract filed.

Failure of plaintiff, a public utility corporation, to file letters purporting to modify contract on file with the Railroad Commission, which should have been filed, does not prevent recovery on basis of original contract, under Civ. Code, § 3517, prohibiting one from taking advantage of own wrong, which, by section 3509, was not intended to qualify, but to aid in just application of, Code, where defendant concurred in arrangement which was in violation of statute, and could itself have filed modified contract.

5. Accord and satisfaction ☞26(3)—Compromise and settlement ☞23(3)—Acceptance of payment under modified contract for electric energy not filed held not to constitute "accord" and "satisfaction."

Evidence held to warrant finding that payments by defendant for electric energy under modified contract, accepted by plaintiff on account, but not in full payment, was not an accord and satisfaction of claim under original contract; "accord," under Civ. Code, § 1521, being an agreement to accept something different or less than what is due in extinction of an obligation, and "satisfaction," by section 1523, being acceptance of accord extinguishing obligation. Since there was no lawful subject-matter for contract of accord and satisfaction, the rates in unfiled modified contract being illegal, there was no meeting of minds, as amount due was in dispute when payments were accepted, there was no consideration,

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**SIERRA & SAN FRANCISCO POWER CO.
v. UNIVERSAL ELECTRIC & GAS CO.
(S. F. 11025.)**

(Supreme Court of California. Oct. 31, 1925.
Rehearing Denied Nov. 30, 1925.)

1. Electricity ☞11—Rate in contract filed with commission only legal rate chargeable.

Rate specified in contract between electric companies filed with Railroad Commission under Public Utilities Act 1915, § 14(b), requiring public utilities to file with commission all contracts affecting rates, are the only lawful

original contract provided for payment of disputed bills, and arbitration prevented defendant from making payments conditional on full satisfaction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accord; Satisfaction—Satisfy.]

In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action for money due by the Sierra & San Francisco Power Company against the Universal Electric & Gas Company. Judgment for plaintiff, and defendant appeals. Affirmed.

William Kehoe, of San Francisco, for appellant.

Thomas H. Breeze, Chickering & Gregory, Carl I. Wheat, and Woodward M. Taylor, all of San Francisco, amici curiæ, for Railroad Commission.

SHENK, J. This is an appeal from a judgment in favor of the plaintiff for the sum of \$13,359.68 on account of an alleged balance due for electrical energy furnished by the plaintiff to the defendant. It is alleged in the complaint that on the 9th day of July, 1915, the parties hereto entered into a contract whereby the plaintiff agreed to sell and the defendant agreed to buy for a period of eight years all of the electrical energy that might be required by the defendant in the regular course of its business in excess of that which might be generated in its own plant; that the defendant agreed to pay for energy at the rate per month of \$1.80 per kilowatt for the first 2,000 kilowatts, maximum demand, with a sliding schedule downward for each successive 2,000 kilowatts, maximum demand; that in addition thereto an energy charge was to be paid of four mills per kilowatt hour for energy taken as determined by the integrating watt hour meter readings; that pursuant to the contract the plaintiff sold and delivered energy to the defendant from August 1, 1918, to December 3, 1919, on account of which the total price to be paid was \$255,623.55; that the defendant had paid the sum of \$241,249.71 and no more. Plaintiff prayed judgment for the difference, to wit, \$14,373.84 and interest.

The defendant answered, denying the indebtedness, alleging a modification of said contract by mutual consent in January, 1917, the payment of bills by monthly remittances in accordance with the modified contract, and the acceptance by the plaintiff of such payments in full satisfaction. The court found for the plaintiff and entered judgment for the amount demanded, less the sum of \$1,016.16, which the plaintiff admitted to be due to the defendant in accordance with the

allegations of a counterclaim duly pleaded. The defendant contends that the evidence is insufficient to support the findings, that the judgment is not supported by the findings, and that the decision is against law.

It appears from the evidence that at all times involved in this action the plaintiff and the defendant were public utility corporations, the plaintiff being a wholesaler and the defendant a retailer of electrical energy in San Francisco; that the rates specified in the contract of July 9, 1915, provided, first, for an energy charge at a fixed rate per kilowatt hour for energy actually used, and, secondly, a service charge at a specified rate per kilowatt hour, based upon the maximum demand during the month, the maximum demand being defined as "the sum of the greatest number of kilowatt hours taken by purchaser * * * during any four consecutive fifteen minute intervals during each month"; that the contracting parties operated under this contract until January, 1917, when the plaintiff endeavored to persuade the defendant to shut down its steam plant and take all of its power from the plaintiff. Defendant objected to the proposal on the ground that it was not assured of the reliability of the plaintiff's service, and that by operating its own steam plant it was enabled to reduce the peak load, thus lowering the maximum demand during the month, and correspondingly decreasing the amount of service charge which it was required to pay. After negotiations, however, an oral agreement was entered into whereby the defendant was to shut down its steam plant, the plaintiff to operate its steam plant seven days a week, and the maximum demand on which the service charge was based was to be figured at nine-tenths of the actual amount thereof. Thereafter letters were exchanged purporting to confirm the oral agreement. Under date of January 2, 1917, the plaintiff addressed a letter to the defendant as follows:

"In consideration of the Universal Electric & Gas Company giving the Sierra & San Francisco Power Company additional load between the hours of 7:15 a. m. and 11 p. m. to the full capacity of the present cable, * * * this company will operate its steam plant between the hours of 7:15 a. m. and 11 p. m., and will also assume nine-tenths of the maximum demand being charged as the maximum demand charge, according to the contract. The minimum service charge under this arrangement is to be based upon 1,500 kilowatts. Should your maximum demand be less than 1,500 kilowatts, then and in that event the nine-tenths factor shall not apply. * * * You stated to the writer that you would operate this month, January, 1917, under the terms above named, in order to determine whether or not this would be satisfactory operative conditions."

On January 10, 1917, the defendant replied:

"Confirming our recent conversation and your letter of January 2, 1917, we understand that, should our peak load equal 1,500 kilowatts or more, we are to be billed for nine-tenths of whatever that peak may be, or at the old rate of \$1.62 per k. w. Should the peak be less than 1,500 k. w., then in that event the rate to remain at \$1.80 per k. w. Also, we understand that your steam plant is to run Sundays as on week days. Trusting this will make a clear record of our understanding, and thanking you for your courtesy in the matter, we remain," etc.

On January 15, 1917, the plaintiff in turn replied:

"Referring to your letter of January 10th, I beg to advise you that your understanding does not agree with ours as to the application of the nine-tenths factor. While the resulting bill would be the same in either event (viz. by applying the nine-tenths factor to the rate, according to your understanding, or applying the nine-tenths factor to the peak, according to our understanding), it was our understanding that the peak, and not the rate, should be the method."

It will be noted from the foregoing correspondence that, while there was some disagreement as to the application of the nine-tenths factor, the result was the same as far as the revenues of the plaintiff and payments by the defendant were concerned, for in billing the defendant for energy furnished for the month of January, 1917, to and including the month of July, 1918, the plaintiff applied the nine-tenths factor in ascertaining the maximum demand charge, and the bills were paid by the defendant as submitted. On July 31, 1918, the plaintiff gave to the defendant a written notice of termination of the special arrangement as follows:

"Owing to the greatly increased cost of labor and materials, and to more difficult operating conditions, which have very largely increased the cost of production, we feel that the special concession covered by our letter of January 15, 1917, by Mr. W. L. McKinley, should not be longer continued. We will therefore cancel the arrangement covered by the aforesaid letter and proceed on the contract basis beginning August 1, 1918."

After the notice of termination was given, and continuously thereafter during the entire period covered by this controversy, all bills rendered by the plaintiff were based on the full maximum demand charge in accordance with the original contract. Payments thereon were made by the defendant as hereinafter more particularly noted. On June 15, 1921, the plaintiff made formal demand for the payment of the difference between the amounts claimed to be due computed according to the original contract and the amounts paid computed on the basis of the reduced rate. Upon the refusal of the defendant to pay this action was brought.

When the contract of July 9, 1915, was en-

tered into, the Railroad Commission did not have jurisdiction over the rates, charges and contracts of the parties hereto, for the reason that they were operating within a municipality which at that time had not surrendered its powers of control in such matters to the commission. Const. art. 12, § 23, amendment approved October 10, 1911; section 82, Public Utilities Act Ex. Sess. 1911, p. 62. After the amendment of section 23 of article 12 of the Constitution in 1914, the Legislature adopted the present Public Utilities Act. Stats. 1915, p. 115. This act went into effect August 8, 1915. By this legislation the Railroad Commission acquired jurisdiction of the parties to said contract with reference to their rates and service. Section 14(b) of the act of 1915 provides:

"Under such rules and regulations as the commission may prescribe, every public utility * * * shall file with the commission within such time * * * as the commission may designate * * * all * * * contracts * * * which in any manner affect or relate to rates, tolls, * * * or service."

In admitted compliance with general order No. 45 of the Railroad Commission, the plaintiff on October 6, 1915, filed with the commission a summary of the rates provided for in the contract of July 9, 1915, listed as a deviation from the regularly filed electrical rates. Thereafter the commission requested that the complete contract be filed in accordance with the general order, and this was done on February 16, 1916. Section 15 of the Public Utilities Act provides:

"Unless the commission otherwise orders, no change shall be made by any public utility in any rate, fare, toll, rental, charge or classification, or in any rule, regulation or contract relating to or affecting any rate, * * * except after thirty days' notice * * * stating plainly the change or changes to be made in the schedule or schedules then in force, and the time when the change or changes will go into effect."

And subparagraph (b) of section 17 of the act provides:

"* * * No public utility shall * * * receive a greater or less or different compensation * * * than the rates, tolls, rentals and charges * * * as specified in its schedules on file * * * nor shall any such public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates, tolls, rentals and charges so specified, nor extend to any corporation or person any form of contract or agreement * * * except such as are regularly and uniformly extended to all corporations and persons; provided, that the commission may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility."

[1] Under the plain mandate of the statute it is clear that, when the contract of July 9,

1915, was filed with the commission, the rates and charges specified therein became the established and only lawful rates which the plaintiff could charge or receive, unless and until a change in such rates was effected in accordance with the statutory requirements, and no such change was made concerning the rates here in question. The letters of January 2, 10 and 15, 1917, were not sent to the Railroad Commission until February 14, 1919, more than six months after the modification provided for therein had been terminated by the plaintiff, and then only at the request of the commission, and there is no evidence that said letters were ever filed. The purported modification of the agreement was therefore ineffective. *Calistoga Elec. Co. v. Napa Valley Elec. Co.*, 11 Opinions and Orders Railroad Comm. 974. Notwithstanding the plaintiff had been charging and receiving less than the regularly authorized rates, it had the right to revert to the legal rate without the sanction of the commission. In *re Village of Cambrria*, Pub. Utility Reports, 1916E. 519.

[2] It is insisted by appellant that the contract of July 9, 1915, was not required to be filed with the commission, because it "was a special contract not available to the general public." To this contention the language of the statute is a complete answer, wherein it is provided that every public utility shall file with the commission its rates or schedules and *all contracts which in any manner affect or relate to rates*. Section 14, subparagraph (b). This provision would include, not only the general rate schedules under which any consumer might be supplied with energy without a special contract, but also all special contracts, such as the one involved herein, affecting or relating to rates. The statute is too plain to admit of any other meaning.

[3] Such being the status of the original contract, the defendant then takes the position that the change made by the letters of January, 1917, did not affect the rates to be charged and collected by the plaintiff, nor change or affect the quantity of electrical energy actually purchased; that the sole change made was in determining the maximum demand; that the maximum demand was actually delivered only one hour in the month, and was charged for as though it had been actually delivered every hour during such month; that it was a charge for service rendered in large part in theory only; and that the parties to the contract had the lawful right to modify the same so as to change the difference between the actual and theoretical delivery. The theory advanced by the defendant is technical and interesting, but it is unnecessary to further discuss it, for the reason that, whatever the theory may have been, the purpose of the arrangement and its practical effect, if legally accomplished, was to modify the terms of the orig-

inal contract, so as to render the energy charge, which the plaintiff was entitled to demand and the defendant was bound to pay, less than that provided for in the original agreement.

When so considered, the arrangement may properly be termed a "device" by which a portion, to wit, 10 per cent., of the legal charge, was remitted to the defendant, in contravention of subparagraph (b) of section 17 of the Public Utilities Act. If a public carrier should say to a shipper, to whom it desired to grant a preference, "We will bill you each month at the rate per hundred pounds specified in our legally established tariff, but in making out our bills we will bill you only for 90 per cent. of the actual weight shipped by you during the month," could it be doubted that such an arrangement would effectuate a reduction of the rate in favor of the shipper? The defendant apparently considered that the letters of January, 1917, should have been filed, for by its letter of September 7, 1918, in response to plaintiff's notice of cancellation of July 31, 1918, it wrote to the plaintiff as follows:

"Referring to your letters of January 2d and 15th, in which you agreed to bill us on a basis of nine-tenths the maximum demand, * * * we would ask: Were those letters filed with the Railroad Commission as a modification of our power contract, as required? If not, they should, of course, be filed, and, the rate having been lowered, it cannot therefore be arbitrarily raised at the pleasure of one of the parties to the agreement."

The defendant was correct in its conclusion that it was necessary to file the letters with the commission, but its further conclusion that the plaintiff having theretofore charged and collected compensation on the basis of an unauthorized rate, could not revert to the legal rate as was done in this case, is not approved.

[4] The defendant further contends that, if said letters were required to be filed, it was the duty of the plaintiff to file them, and to allow the plaintiff to recover in the face of such breach of duty would be to permit the plaintiff to "take advantage of its own wrong," citing section 3517 of the Civil Code. But that maxim of jurisprudence is not of universal application. It was not intended to qualify any of the provisions of the Code, but to aid in their just application. Civ. Code, § 3509. While it may properly be said that the plaintiff was in duty bound to file the modified contract with the Railroad Commission, and, failing to do so, was subject to the penalties prescribed by law, it must also be said that the defendant was not wholly blameless, for it concurred in an arrangement which was contrary to the statute. It could have protected its rights by filing the modified contract with the commission. The documents providing for the modification were presumably in its posses-

sion, as well as in the possession of the plaintiff.

The argument also loses sight of one of the purposes of the regulation of rates of public utility corporations. The public in general and the consumers in particular are interested in the relations existing between the corporation and each of its consumers. To accede to the position of the defendant would be to permit a public utility corporation to deplete its revenues by special secret arrangement with preferred consumers, thus leading to possible financial embarrassment or depreciated service, and without recourse as against the preferred consumer. It seems obvious that a consumer who has participated in such a prohibited arrangement is not in position to avoid payment of the legal charge on the ground that the other party to the transaction had not done its full duty in the premises.

[5] The trial court found and decided that there had been no "accord and satisfaction" of the claim of plaintiff against defendant in whole or in part. The defendant attacks this finding as being contrary to the law and the evidence. Upon receipt of the bill covering power delivered for the month of August, 1918, the defendant refigured the same, applying the nine-tenths factor, which made a reduction for that month of \$420.12. A new bill, with voucher attached, based on the refigured amount, was prepared by the defendant and transmitted to the plaintiff, together with a check for the smaller amount. The wording of the voucher was as follows:

"Received of Universal Electric & Gas Company in full payment of above account six thousand eight hundred twenty-six and $\frac{4}{100}$ dollars."

The plaintiff refused to sign the voucher, but wrote the defendant as follows:

"We inclose herewith a receipt for \$6,826.42, the amount of your check on account of August, 1918, power bill, \$7,246.54. Because of the deduction which you have made from our bill we are obliged to furnish you with a receipt on account. We have accepted the check under protest and have passed the same to your credit."

The following is the form of the receipt:

"Received of Universal Electric & Gas Company six thousand eight hundred twenty-six and $\frac{4}{100}$ dollars to apply on account of August, 1918, power bill. Unpaid balance, \$420.12."

The same procedure was followed by both parties each month thereafter to and including February, 1919. From March to June, 1919, the defendant continued to send the vouchers to the plaintiff with checks for the smaller amount. As to these vouchers the plaintiff signed and returned them, first crossing out the words "in full payment of above account," and inserting the words "on

account" of the bill for the particular month. Beginning July, 1919, and ending December, 1919, when the service was apparently discontinued by mutual consent, the defendant, on receipt of each monthly statement for that period, made out a bill for the smaller amount and submitted it, with a voucher check on the back of which was the following:

"If not correct return without alterations and state differences. Make all indorsements below. This check is hereby accepted by the payee in full payment of the within account and indorsed as follows."

These checks were indorsed by the plaintiff without change or alteration. In addition to the foregoing procedure, it appears that early in the period covered by this controversy the parties referred the matter to their respective attorneys, and payments were thereafter made by the defendant, through its attorney, with an accompanying letter, beginning December 9, 1918, as follows:

"This check represents the amount admitted to be due by the Universal Company on account of the items for electrical energy furnished and charged in your bill in the month of October, 1918. The check does not include two items mentioned in that account, viz. the surcharge of $1\frac{1}{2}$ mills per k. w. h. and in addition deducts one-tenth of the maximum demand charge. * * * It was the expectation of the Universal Company and of myself that before tendering the inclosed check it would take up with your attorney * * * the items in question as to which payment is not made, * * * and if agreeable to you this procedure will be adopted. I am in hopes of obviating the necessity of resorting to the arbitration provisions of 1915 contract. * * *"

The checks for the remaining months of the period were transmitted through the defendant's attorney and were accompanied by his letters identical in form as follows:

"Herewith please find Universal Electric & Gas Company's check, * * * being the amount admitted to be due on your bill. * * * The check is similar to that sent you with my letter of December 9, 1918, covering October bill, the same deductions being made from your statements as rendered and the same reservations and conditions being present as regards the items withheld. * * * As on previous occasions you will undoubtedly not be in a position to sign the full payment voucher accompanying the check; but, if you will attach a receipt and return the same with the voucher, pending final adjustment, this will be appreciated."

An accord is an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled. Civ. Code, § 1521. Acceptance by the creditor of the consideration of an accord extinguishes the obligation, and is called satisfaction. Civ. Code, § 1523; *Creighton v. Gregory*, 142

Cal. 34, 41, 75 P. 569. Since an accord is an agreement it is subject to the same rules applicable to other agreements. 1 Cal. Jur. 127.

"The discharge of claims by way of accord and satisfaction is dependent upon contract express or implied; and it follows that the essentials necessary to valid contracts generally must be present in a contract of accord and satisfaction. Therefore there must be (1) a proper subject-matter; (2) competent parties; (3) a consent or meeting of the minds of the parties; and (4) a consideration." 1 R. C. L. 178, § 3.

The agreement of accord and satisfaction which the defendant here contends for could under the evidence arise only by implication. The statute expressly forbade the plaintiff to charge or receive compensation for electrical energy at any rate other than that specified in the contract duly filed. It therefore could not lawfully accept the amounts tendered by the defendant. In view of this situation, counsel for the plaintiff very pertinently inquires: "How can the law imply that plaintiff has done that which the statute expressly forbids?" We think the answer must be that a contract of accord thus arising cannot properly be brought into being with one of the essentials of a contract lacking, to wit, a lawful subject-matter. Since an accord and satisfaction is the result of an agreement it must also be consummated by a meeting of the minds of the parties.

"The great weight of authority in American courts undoubtedly supports the rule that where the amount due is in dispute, and a check for an amount less than that claimed is sent to the creditor, with a statement that it is sent in full satisfaction of the claim, and the tender is accompanied by such acts or declarations as amount to a condition that, if the check is accepted at all, it is accepted in full satisfaction of the disputed claim, and the creditor so understands, its acceptance by the creditor constitutes an accord and satisfaction, even though the creditor states at the time that the amount tendered is not accepted in full satisfaction. Wald's Pollock on Contracts (3d Ed.) p. 839. Whether there was a dispute concerning the amount due, and whether the tender was on condition that acceptance would be in full satisfaction, are primarily questions of fact for the trial court." Lapp-Gifford Co. v. Muscoy Water Co., 166 Cal. 25, 27, 134 P. 989, 990.

From the oral evidence in the case at bar, and the conduct of the parties as indicated by the documentary evidence above noted, it satisfactorily appears that the amount actually due was in dispute at the time of the acceptance and retention of the several checks, and that the tender was not subject to the condition that acceptance of each check would be satisfaction in full. It is

also clear that the element of consideration for the agreement of accord was lacking. The court was therefore correct in finding and concluding that there had been no accord and satisfaction. Furthermore, the contract of July 15 expressly provided that:

"In case purchaser at any time shall dispute any bill rendered by Power Company under the provisions of this agreement, then within the period fixed herein for the payment of such bill, purchaser shall pay Power Company the amount which it admits to be due by it on account of the items charged in such bill without deduction, * * * and shall forthwith offer to submit to arbitration, as hereinafter provided, the question with respect to the balance unpaid by it. * * *"

In view of the foregoing provision of the contract, it seems reasonable to conclude that the defendant had no right to attach a condition to its payment of the amount conceded to be due, and by admittedly failing to offer to submit to arbitration subject the plaintiff to its claim of accord and satisfaction.

From what has been said it is unnecessary to discuss the question of whether or not the modification of the original contract was effective only during the month of January, 1917, as contended by the plaintiff, or during the entire period covered by the controversy, as contended by the defendant. In either event the modification did not become legally effective, and the period of its duration was therefore of no consequence.

The judgment is affirmed.

We concur: MYERS, C. J.; RICHARDS, J.; SEAWELL, J.; WASTE, J.; LAWLOR, J.; LENNON, J.

197 Cal. 426

**POSTAL TELEGRAPH-CABLE CO. v.
RAILROAD COMMISSION OF STATE
OF CALIFORNIA. (S. F. 11344.)**

(Supreme Court of California. Nov. 6, 1925.)

1. Electricity ☞9(3)—Court not required to consider objections to order of Railroad Commission not set forth in application for rehearing by commission.

On certiorari to review order of railroad Commission allowing petitioner one-half of cost of relocating telegraph line, Supreme Court was not required to consider objections to commission's order on ground that it violated state Const. art. 1, § 14, and federal Const. Amend. 14, in view of Public Utilities Act, §§ 66 and 67, where none of such grounds was specifically set forth by petitioner in its application for rehearing by commission.

2. Electricity ☞9(3)—Railroad Commission's departure from own precedent not under control of court.

On certiorari to review order of Railroad Commission allowing one-half of cost of relocating telegraph line, departure by commis-

sion from its own precedent or failure to observe a rule ordinarily respected by it is not a matter under control of Supreme Court, since it neither tends to show that commission had not regularly pursued its authority or that departure violated any rights of petitioner guaranteed by state or federal Constitution.

3. Electricity ☞9(3)—Railroad Commission's order directing greater horizontal separation of power and communication lines held proper.

Where Railroad Commission, in making its order directing a greater horizontal separation of a power and communication line under Public Utilities Act, § 36, was acting within limits of police power of the state, and neither company had a vested right to remain where it was located, regardless of priority of franchise, as against public's welfare, safety, and convenience, such order was properly made.

4. Electricity ☞9(3)—Railroad Commission's apportionment of cost of horizontal separation of communication and power lines affirmed.

Order of Railroad Commission directing greater horizontal separation of power and communication lines, and fixing proportion of cost to be borne by each of companies at one-half the total cost of such change, will be affirmed, where such companies failed to agree upon a division of such costs, which costs were a joint charge against both within Public Utilities Act, § 36, and it did not appear that commission acted arbitrarily or oppressively, though apportionment of cost in favor of one company might not be as large as Supreme Court would have allowed, were it vested with jurisdiction to fix the amount.

In Bank.

Application for certiorari by the Postal Telegraph-Cable Company against the Railroad Commission, to review order of such commission allowing petitioner one-half of cost of relocating telegraph line. Order affirmed.

Willard P. Smith, of San Francisco (Kennett B. Dawson, of San Francisco, of counsel), for petitioner.

Carl I. Wheat and Woodward M. Taylor, of San Francisco, for Railroad Commission.

Charles P. Cutten and Ralf W. Du Val, both of San Francisco (Wm. B. Bosley, of San Francisco, of counsel), for Pacific Gas & Electric Co.

SEAWELL, J. Application for a review of that portion of an order made by the Railroad Commission whereby petitioner was allowed one-half of the cost of relocating a portion of its telegraph line in certain areas in which it is closely paralleled by a high-power transmission line operated by the Pacific Gas & Electric Company, in order to prevent induction interferences to petitioner's telegraph line, which, by reason of its close proximity to the power line of the Pa-

cific Gas & Electric Company, renders induction unavoidable.

The terms "communication company" or "communication lines," as employed herein, are meant to identify the petitioner or its telegraph line. The terms "transmission line," "power company," or "power lines" have a corresponding reference to the Pacific Gas & Electric Company or its property. The communication company and the transmission company are respectively public utilities operating under the authority of law.

On August 23, 1918, the Postal Telegraph Company, a transcontinental telegraph system, with telegraph and cable connections with various parts of the world—a portion of which system is situate within this state, under the laws of which it was organized and exists—filed a complaint against the Pacific Gas & Electric Company, a public utility engaged in this state in the business of furnishing electric power for general commercial purposes, by which it is alleged that in the year 1886 the Postal Telegraph-Cable Company built, equipped, and began the operation of the telegraph line in question. The city of San Francisco was the point of beginning of said system, which extended easterly through Benicia, Suisun, Elmira, Dixon, Davis, and Sacramento to the easterly boundary of the state, thence to various parts of the continent. Said telegraph line was taken over by petitioner in 1908, and it has ever since been operated and maintained by petitioner in a safe and proper manner, and in full compliance with the laws of the state of California and the rules and regulations of the Railroad Commission of this state. In this connection it is further alleged that the telegraph line was originally constructed in a good and substantial manner, and at all times since its construction has been properly maintained, operated, and equipped with the most modern and approved devices obtainable for the prevention of electric induction into or upon its communication wires; that the voltage used on or over its line in the transmission of telegraphic messages has at no time exceeded 350 volts and the amperage has not exceeded one-tenth of one ampere; that the transmission company since October 4, 1905, has, between the city of San Francisco and the city of Sacramento, for the transportation of electric current and energy, maintained a pole system consisting of copper wires strung upon wooden poles, over which it transports normally an alternating electric current of high potentiality, to wit, about 50,000 volts.

It is alleged, and is unquestionably a fact, that the induction interferences from which petitioner has and does now suffer is the result, primarily, of the close proximity at which the power company at the time of the construction of its line—1900-1904—placed

its pole lines with reference to petitioner's line in the vicinity of Davis, Dixon, Vandeen, and Elmira, and intermediate points between Suisun and Davis for a total distance of five miles, parallel with petitioner's line, making a parallel separation not greater than 22 feet between the pole lines of said transmission and communication companies, and at another section for a distance of 8 miles, with a horizontal separation not greater than 24 feet. Other parallelisms too narrow for the safe and efficient management of the communication line are alleged. It is also alleged, and found as a fact by the commission, that the normal disturbances from which petitioner is troubled is seriously increased and aggravated by defective construction and poor maintenance of said power lines and the failure of said power company to make needful repairs and improvements for the prevention of surges; the overloading of the system with electric energy beyond its capacity; neglect to patrol its lines at seasonable times; the violation, in certain instances, of the laws of the state of California and the regulations of the Railroad Commission governing the operation and maintenance of said power lines; and a general state of deterioration into which said power lines has been allowed to pass. There is no dispute as to the physical facts so far as parallels are concerned. At no point are the two pole systems after leaving the Alameda county line eastward to Sacramento, a distance of approximately 70 miles, placed at a greater distance apart than 210 feet.

As a result of said inductive interferences, which cause buzzing noises and confusion of sounds, the transmission of messages is made difficult, if not impossible, and long delays in the transmission of messages are of frequent occurrence. Petitioner's equipment has frequently been burned out or damaged by surges of electric energy passing over the wires of the power company, the result of improper maintenance, operation, and a too close contact of the lines of said company. There is no doubt but that petitioner has sustained damage and has suffered much inconvenience from the inductive interferences arising from an indisputable situation. The communication line being by far the weaker in electric voltage, and being compelled from necessity to use instruments and devices in the transmission of messages which are delicate and highly sensitive to air waves and atmospheric and electric disturbances, renders it impossible for it to successfully combat induction disturbances which are rendered unavoidable by the close proximity of the wire lines, and cannot be prevented even by the employment of the most modern and approved methods known to electrical science or skill. It is practically admitted that the efficient management and control of petitioner's property, as well

as the safety of the general public and the employees of both companies, require that the parallel separation between the pole lines of said companies be not less than 500 feet.

The prayer of petitioner was that the commission either require the power line to repair, reconstruct, and equip its power lines so as to prevent surges thereon or to remove its line between the cities of Sacramento and Suisun a sufficient distance from petitioner's line to prevent induction thereupon, "and for such other, further, and different relief as may appear just in the premises," and for costs.

The answer of the power company alleges that it owns and operates two 60 K.V. lines from Suisun to Davis, a distance of about 27 miles, which were originally constructed by the Bay Counties Power Company in 1900, and one 60 K.V. line from Davis to Sacramento, a distance of 13 miles, constructed in 1904. Both of said lines, for the greater portion of the distance here involved, are operated on the private right of way of each company, and are adjacent to the right of way of the Southern Pacific Company. As to the allegations that said power lines are or ever were poorly constructed, or have at any time been poorly maintained, operated, or equipped in violation of any law or statute or rule of any commission or in any respect whatsoever, said power company made specific denials. In short, it denied that any act done by it or failure or omission or neglect to perform any duty imposed upon it by law has caused the communication company any damage or injury whatever.

The commission, after hearing a great mass of expert evidence upon the issues involved, extending over a long period of time, made an order that the petitioner, Postal Telegraph-Cable Company, submit for its approval, within 60 days of the date thereof, plans for the relocation of its circuits between the cities of Elmira and Davis to a new position along the northerly side of the Southern Pacific Company's right of way between Elmira and Davis or in another location equally distant from the circuit of said power line. A similar order was made directing the removal of petitioner's circuits in the vicinity of the town of Vandeen within that section where its circuits paralleled the power circuits on the same side of the Southern Pacific Company's right of way to a position along the southerly line of said Southern Pacific Company's right of way, or to another location equally distant from said power line company's circuit.

The order as to the matter of cost resulting from said changes of location was that said cost should be equally borne by the communication and transmission lines, respectively.

Petitioner filed in due course of time an application for a rehearing. Said applica-

tion insisted that, inasmuch as it had been found by the commission that the close proximity of the circuits of the contending parties caused serious and unavoidable interferences upon the lines of the petitioner of such a nature and to such an extent as to warrant the increase of the separation, any order requiring it to bear one-half of the cost resulting from said change was unlawful. The commission was requested to modify its order by providing that the entire cost of relocation be borne by the power company. As a final request, the petitioner prayed that the order "be modified so as to require the entire expense of relocation, except the cost of new equipment in place of old, be met by the defendants (power company), and that the question of relocating the lines between Davis and Sacramento and between Elmira and Suisun be left open until the result of the changes ordered be determined and the foregoing application for a rehearing be granted, and an order made to that effect."

[1] Petitioner urges in this court as specific grounds for the annulment of the commission's order violations of those clauses of the state Constitution (article 1, § 14) and the federal Constitution (Fourteenth Amendment), which provide that private property shall not be taken or damaged for public use without just compensation having first been made to the owner, and the due process and equal protection clauses (Fourteenth Amendment) of the federal Constitution. None of these grounds were specifically set forth in its application for a rehearing by the commission. Section 66, Public Utilities Act (Stats. 1915, p. 115), provides that an application for a rehearing of any order or decision made or given by the Railroad Commission "shall set forth specifically the ground or grounds on which the applicant considers said decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in said application." It must be conceded that, in setting forth the grounds upon which the unlawfulness of the order was alleged to be vulnerable to attack, it did not specifically set forth any of the constitutional objections which are urged before us in this proceeding as grounds sufficient to compel the annulment of the commission's order. The validity of the limitation placed upon the control of the courts of this state by the provisions of sections 66 and 67 of the Public Utilities Act has been definitely settled by the cases *Pacific Telephone and Telegraph Co. v. Eshleman*, 166 Cal. 640, 137 P. 1119, 1 Ann. Cas. 1915C, 822, 50 L. R. A. (N. S.) 652; *Clemmons v. Railroad Commission*, 173 Cal. 254, 159 P. 713; *Marin Municipal Water District v. North Coast Water Co.*, 178 Cal. 324, 173 P. 473; *San Leandro v. Railroad Commission*, 183 Cal. 229, 191 P. 1, and other more recent decisions of this court. In *San*

Leandro v. Railroad Commission, *supra*, speaking to the point that petitioner had not specifically set forth in its application for a rehearing a ground which it was then urging in this court for the annulment of the order, we said:

"* * * Petitioners failed to specifically set forth the alleged failure to fix a rate base in their application to the commission for a rehearing, and are, therefore, precluded by the terms of section 66 of the Public Utilities Act from urging the objections in this court."

A situation practically identical with the one here presented was before the Supreme Court of Missouri. Section 110 of the Public Service Act of that state (Laws 1913, p. 641) provided that "no corporation or person or public utility shall in any court urge or rely on any ground not set forth in said application" (referring to a rehearing). A constitutional question not raised by the applicant in its petition for a rehearing before the commission was urged in the circuit court and Supreme Court. The court refused to entertain the question, and tersely said:

"The constitutional question injected into this controversy for the first time in the petition for review was not timely. How, without a contradiction in terms, can a matter be reviewed which has not been viewed? * * *" *State ex rel. Buffum Telephone Co. v. Public Service Commission*, 272 Mo. 627, 199 S. W. 962, L. R. A. 1918C, 820.

While we feel that we would be fully justified in dismissing from consideration the constitutional questions which are specifically set out in the brief of petitioner and referred to in less specific language in the petition for the writ, and which were not specified as a ground of unlawfulness in the application for a rehearing before the commission, other reasons impel us to give consideration to the constitutional questions within the limitations which petitioner itself has placed upon them.

The induction disturbances complained of are not of recent or sudden development, but have existed in a noticeably increasing degree since about 1909, and were officially brought to the attention of the commission by petitioner in 1919. It has been a vexatious problem with the commission for a number of years. At its behest joint conferences were called with the view of devising some plan or means by which the increasing induction disturbances might be minimized or suppressed. The officers of both companies, both before and after the order of relocation was made, and their expert electricians and engineers met in council with the commission and its engineers upon a number of occasions in an endeavor to hit upon some practical solution of a difficult problem. After much experimentation, investigation, and many negotiations and discussions, the commission was forced to the conclusion that

there was but one practicable, reasonable solution of the question which would afford petitioner relief from induction troubles, to wit, a wider horizontal separation of the pole lines of the respective companies. The soundness of its conclusion is not questioned. Neither is the right of the commission to compel the petitioner to relocate its lines challenged. It is conceded by petitioner that, if the commission had made an order requiring petitioner to relocate its lines, and had assessed the power company with the entire cost of such relocation, it would have been a valid order, and the commission's authority in such a case would have been regularly pursued. In other words, the jurisdiction or power of the commission to determine the question it had taken hold of depended—in the view of petitioner—upon whether it had acted wisely or unwisely in the determination of the issue submitted. Such, of course, cannot be the rule. Failure to make an equitable apportionment of costs would constitute nothing more than error of judgment. Petitioner's contention, in short, is that, the telegraph line having been built and operated some 14 years prior to the construction of the power line, and the induction disturbances being caused by reason of the existence of such power line, *ex proprio vigore* prohibited the making of but one decision or order. Petitioner thus states its position:

"The only question before the court is whether or not 50 per cent. constituted just compensation, but we consider it necessary to explain the basis of our claim so that the court can see why we are entitled to the relief which we now ask. Our right is based on prior occupancy, and we will therefore discuss the rights of a prior occupant. The commission has decided that we are prior occupants, and entitled to relief, so that the question is not really before this court, but its discussion is necessary to understand our claim."

Again, the closing words of petitioner's written argument are in these words:

"That part of the order of the railroad commission requiring petitioner to pay one-half of the cost of relocating its own line should be annulled."

Thus it appears that petitioner does not take the position that the commission was without jurisdiction or authority to require it to relocate its lines at certain points in order to prevent the difficulties and dangers sought to be remedied for the reason and on the ground that it was first in point of time in the construction of its line, but insists that such priority gave it the absolute right to demand and receive the entire cost of the relocation of any portion of its line, if such should be the order of the commission, and under no possible set of circumstances would the commission be justified in awarding a lesser amount than the full amount of said

costs. The question of priority was considered by the commission in making its apportionment of cost as between the companies affected, and its résumé of the situation follows:

"The method of dividing the cost between utilities whose lines are involved in a parallel, and which require reconstruction, relocation, or other changes, heretofore followed by this commission, has been to require the utility in whose plant any capital addition is made to bear the cost of that added plant, and that changes other than capital charges in either the power or communication circuits, including the cost of remedial measures, be paid for by the party creating the parallel and the cost resulting from the planning or determination of the necessary remedial measures to be paid for by the utility making the same.

"The evidence in this proceeding shows that both the power and communication circuits have been in operation for many years and long before the question of inductive interference was given serious consideration. Since that time changes have been made by both utilities in their circuits. In view of the history of the lines involved in this matter, it does not appear that the question of priority of construction should be given material weight in determining the responsibility of payment of costs resulting in the mitigation of interference."

[2] The departure by the commission from its own precedent or its failure to observe a rule ordinarily respected by it is made the subject of criticism, but our reply is that this is not a matter under the control of this court. We do not perceive that such a matter either tends to show that the commission had not regularly pursued its authority or that said departure violated any right of the petitioner guaranteed by the state or federal Constitution. Circumstances peculiar to a given situation may justify such a departure.

We are not here concerned with any monetary damages which may have accrued to petitioner against the power company because of the negligent or improper construction or maintenance of its circuit system. The commission did not have jurisdiction to adjudicate such an issue. The question germane to the commission's duty was whether the two companies could exist in their present location and perform public services under grant of the laws of the state with due regard to public efficiency and the safety of person and property. The commission undertook to exercise its power upon complaint by the petitioner in accordance with the provisions of section 36, Public Utilities Act.

It is to be kept in mind that at the time the power line was constructed possible induction interferences were not considered or thought of by the builders of either of said lines, and no serious inconveniences were felt until a number of years thereafter. The communication line, which from the begin-

any purpose. This court, in the Bagley Case, supra, recognized that, notwithstanding the merger, the attachment lien still continued in existence and retained its identity for the purpose and with the effect of preserving the priority thereby acquired. But whatever may be the extent to which the attachment lien became merged with the judgment lien, or whatever may be the extent to which the former retained its separate existence and identity, there is no room for doubt, under the law as it now exists, that the lien of the judgment and the lien of the attachment were both terminated by the filing of the supersedeas bond. Section 671 of the Code of Civil Procedure, as amended in 1917 (St. 1917, p. 141), provides:

"The lien [of the judgment] continues for five years unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking as provided in this Code, in which case the lien of the judgment *and any lien by virtue of an attachment that has been issued and levied in the action ceases.*"

[3-5] The italicized words were added to the section by the amendment of 1917. In a case arising under this section as it read prior to this amendment, Chief Justice Beatty in a concurring opinion argued with much force that the statute as it then stood did not expressly provide that the filing of a supersedeas bond discharges an attachment lien, and presented cogent reasons why it should not be construed as so providing by implication. *Riley v. Nance*, 97 Cal. 206, 31 P. 1126, 32 P. 315. However persuasive those reasons may have been, they seem to have been rejected by the Legislature, which has now made its intent plain beyond question that the filing of the supersedeas bond upon appeal from a judgment shall put an end to the attachment lien as well as to the judgment lien. Attachment liens are solely creatures of statute. They can be created and can continue to exist only in the cases and to the extent to which the Legislature by statutory enactment has authorized their creation and continued existence. We must conclude, therefore, that the attachment lien which the respondent is here seeking to have extended ceased to exist when the supersedeas bond was filed herein, and that there is now no lien in existence upon which an order for extension could operate. Section 542a does not empower the court to create a lien where none exists, nor to revive a lien which has ceased to exist. Respondent recognizes this, in that he reminds us in his brief that, unless an order extending the lien is made and filed prior to November 16, 1925, it will be ineffective. It follows that the motion must be, and it is hereby, denied.

We concur: **LAWLOR, J.; WASTE, J.; RICHARDS, J.; SEAWELL, J.; LENNON, J.; SHENK, J.**

197 Cal. 408

In re STEVENS. (Cr. 2747.)

(Supreme Court of California. Nov. 6, 1925.)

1. Courts ☞212 — Attorney's application for readmission after disbarment is a "cause," which Supreme Court may transfer from District Court of Appeals.

Under Const. art. 6, § 4, providing that Supreme Court shall have power to order any cause pending before a District Court of Appeal to be heard and determined by Supreme Court, application of a disbarred lawyer for readmission is a "cause," which Supreme Court has jurisdiction to transfer from District Court of Appeal before or after decision therein for hearing and determination by Supreme Court.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cause (In Practice).]

2. Attorney and client ☞61—Supreme Court and District Courts of Appeal, but not superior courts, have original jurisdiction of applications for restoration to practice after disbarment.

Notwithstanding Code Civ. Proc. § 276, conferring exclusive jurisdiction on District Courts of Appeal to admit original applicants to practice law, Supreme Court, as well as District Courts of Appeal, has original jurisdiction over applications for restoration to practice after disbarment, but superior court is without such jurisdiction.

3. Attorney and client ☞61—On application for readmission after disbarment, question of bar examination discretionary with court.

All applicants for readmission after disbarment are not required to submit to re-examination as to their mental qualifications, as required in the case of original applicants by Code Civ. Proc. §§ 276-277, but question of re-examination by board of bar examiners should be left to sound discretion of court, and in a proper case the same procedure may be required as in the case of an original applicant seeking admission.

Richards and Lennon, JJ., dissenting.

In Bank.

In the matter of the application of Walter H. Stevens for readmission as an attorney at law. Transferred to the District Court of Appeal for further proceedings.

See, also, 59 Cal. App. 251, 210 P. 442; 63 Cal. App. 682, 219 P. 1014.

Gates & Randles, of Los Angeles, for applicant.

Norman Sterry, Oscar Lawler, and Guy R. Crump, all of Los Angeles, for respondent Los Angeles Bar Ass'n.

LAWLOR, J. Application for readmission to practice law in all the courts of this state.

The petitioner, Walter H. Stevens, was admitted to the bar of this state by the District Court of Appeal for the Second Appellate District on January 10, 1911. It was not until March 1, 1912, however, that he first en-

gaged in active practice. A grand jury on November 18, 1913, returned to the District Court of the United States, Southern Division of the Southern District of California, an indictment against him, charging a conspiracy to use the United States mails in a scheme to defraud—a felony involving moral turpitude. After a trial and conviction thereof he was, on September 7, 1915, sentenced to imprisonment for six months, and to pay a fine of \$2,500. On June 14, 1917, the said District Court of Appeal entered an order of disbarment based upon the said conviction. Petitioner was discharged on December 8, 1917, having served the term of imprisonment. Since his discharge he has been in the employ of the Los Angeles Railway Corporation, and it was shown that during this employment he was promoted several times. On October 31, 1921, he was granted a pardon by the President of the United States "for the purpose of restoring his civil rights."

Petitioner, in March, 1922, filed a petition in the said District Court of Appeal for readmission as an attorney at law, which petition was denied. *In re Stevens*, 59 Cal. App. 251, 210 P. 442. In the year 1923 a similar petition was filed in the same court, and likewise denied. *Id.*, 63 Cal. App. 682, 219 P. 1014. The present petition, with its supporting affidavits, was filed in the same court on April 10, 1924. An answer thereto was made by the respondent Los Angeles Bar Association, which, as stated by the petitioner, presented "an issue of law only." No counter affidavits were filed in opposition to the affidavits of petitioner "as to his recovered moral character and high standing as a man and worthy citizen." This petition was also denied in the said District Court of Appeal.

It is stated by petitioner that—

"The legal issue in this matter was raised in the answer of the Los Angeles Bar Association, in paragraph 2 thereof, as follows: 'That said applicant has not submitted to any examination conducted by the state board of bar examiners, has not satisfactorily, or otherwise, passed any such examination, nor has he satisfied said board as to his moral character, nor has any certificate been issued to nor has said applicant complied in any respect with the provisions of sections 276a or 277 of the Code of Civil Procedure.'"

Petitioner contends that—

"The Constitution of California, adopted in 1879, places no restrictions upon the judiciary of this state respecting the right to control the admission and licensing of persons to practice law in this state. In fact, as it was adopted, so it stands to-day, silent upon the question of how, when, or whom the court shall admit. Neither is there any restriction upon the court as to how, when, or whom it may readmit as an attorney and officer of this court, after disbarment for whatever cause. * * *

"A disbarred attorney, for whatever cause, still retains a right to apply to the court for

readmission to practice, and, when he can produce satisfactory evidence to the court of his reformation, and general rehabilitated good name, character, and integrity, the court will hear him. * * *

"In the case at bar, there was in our judgment a clear case made on the affidavits submitted with the petition and in support thereof to have warranted the learned District Court of Appeal * * * in granting the prayer of the applicant, and we are of the firm conviction that said court must have been convinced of the satisfactory proofs offered, to justify an order of readmission as prayed for, and under all of our state decisions the only question before the court necessary to warrant it in granting the petition was the sufficiency of the evidence offered. Not finding any fault with our evidence, and lacking any evidence in opposition, the learned District Court of Appeal erred in denying the relief asked for."

We quote from respondent's brief:

"First. An attorney who has been permanently disbarred is relegated to the status of one who has never been admitted to practice law; and, to be readmitted to practice, must comply with the requirements of part I, title 5, chapter 1, of the Code of Civil Procedure.

"Second. If the power exists to readmit a disbarred person to practice without formal compliance with said code provisions, the court may, and should, in its discretion, require reference to the board of bar examiners for examination as to mental and moral qualifications.

"Third. Neither applicant [referring also to *In re Cate* (Cr. 2734) 241 P. 95] has shown any such regeneration of character as to justify his admission to practice."

The provisions of the Code of Civil Procedure covering original admissions to the bar read as follows:

"276. *Qualifications for Admission as Attorney and Counselor.* Every applicant for admission as an attorney and counselor must present to the District Court of Appeal of the Appellate District in which he resides satisfactory testimonials of good moral character, together with satisfactory proof that for at least three years he has diligently and in good faith studied law in such manner, upon such subjects and under such conditions as the Supreme Court or the board of bar examiners shall have prescribed. Before being admitted he must produce a certificate showing that he has satisfactorily passed an examination conducted by the board of bar examiners.

"Applicants must apply for admission to the District Court of Appeal of the Appellate District in which they reside; provided, that a person may make application and be examined and admitted in another appellate district upon filing with his application a written statement showing good cause therefor, satisfactory to the court to which he applies, accompanied by the written consent of the presiding justice of the appellate district in which he resides.

"276a. *Board of Bar Examiners. Appointment. Examinations. Certificates.* The Supreme Court is empowered to appoint three competent attorneys to examine applicants for admission as attorneys and counselors at law. Such persons shall constitute the board of bar examiners. The said board shall hold examina-

tions for admission to the bar of applicants who have regularly filed their applications and paid all necessary fees, upon such subjects, and at such times and places as the Supreme Court or said board may, by its rules or orders direct; provided, that said examination shall be wholly or in part written examinations. The examinations may be conducted by two members of the board. Said board shall issue a certificate to each of said applicants who shall satisfactorily pass such examination and who shall satisfy said board as to his moral character. Nothing herein shall be construed as preventing the District Courts of Appeal from further examining any applicant where deemed proper. * * *

"277. *Certificate of Admission. May Practice in all Courts.* Upon presentation to it of the evidence required by section two hundred seventy-six, any district court of appeal shall admit the applicant as an attorney and counselor at law in all the courts of this state, and shall direct an order to be entered to that effect upon its records, and that a certificate of such admission be given to him by the clerk of the court, which certificate shall be his license. Every person admitted to practice by a District Court of Appeal, either upon examination or otherwise, may practice as an attorney in all of the courts of this state, including the Supreme Court; and every person now entitled to practice in the Supreme Court of this state may practice as an attorney in any District Court of Appeal.

"278. *Oath.* Every person on his admission must take an oath to support the Constitution of the United States and the Constitution of the state of California, and to faithfully discharge the duties of an attorney and counselor at law to the best of his knowledge and ability. A certificate of such oath must be indorsed upon the license."

Preliminarily we will consider the question suggested by the court at the oral argument as to whether or not the Supreme Court may entertain an application for hearing in said court in a proceeding of this nature where it arises in and is decided by a District Court of Appeal.

Section 4, article 6, of the Constitution provides in part:

"The Supreme Court shall have power to order any cause pending before the Supreme Court to be heard and determined by a District Court of Appeal, and to order any cause pending before a District Court of Appeal to be heard and determined by the Supreme Court.
* * *

In re Wells, 174 Cal. 467, 163 P. 657, was a proceeding brought by a committee of the Orange county bar association in the District Court of Appeal for the Third Appellate District to set aside and vacate on the ground of fraud a previous order of said court admitting the accused to practice law in all the courts of this state on the presentation of a license to practice law in the state of Nevada. A demurrer and a motion to strike out the allegations of the petition were interposed, both sustained, and the petition dismissed. Within 60 days thereafter the said committee

petitioned the Supreme Court for a transfer of the cause, and the application was granted. After hearing, this court denied the motion to strike out the petition, and ordered the demurrer overruled. The first question presented was whether or not this court had power to transfer and entertain such a proceeding. In construing the word "cause" found in section 4 of article 6 of the Constitution the court declared at page 472 (163 P. 659):

"The Supreme Court was given power in any matter decided by the District Court of Appeal to vacate the decision and order it transferred to its own calendar for rehearing and decision. To describe the decisions subject to this power the word 'cause' was selected. This was the word used in the clause of section 2 giving similar power over the department decisions, which, in that clause, as we have said, has been understood to apply to every matter that could be decided by a department. The familiar rule of construction requires that it be given a similarly broad meaning in the new provision, and to include every matter decided by a District Court of Appeal, and operating as a final decision or disposition thereof in that court. It is clear, therefore, that the power to transfer causes from the District Court of Appeal to the Supreme Court, either before or after judgment in the District Court of Appeal, was intended to have this all embracing application." (Italics ours.)

[1] It follows that, this proceeding being a "cause" within the contemplation of the Constitution, this court has jurisdiction to transfer it from the District Court of Appeal before or after decision therein, for hearing and determination herein.

The history of the legislation bearing on the admission of applicants to practice law and the removal or suspension of attorneys and counselors at law may aid in the determination of the question of restoration herein involved. Neither the former nor the present Constitution has ever assumed to deal with any of these subjects.

Section 2 of an act of 1851 (Stats. 1851, p. 48) provided for an examination by a Supreme Court justice of applicants seeking admission to practice law in all the courts of the state. Section 4 thereof authorized the district and county courts to admit applicants to practice in their respective courts.

In 1872, when the Codes were adopted, section 276, Code of Civil Procedure, was made to cover the subject of admission to practice. It provided that an applicant "undergo a strict examination, in open court, as to his qualifications, by the justices of the Supreme Court." Thus it will be seen that by the adoption of the Codes the district and county courts were relieved of the power conferred by the above act of 1851. However, section 276, Code of Civil Procedure, was amended in 1874 (Stats. 1873-74, p. 404) so as again to confer on the several district and county courts the authority to admit

applicants to practice in their respective courts. In 1880 the section was amended (Code Amendments 1880, p. 55) taking such power from those courts and vesting in the superior court authority to admit applicants to practice exclusively in that court. Again in 1895 (Stats. 1895, p. 56) the section was amended so as to divest the superior court of authority to admit applicants to practice in that court, and substituting in place thereof a proviso that not less than three of the Supreme Court commissioners, to be designated and appointed by the chief justice, may also examine applicants seeking admission to practice, reporting the results of the examinations to the Supreme Court for final action. By an amendment of 1905 (Stats. 1905, p. 5) the authority to admit applicants to practice in all the courts of the state was and now is vested exclusively in the District Courts of Appeal created by the Constitution in the preceding year. In 1917 (Stats. 1917, p. 906) an amendment to section 276, Code of Civil Procedure, provided that an applicant seeking admission to practice "must produce * * * satisfactory proof of having studied law for a period of at least two years, and undergo in open court a strict examination, a part of which must be in writing. * * *" This section was again amended in 1919, and section 276a, Code of Civil Procedure, added (Stats. 1919, p. 721), creating the board of bar examiners, and providing for their conduct of examinations for admission to the bar; the order of admission by the District Courts of Appeal being based on a certificate of the board certifying to the applicant's mental and moral qualifications.

It is to be noted that prior to the 1905 amendment of section 276, Code of Civil Procedure, the Supreme Court exercised exclusive jurisdiction in the admission of applicants to practice as attorneys and counselors at law in all the courts of the state.

The power to remove or suspend from practice attorneys and counselors at law was vested by section 13 of said Act of 1851 (Stats. 1851, p. 48) exclusively in the Supreme Court. Section 13 was amended in 1859 (Stats. 1859, p. 60) so as to also vest in the district courts the authority of removal or suspension.

By the adoption in 1872 of the codes, section 287, Code of Civil Procedure, contained a provision similar to said section 13, leaving the authority to remove or suspend attorneys and counselors at law in the Supreme Court and the district courts. The amendment of section 287 in 1880 (Stats. 1880, p. 57) transferred to the superior court the authority theretofore vested in the district courts. By the later amendment of 1911 (Stats. 1911, p. 848) the power of removal or suspension was also given to the District Courts of Appeal and ever since such authority has resided in the Supreme Court, the District Courts of Appeal, and the superior court.

As already indicated, respondent contends that an applicant seeking readmission to practice is in the same position as an original applicant seeking admission, and hence, to be readmitted, the provisions of sections 276, 276a, and 277, Code of Civil Procedure, must be followed. Since under these provisions the power to admit original applicants to practice is vested exclusively in the District Courts of Appeal, this contention is tantamount to a claim that all applications for restoration to practice must likewise be made to those courts. Upon this hypothesis we will now proceed to consider whether such authority is vested exclusively in the District Courts of Appeal. So far as our research has extended, the Legislature has never conferred such authority on any court. This being so, it is well to consider what the practice has been in this regard.

Prior to the creation of the District Courts of Appeal in 1904 the Supreme Court exercised jurisdiction over applications for restoration to practice. We cite, for instance, the following authorities: *People v. Turner*, 1 Cal. 143; *Id.*, 1 Cal. 190; *Fletcher v. Daingerfield*, 20 Cal. 427; *Cohen v. Wright*, 22 Cal. 293; *Case of Lowenthal*, 61 Cal. 122; *Ex parte Tyler*, 107 Cal. 78, 40 P. 33; and *In re Treadwell*, 114 Cal. 24, 45 P. 993.

Since the creation of the District Courts of Appeal, and up to the amendment of section 276, Code of Civil Procedure, in 1919 (creating the board of bar examiners), the Supreme Court and the District Courts of Appeal have both assumed original jurisdiction over applications for restoration to practice. As illustrative of this practice see *Matter of Paul A. Vincillione*, the decision appearing only in the minutes of the Supreme Court under date of December 15, 1913; *Matter of Shepard*, 35 Cal. App. 492, 170 P. 442; and *In re Thompson*, 37 Cal. App. 344, 174 P. 86.

Upon this question we think it was never contemplated that the Supreme Court, a court of final jurisdiction in the state—which has from the beginning exercised original jurisdiction in such matters, and with which the Legislature has never interfered, either prior to or since the creation of the District Courts of Appeal—is without jurisdiction to entertain such applications or without authority to exercise a salutary control over the bar of the state.

[2] And while the Legislature did not, when amending section 276, Code of Civil Procedure, in 1905, confer exclusive jurisdiction on the District Courts of Appeal to admit original applicants to practice, nor when amending the said section in 1917 and 1919 include authority to entertain applications for restoration to practice after disbarment, still, those courts having for years been vested with exclusive jurisdiction to admit original applicants to practice, having

authority to remove or suspend attorneys and counselors at law, and having entertained applications for restoration, their jurisdiction, in restoration proceedings can hardly be said to be open to question. It follows that the Supreme Court and the District Courts of Appeal have, for the reasons advanced, original jurisdiction over applications for restoration to practice after disbarment.

Though the application herein was not made to the superior court, nevertheless the question whether it has jurisdiction to restore to practice after disbarment is necessarily involved by respondent's position indicated above—that such authority is vested alone in the District Courts of Appeal. So far as we are aware, it may be said that this question has been involved in three cases. In *Re Wharton*, 130 Cal. 486, 62 P. 741, a judgment of disbarment had been entered by the superior court, and an application was made in the Supreme Court to set it aside. This court declared:

"As the original proceedings for the disbarment were had and determined before the superior court, any application for a modification or change in its judgment should be made in that court."

The application in that case, it would appear, was in its essence a demand for restoration to practice after disbarment, for, if such application "to set aside the judgment" had been granted, the disability would have automatically disappeared. Apparently the authority of the superior court to restore to practice was not brought into question. Evidently the court regarded the proceeding as an application to modify or change the judgment rather than one for restoration, and what is said in the decision that such relief could only be afforded by the court which rendered the judgment must be interpreted in that light, and not as a decision that the superior court had or had not jurisdiction to restore to practice after disbarment.

In *Danford v. Superior Court*, 49 Cal. App. 303, 193 P. 272, it was declared that In *re Wharton*, supra, erred in holding that the application in that case was for a modification or change of the judgment of disbarment rather than an application for "admission." What was said by the court in that connection will, to avoid repetition of quotation, appear under the next and final point.

While we agree with the conclusion announced in *Danford v. Superior Court*, supra, that the superior court cannot restore a disbarred attorney to practice, yet we cannot accept the conclusion that the determinative factor is the lack of authority in that court to admit original applicants to practice, for we have shown that, notwithstanding the Supreme Court also lacks such authority, it may, nevertheless, entertain applications for restoration to practice

In *re Hahn*, 56 Cal. App. 702, 206 P. 473, involved an application by the district attorney of Los Angeles county in the superior court to set aside the "reinstatement" by that court of the accused attorney. The disbarment had also been entered by the superior court. The District Court of Appeal declared:

"The action of the district attorney was taken under the view that the superior court was without jurisdiction to make the order of reinstatement. The decisions in *re Mash*, 39 Cal. App. 548, 179 P. 897, and *Danford v. Superior Court*, 49 Cal. App. 303, 193 P. 272, affirmed this view, and the superior court held that the judgment of disbarment was still effective."

What we have said concerning *Danford v. Superior Court*, supra, is equally applicable here.

In the absence of direct provision on the subject, and in view of the facts that the authority of the superior court to admit to practice was confined to its own forum, that it was divested of such authority 30 years ago, that the later legislative policy was to vest that jurisdiction exclusively in the District Courts of Appeal, and that the practice for years has uniformly been to present applications for restoration to practice to the Supreme Court or the District Courts of Appeal, the conclusion is inescapable that the superior court is without jurisdiction to entertain applications for restoration to practice.

We therefore hold that the Supreme Court and the District Courts of Appeal have, but that the superior court has not, original jurisdiction to determine applications for restoration to practice of attorneys and counselors at law after disbarment.

We will now pass to the final and principal question whether applicants for restoration to practice must, as in the case of original applicants, submit to an examination as to their mental qualifications. In other words, may a disbarred attorney be restored to the right to practice upon the production of satisfactory testimonials of good moral character without the necessity of submitting to a re-examination? We do not find that this question has ever before been presented in this state.

Respondent, while contending that a disbarred attorney seeking restoration to practice is in the same position as an applicant seeking admission for the first time, states that—

"By section 276a, added in 1919, provision is made for the appointment of the bar examiners, and for the holding of 'examinations for admission to the bar of applicants who have regularly filed their applications.' * * *

[3] But sections 276, 276a, and 277, Code of Civil Procedure, are concerned only with the procedure to be followed in the case of an applicant seeking admission for the first

time. None of these sections assumes to cover the case of a disbarred attorney seeking restoration of the privilege to practice. Nowhere is it in terms required that such an applicant must produce "a certificate showing that he has satisfactorily passed an examination conducted by the board of bar examiners. * * *

Since the addition of section 276a, Code of Civil Procedure, providing for the board of bar examiners, and up to the present time, the practice has been followed by the Supreme Court and the District Courts of Appeal, in the exercise of original jurisdiction, of entertaining applications for restoration to practice after disbarment without requiring the applicants to submit to an examination as to their mental qualifications. In re Application of John S. Delancey, and In the Matter of Hatch, reported only in the minutes of the Supreme Court under date of August 9, 1920, and September 20, 1920, respectively; Danford v. Superior Court, 49 Cal. App. 303, 193 P. 272; Bar Association v. Cantrell, 53 Cal. App. 758, 200 P. 968; In re Hahn, 56 Cal. App. 702, 206 P. 473; In re Stevens, 63 Cal. App. 682, 219 P. 1014; In re O'Connell, 64 Cal. App. 673, 222 P. 625.

The authorities relied upon by respondent to sustain the claim that a re-examination is a prerequisite to the granting of an application for restoration to practice are In re Mash, 39 Cal. App. 548, 179 P. 897, and Danford v. Superior Court, 49 Cal. App. 303, 193 P. 272. In the former the petitioner had been admitted to practice in this state by the District Court of Appeal upon his production of a license to practice issued by the Supreme Court of Iowa. His California license was subsequently revoked on the ground that he had concealed, at the time of his admission here, certain facts concerning his past life which, if they had been revealed, would have resulted in a denial of his application to be admitted to practice in the courts of this state. Subsequently upon an application for restoration to practice the District Court of Appeal found the evidence tending to show his reformation sufficient to warrant his name again being placed on the roll of attorneys. In denying an application for transfer, the Supreme Court declared in part:

"The application to the district court is not to be regarded as a motion to vacate the order previously made by that court revoking its original order admitting Mash to practice law. That order stands unaffected. His present application to that court is to be considered as an application for admission to the bar, either on examination in open court and 'testimonials of good moral character,' under section 276 of the Code of Civil Procedure, or for admission on production of a license from a sister state 'and satisfactory evidence of good moral character,' under section 279 of the Code of Civil Procedure. * * * The power to admit persons to practice law is now vested exclusively in the

District Court of Appeal, and consequently it is to that court that the 'satisfactory evidence,' or the 'testimonials,' as the case may be, are to be produced, and it is for that court to determine whether they are sufficient to establish the moral character required. Such a decision is a finding upon a question of fact.

"Our functions in such a case are supervisory only. We have no original authority to admit persons to practice law. Hence we should not interfere with the decision of the District Court of Appeal upon such question of fact, unless the record and proceedings in that court show that an error of law led it to the decision, or that the evidence was either wholly insufficient to establish the good moral character of the applicant or so slight as to be grossly inadequate."

In Danford v. Superior Court, 49 Cal. App. 303, 193 P. 272, the petitioner had been disbarred by an order of the superior court for the county of Los Angeles. Subsequently the superior court, upon its own motion, and without notice to the Los Angeles Bar Association, ordered the accused "reinstated" to the practice of the law in the superior court. At a later date another judge, sitting in said superior court, set aside the order of reinstatement upon motion of the Bar Association of Los Angeles county. Notwithstanding this latter order, the petitioner held himself out as a practicing attorney; and appeared as such in the superior court for the city and county of San Francisco. Contempt proceedings were thereupon commenced against petitioner in that case, and he sought a writ of prohibition to restrain said superior court from entertaining said contempt proceedings. In denying the writ, the District Court of Appeal said at page 305 (193 P. 274):

"Assuming the power to disbar, the order of disbarment became final upon its affirmation by the Supreme Court. Thereafter no court had power to modify or set aside the order either upon motion or otherwise. An application for reinstatement of an attorney disbarred by a judgment of a court of competent jurisdiction, made after the order of disbarment has become final, must be treated as an application for admission to practice and not as an application to vacate the order of disbarment. As such it must be addressed to the court having jurisdiction to admit an attorney to practice. In re Mash, 39 Cal. App. 548 [179 P. 898].

"Since the amendment to section 276 of the Code of Civil Procedure, in 1895, the superior court is without jurisdiction to admit an attorney to practice in any court of the state. That power, at the time the order purporting to reinstate the petitioner was made, was, and now is, conferred exclusively upon the district courts of appeal. Hence the superior court in Los Angeles, being without jurisdiction to admit petitioner to practice, could not entertain an application for restoration after disbarment. * * *

"In the case of In re Wharton, 130 Cal. 486, 62 P. 741, there is language intimating that where the disbarment took place in the superior court the motion for reinstatement should be made in that court, but the error of the ruling in that case is that the court treated the mo-

tion for reinstatement as a motion to modify the judgment of disbarment rather than a motion for admission to the bar. In view of the decision of the Supreme Court in *Re Mash*, supra, the *Wharton* Case is not controlling. Treating the motion for reinstatement as a motion for admission to the bar, as it must be treated, it necessarily follows that such motion must be addressed to a court which has jurisdiction to admit to the bar. As the superior court had no power to admit petitioner to practice in any court, there can be no doubt that the order in question is void on its face for want of jurisdiction in the court."

A petition for hearing in the matter of *Danford v. Superior Court*, supra, was denied by this court.

It is clear that in *re Mash*, supra, is not authority on this question. The applicant in that case, it is true, sought "an order restoring him to the roll of attorneys and counselors at law entitled to practice in the courts of this state," but the opinion of the Supreme Court in denying the petition for transfer did not declare that an attorney who had been duly admitted to practice and was thereafter disbarred must, upon an application to be restored to the roll of attorneys, apply to the courts having exclusive jurisdiction over original admissions to the bar and submit to a re-examination as to his mental qualifications. On the contrary, it was put upon the ground that, as the applicant's license to practice law in this state had been obtained by fraud, he stood before the court as if he had never been admitted to practice, and it was upon that reasoning the conclusion was reached that the statutory procedure governing original applicants (sections 276-277, Code Civ. Proc.) must be pursued or he should proceed "for admission upon production of a license from a sister state 'and satisfactory evidence of good moral character,' under section 279 of the Code of Civil Procedure."

Although *Danford v. Superior Court*, supra, does declare that "an application for reinstatement of an attorney disbarred by a judgment of a court of competent jurisdiction * * * must be treated as an application for admission to practice and not as an application to vacate the order of disbarment" and that "as such it must be addressed to the court having jurisdiction to admit an attorney to practice, (in *re Mash*, 39 Cal. App. 548 [179 P. 893])," nevertheless, it is lacking in authoritative force, for the reason that it is founded on *In re Mash*, supra, which, as we have shown, is not authority on the point. We have examined the petition for a transfer of the *Danford* Case to this court, and find it was urged that the decision of the District Court of Appeal was in error in holding that applications for restoration can only be entertained by the courts having jurisdiction to admit to practice. From this it may be contended that the principle was accepted by this court. But, as

the remedy sought involved a question of jurisdiction only, it is conceivable that in the denial of the transfer the question was either not passed upon or deemed not controlling. It is also pertinent to consider that, under the rule governing applications for transfer from the District Courts of Appeal in cases properly appealable to those courts, the denial of the petition for transfer "is not to be taken as an expression of any opinion by this court, or as the equivalent thereof, in regard to any matter of law involved in the case and not stated in the opinion of that court, nor, indeed, as an affirmative approval by this court of the propositions of law laid down in such opinion." *People v. Davis*, 147 Cal. 346, 350, 81 P. 713, 720. Moreover, this court exercised jurisdiction in restoration proceedings in the *Delancey* and *Hatch* Cases, respectively, a short time before, and a few days after the decision in the *Danford* Case was handed down by the District Court of Appeal. We think it as reasonable to hold that in denying the petition for transfer in the *Danford* Case this court did not approve the holding on this point as it is to hold that it did, for, as above indicated, the general subject was before the court about the time the *Delancey* Case and the *Hatch* Case were considered.

The *Danford* Case holds, as already indicated, that an application for restoration must be treated as an application for original admission, and as such must be addressed to the court having jurisdiction to admit to practice in the first instance. Our conclusion is that the *Danford* Case is in error in two particulars—first, in holding that such an applicant is in the same position as one seeking original admission; and second, in declaring that this principle was laid down in the *Mash* Case. It follows that the implication of the *Danford* Case that the applicant for restoration to practice must submit to a re-examination is also erroneous. In any event, it is proper to say that we are not prepared, in the absence of legislative expression, to accept the conclusion that every applicant for restoration to practice must submit to a re-examination as to his mental qualifications. No adequate reason occurs to us for making the rule invariable. The law is interested in the regeneration of erring attorneys, and in the enforcement of a sound discipline its disposition ought not to be to place unnecessary burdens upon them.

In some cases, where it would be in the interest of justice to restore to his life work a disbarred attorney, and concerning whose grasp of the law there is no question, such a requirement would be unnecessary. On the other hand, cases may arise where it is apparent the applicant has not shown as an attorney that he possesses the requisite mental qualifications, and in such cases the rule contended for would be properly applied. In our opinion, the alternative rule proposed by

the respondent that the question of a re-examination of the applicant by the board of bar examiners should be left to the sound discretion of the courts we hold to be the proper one, and in a case calling for such re-examination and restoration the same procedure may be followed as in the case of an original applicant seeking admission.

It has been shown that the applicant has sought "readmission" to practice. We have considered the case upon the hypothesis that an order of "suspension" operates automatically—that is to say, when the period of suspension has expired the attorney is ipso facto entitled to practice; that "reinstatement" and "restoration" apply to the case of a disbarred attorney who has by an order of court been returned to practice. And, while there may be an etymological distinction between the latter terms and "readmission"—the latter possibly importing re-examination—we have given to "readmission" the same import as "reinstatement" and "restoration."

It is ordered that the matter be transferred to the District Court of Appeal, Second Appellate District, Division 2, for further proceedings in accordance with the views herein expressed.

We concur: MYERS, C. J.; SHENK, J.; SEAWELL, J.; WASTE, J.

RICHARDS, J. (dissenting). I am in agreement in the main with the discussion and conclusions arrived at in the foregoing opinion, but I disagree with and dissent from that portion thereof wherein the suggestion is made that the District Court of Appeal, in the hearing of disbarment or reinstatement cases, may put in issue the mental qualifications or equipment of the practitioner seeking evasion or removal of the bar sinister, and may in its discretion refer the latter to the bar examiners for re-examination. No precedent has been cited, and I am satisfied none exists, for such a procedure. The question as to the mental qualifications in point of learning of one seeking admission to the bar is determined in the first instance by the procedure provided by statute for the ascertainment of these qualifications, and, once ascertained, and the license issued, the ability and the right of the holder of such license by virtue of the ascertained possession of these qualifications is not thereafter the subject of review. If in the course of his subsequent practice the attorney commits any unethical act which brings him under the penalty of disbarment, the procedure for the ascertainment of such wrongdoing and the order inflicting such penalty are predicated wholly upon the proofs of his subsequent misstep. The question as to the mental qualifications or equipment of the accused practitioner is in no wise involved in that inquiry, and could not, in fact, be considered by the

tribunal investigating the case. Upon the application of the disbarred attorney for reinstatement, the question of his mental qualifications and equipment are equally beyond the scope of inquiry—the sole question being whether by his good conduct since his disbarment he has shown cause for restoration to his former position at the bar; whether the doctrine of *locus penitentiae* shall be applied to his case. To extend the inquiry so as to invest the tribunal making it with the power to require the applicant for reinstatement to submit to a re-examination as to his mental qualifications or equipment would be to deny, especially to elderly practitioners, the mercy to which their repentance and good conduct would otherwise entitle them, and to invest the tribunal authorized to extend such mercy with powers never heretofore exercised and liable to great abuse.

I concur: LENNON, J.

197 Cal. 796

In the Matter of the Application of Clyde E. CATE for Reinstatement as an Attorney at Law. (Cr. 2734.)

(Supreme Court of California. Nov. 6, 1925.)

In Bank.

Application for reinstatement. Transferred to District Court of Appeal for further proceedings.

Vincent B. Vaughan, of Los Angeles, for applicant.

Norman S. Sterry, Oscar Lawler, and Guy R. Crump, all of Los Angeles, for respondent Los Angeles Bar Ass'n.

LAWLOR, J. The applicant, Clyde E. Cate, was, on June 14, 1912, admitted by the District Court of Appeal of the Second Appellate District to practice law in all the courts of this state. According to the petition of the applicant in the said District Court of Appeal an action was commenced against him in the superior court for Los Angeles county on April 23, 1918, charging applicant with the violation of the oath taken by him as an attorney and counselor at law, with violation of his duties as such attorney and counselor at law, and with the commission of acts involving turpitude, dishonesty, and corruption, and seeking his disbarment. On June 6, 1918, the said superior court entered its judgment disbarring the applicant.

This is the third application for reinstatement. The opinions in each of the two earlier applications will be found in *Re Application of Clyde E. Cate*, 54 Cal. App. 401, 201 P. 964, and *In re Application of Clyde E. Cate*, 60 Cal. App. 279, 212 P. 694, respectively.

The same questions are involved in this proceeding as in *Re Application of Walter H. Stevens* (Cr. 2747) 241 P. 88, this day decided, and upon the authority of that case, and for the reasons therein stated, it is ordered that the matter be transferred to the District Court of Appeal, Second Appellate District, Division 2.

for further proceedings in accordance with the views therein expressed.

We concur: MYERS, C. J.; SHENK, J.; SEAWELL, J.; WASTE, J.

74 Cal. App. 436

WORTH v. DOWNEY et al., City Trustees.
(Civ. 5095.)

(District Court of Appeal, Second District, Division 1, California. Sept. 25, 1925. Hearing Denied by Supreme Court Nov. 23, 1925.)

1. Municipal corporations — 159(1)—Petition for recall election held to demand election of successors.

Petition for recall of members of city board of trustees, which, though not in precise words of St. 1911 (Ex. Sess.) p. 128, was in language broad enough to include statutory requirement, held to contain demand for election of successors to trustees sought to be removed.

2. Municipal corporations — 124(5)—Statute providing for recall of elective officers liberally construed.

St. 1911 (Ex. Sess.) p. 128, providing for recall of holders of municipal elective offices and election of successors, should be liberally construed, with view to promote purpose for which it was enacted.

3. Municipal corporations — 159(1)—Signers to petition for recall election need not add to signatures business.

Signers to petition for municipal recall election need not add to their signatures their business or occupation.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Proceeding by John M. Worth against Frank M. Downey and others, as Trustees of City of Lynwood, for a writ of mandate to compel defendants to call recall election. From a judgment granting writ of mandate, defendants appeal. Affirmed.

Oscar E. Winburn, Julius V. Patrosso, and C. C. Mishler, all of Los Angeles, for appellants.

Carl V. Hawkins and Jonah Jones, Jr., both of Long Beach, for respondent.

CURTIS, J. Three petitions, asking for the recall of three members of the board of trustees of the city of Lynwood were filed with the clerk of said board of trustees. The trustees sought to be removed thereby were Frank M. Downey, Lars C. Anderson, and Charles F. Reed. These petitions were precisely alike, except as to the name of the trustee sought to be removed. That against Trustee Downey was as follows:

"Petition for the Recall of Frank M. Downey, Trustee of the City of Lynwood, California.

"To the President of the Board of Trustees of the City of Lynwood, California—Gentlemen:

"We, the undersigned qualified electors of the said city of Lynwood, California, pursuant to the Constitution and laws of the state of California, hereby petition your honorable board to take such proceedings as are therein provided to recall Frank M. Downey, trustee of the city of Lynwood, upon the following grounds, to wit: Frank M. Downey has failed to establish or maintain public confidence in himself as city trustee. He has not intelligently planned or successfully maintained our city's progress. He has been unable to properly grasp the present needs of the city of Lynwood, or vision its future. He has not the necessary training or experience required to properly manage the development of the city's growth.

"For the above reasons, believing that he has not made good as city trustee, and that his continuance in office will serve only to retard municipal progress, destroy civic harmony, discredit the laws and government of our city, and to nullify the sacrifice which members of the board of trustees are making in civic service, we petition the recall of Frank M. Downey."

Each of these petitions was certified as sufficient by the clerk of said board and submitted to said board of trustees. The board of trustees, however, refused to call any election under said petitions and this proceeding was instituted in the superior court of the county of Los Angeles for a writ of mandate to compel said board to call such election. Upon the trial of said action, judgment was rendered in favor of the plaintiff therein, and from said judgment the defendants have appealed.

The only contention made by appellants, in support of their appeal, is that the petitions failed to comply with the requirements of the statute under which said proceedings were brought. It is conceded that the statute applicable thereto is that certain act entitled:

"An act providing for the recall of elective officers of incorporated cities and towns, approved March 2nd, 1912." Stats. 1911 (Ex. Sess.) p. 128.

A portion of section 1 of said act is as follows:

"The holder of any elective office of any incorporated city or town may be removed or recalled at any time by the electors; provided, he has held his office at least six months. The provisions of this statute are intended to apply to officials now in office, as well as to those hereafter elected. The procedure to effect such removal or recall shall be as follows: A petition demanding the election of a successor to the person sought to be removed shall be filed with the clerk of the legislative body of such city or town, which petition shall be signed by qualified voters equal in number to at

least twenty-five per cent. of the entire vote cast within such city or town for all candidates for the office which the incumbent sought to be removed occupies, at the last preceding regular municipal election at which such officer was voted for. * * *

It is further provided in said section that:

"If the petition shall be found sufficient, the clerk shall submit the same to the legislative body of the city or town without delay, whereupon, that body shall forthwith cause a special election to be held. * * *

At this election, the section further provides, the question of the recall of the officer sought to be removed, and the election of his successor shall be submitted to the electors of said city or town.

[1, 2] The objection most strongly urged by appellants, as to the sufficiency of said petitions, is that they do not contain "a demand for the election of a successor to the person sought to be removed," as required by the above section of said act. It is true that these precise words are not to be found in any of said petitions, but each of said petitions contains a request or demand that the board of trustees of said city take such proceedings as are provided by law for the recall of its officers. These proceedings, as will be noted by the above reference to said act, provide, among other things, for the election of the successor to the person sought to be removed, provided a majority of those voting on the recall of said officer, vote for his removal. The petitions, therefore, if not in the precise words of the statute, yet in language broad enough to include the statutory requirements, do contain a demand for the election of successors to the trustees which are sought to be removed. This is so for the reason that they asked that the board of trustees take all the proceedings provided by the statute for the removal of officers sought to be recalled. The statute under which these proceedings were instituted should be liberally construed with the view to promote the purpose for which it was enacted. *Conn. v. City Council*, 17 Cal. App. 705, 713, 121 P. 714, 719. No person reading these petitions would be under any misapprehension as to their meaning. They would readily understand therefrom that their purpose was to initiate proceedings for the recall of the persons named therein. Such officers could not be recalled, except by the election of their successors. This is not only the plain provision of the law, but it is a subject of such general understanding that no one, we think, could be heard to say that he was either misled or deceived as to the actual intent and purpose of the petitions.

[3] A further objection is made to said petitions, in that the signers thereof failed to add to their signatures their business or occupation. This question in our opinion has

been settled by the rulings of our courts adversely to appellants' contention. *Conn. v. City Council*, supra; *Locher v. Walsh*, 17 Cal. App. 727, 121 P. 712; *Osborn v. Board of Supervisors*, 27 Cal. App. 85, 148 P. 970.

We are therefore of the opinion that each of said petitions substantially complies with the statute in question, and is therefore valid. It was the duty, therefore, of said board of trustees, upon the submission to them by the clerk of said board of said petitions, properly certified to be sufficient, to call an election, as provided by said statute.

In holding that these petitions are sufficient under the statute, we do not desire to be understood as commending them as models to be followed in proceedings which may hereafter be instituted under this or similar statutes, nor as approving the practice, employed in the drafting of these petitions, of departing so radically from the words of the statute. While in this case we believe the petitions to be sufficient, yet the extreme difference in their phraseology from that of the statute afforded a reasonable opportunity for a successful contest as to their validity. The result has been that the proceedings which they initiated have been long delayed, probably to the great annoyance and vexation, not only of the parties directly interested, but to the community involved. This litigation has also taken much of the time of the courts, now already greatly overburdened. All this could no doubt have been avoided had the petitions been drafted as near as practicable in the words of the statute.

The judgment is affirmed.

I concur: CONREY, P. J.

74 Cal. App. 440

PEOPLE v. GEORGE et al. (Cr. No. 1194.)

(District Court of Appeal, Second District, Division 2, California. Sept. 29, 1925. Hearing Denied by Supreme Court Nov. 27, 1925.)

1. Criminal law ⚖️44—"Attempt" distinguished from preparation.

An "attempt" to commit crime as distinguished from intention, involves some overt act, and consists of some direct movement beyond mere preparation toward consummation of intended crime, but falling short of ultimate design, and is committed if the actual transaction has commenced which would have ended in the crime if not interrupted.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Attempt.]

2. Conspiracy ⚖️43(5)—Indictment or information need not allege attempt to commit offense.

Under Pen. Code, §§ 182, 184, an information or indictment for conspiracy need not aver an attempt to commit the crime which is object of conspiracy, but allegation of any overt

act tending in some degree to effect such object is sufficient.

3. Conspiracy ☞27—Conspiracy is gist of statutory offense.

The common-law rule that the agreement is the gist of the offense of conspiracy is not changed by Pen. Code, §§ 182, 184, requiring proof of some overt act.

4. Conspiracy ☞43(5)—Indictment for conspiracy to obtain money by false pretenses from insurance company held to sufficiently allege overt acts.

Indictment for conspiracy to obtain money by false pretenses, alleging that defendants procured one of their number to be insured and then staged fictitious drowning pursuant to agreement to defraud insurer, held to sufficiently allege overt acts within requirements of Pen. Code, § 184.

5. Indictment and information ☞71—Indictment held not bad for uncertainty as to object of conspiracy.

Indictment for conspiracy to obtain money from insurance company by false pretenses that insured had accidentally drowned held not uncertain, in that it could not be ascertained therefrom whether defendants were charged with conspiracy to commit crime denounced by Pen. Code, § 532, or that denounced by section 549, but to clearly and sufficiently charge conspiracy to violate section 532.

6. Conspiracy ☞47—Evidence held to warrant conviction of conspiracy to obtain money by false pretenses.

In prosecution for conspiracy to obtain money from insurance company by false pretenses that insured had been drowned, evidence of the formation of conspiracy held sufficient to warrant conviction.

7. Criminal law ☞823(4)—Instruction authorizing conviction for conspiracy without reference to overt acts held not error.

In prosecution for conspiracy to obtain money by false pretenses, an instruction, that defendants were to be found guilty if jury were satisfied beyond reasonable doubt that the alleged combination was formed, held not error, because not informing the jury as to necessity of proof of an overt act, where the uncontradicted evidence of overt acts was so complete that jury could not have found that overt act had not been committed and where other instructions properly covered the law as to overt acts.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

W. N. George and others were convicted of conspiring to obtain money by false pretenses, and the defendant named appeals. Affirmed.

W. H. Wadsworth, Herman Mohr, and Bordwell, Mathews & Wadsworth, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

WORKS, J. Defendant W. N. George and others were charged by indictment with the crime of conspiring to obtain money by false pretenses. All of the defendants except Hughes were convicted. Defendant George appeals from the judgment of conviction.

The indictment, shortened by the omission of formal matters and of allegations which are not material to the inquiry upon which we now embark, was in the following language:

"The said defendants John Dexter Wiley, Belle Wiley, W. N. George, and H. J. Hughes are accused * * * of the crime of conspiracy to obtain money and property by false pretenses, a felony committed * * * as follows, to wit: That * * * said defendants * * * did * * * conspire, * * * by divers unlawful, false and fraudulent representations and pretenses to obtain the sum of ten thousand dollars * * * from the Great Republic Life Insurance Company, a corporation, * * * upon the false and fraudulent representation and pretense to be made by the said defendants Belle Wiley and W. N. George to the said * * * company that the said John Dexter Wiley had been drowned and lost his life * * * by falling overboard from a boat into the waters of the Pacific Ocean, * * * and that the said Belle Wiley was entitled to receive said sum * * * from the said * * * company under a policy of insurance covering the life of the said John Dexter Wiley, * * * the said Belle Wiley being then and there the beneficiary named in the said policy of insurance. * * * That thereafter and in the course of the said conspiracy and in furtherance thereof, * * * the company through the said defendant W. N. George, as soliciting agent of said company for a policy of insurance upon his, the said John Dexter Wiley's life, in the sum of ten thousand dollars, and that thereafter * * * the said John Dexter Wiley received from the said * * * company and the said defendant W. N. George the said policy of insurance upon his, the said John Dexter Wiley's life, * * * with the said Belle Wiley named therein as beneficiary in the event of the death of the said insured, John Dexter Wiley. That thereafter and in the course of said conspiracy and in furtherance thereof * * * the said defendants John Dexter Wiley and W. N. George caused and induced one Joseph McAfee to agree to permit the * * * defendants * * * to allow them * * * to use * * * the said Joseph McAfee's boat known as the Catalina Flyer for the purpose of making a false, fraudulent and fictitious showing and representation to said * * * company that the said John Dexter Wiley had lost his life by falling overboard from said boat while said boat was cruising in the waters of the Pacific Ocean, * * * That thereafter and in the course of the said conspiracy and in furtherance thereof * * * the * * * defendants * * * procured for the said John Dexter Wiley a hat and a pair of colored spectacles for the use and purpose of fraudulently disguising and changing the appearance of the said John Dexter Wiley to assist the said John Dexter Wiley in getting away undetected from the scene of said false and

fraudulent representation of drowning by the said John Dexter Wiley. That thereafter and in the course of the said conspiracy * * * the said defendants secured certain other clothing and wearing apparel of [for (?)] the said John Dexter Wiley and caused * * * the said defendants H. J. Hughes and W. N. George to wait at the harbor of San Pedro * * * with the said clothing and an automobile for the purpose of carrying and conveying the said John Dexter Wiley out of the * * * state of California for the purpose of hiding the identity of the said John Dexter Wiley and for the purpose of assisting the said John Dexter Wiley, Belle Wiley, W. N. George, and H. J. Hughes in effectuating and making the said false and fraudulent claim to the said * * * company that the said John Dexter Wiley had met his death as aforesaid. That thereafter and in the course of the said conspiracy * * * the said defendants John Dexter Wiley and Belle Wiley went upon the said boat of the said Joseph McAfee, * * * and that * * * said boat under the command of said Joseph McAfee shipped away ostensibly for the purpose of making a cruise around * * * [the] Island of Catalina. That thereafter and in the course of the said conspiracy, * * * while the said boat was on its said cruise, and at a point adjacent to the shore of said island of Catalina, * * * the said Belle Wiley did then and there falsely and fraudulently represent and pretend to the said Joseph McAfee and to the passengers on said boat that the said John Dexter Wiley had fallen overboard from said boat; and the said John Dexter Wiley did then and there falsely and fraudulently represent and pretend to the said Joseph McAfee and to the passengers on said boat that he had fallen overboard from said boat. That in truth and in fact the said John Dexter Wiley had not fallen overboard from said boat, but in truth and in fact did then and there falsely and fraudulently make the representation that he had fallen overboard from said boat and had immediately thereafter gone through a hatch in the said boat and to a lower deck and portion thereof and there disguised his appearance and hid himself. That thereafter and in the course of the said conspiracy * * * the said defendants John Dexter Wiley, Belle Wiley and W. N. George caused and procured the said Joseph McAfee and the engineer of said boat to proceed to the city of Avalon, at said island of Catalina, * * * and there put ashore the said John Dexter Wiley from the said boat while the same was anchored in the harbor of said Avalon and while the said John Dexter Wiley was then and there disguised as aforesaid. That thereafter and in the course of said conspiracy * * * the said defendants H. J. Hughes and W. N. George procured the clothes and wearing apparel of the said John Dexter Wiley and procured an automobile and thereafter * * * proceeded to the harbor of San Pedro * * * aforesaid, and there awaited the arrival of the said John Dexter Wiley to take him out of the * * * state of California for the purpose hereinabove stated. * * *

This pleading was demurred to and the demurrer was overruled. It is now contended that it should have been sustained.

Section 182 of the Penal Code provides, in part:

"If two or more persons conspire: * * * To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises, * * * they shall be punished in a certain manner."

Section 184 of the same enactment reads:

"No agreement amounts to a conspiracy, unless some act, besides such agreement, be done within this state to effect the object thereof, by one or more of the parties to such agreement and the trial of cases of conspiracy may be had in any county in which any such act be done."

These are the provisions which determine the question whether the indictment states a public offense. The specific question presented for our consideration is this: Does the pleading allege the commission of the overt act contemplated by the language of section 184?

It is insisted that in determining this question we may resort with profit to adjudications passing upon the sufficiency of indictments or informations which charge attempts to commit various crimes. It is said that the strength and stature of the present indictment may be measured accurately by the standards furnished by such adjudications, and as introductory to an examination of them appellant quotes the following from a noted text-writer:

"Two elements—each distinct from the other, and not commonly operating together, but each in its own separate class of cases, dominate the law of conspiracy. The one is combination, the other attempt. Thus— * * * In many circumstances, if two or more combine to do a wrong—whether as the means to something else or as the contemplated end—such mere combining more endangers or disturbs the community than would the executed wrong accomplished by the single will. This is the central idea in the law of conspiracy. * * * In other circumstances, there is no special evil in the combination, and its indictable quality does not consist in this linking of wills for wrong. Then the thing contemplated must be such as would be indictable if performed by one, and the conspiracy is punishable simply because it is an attempt. * * * We have already seen, in a general way, that to a certain extent conspiracy is a species of attempt. And— * * * The act of conspiring, and the specific intent to accomplish what constitutes a substantive crime, are in combination a criminal attempt, and it is the professional usage to term it a conspiracy. It follows the same rules, and is subject to the same limitations, as other attempts. * * * In attempt conspiracies—wherein the mischief does not lie specially in the combining, the wrong intended must be such as would be indictable if actually done by a single individual; and when it is such, the conspiracy is generally punishable." Bishop, New Crim. Law (8th Ed.) §§ 173, 191, 195.

"A conspiracy being an attempt to do something not yet accomplished, in reason the rule

in other attempts applies to it. * * *"
Bishop, New Crim. Proc. vol. 2, § 207.

Respondent vigorously assails these views of Mr. Bishop, and we are thus brought to a consideration of some of the basic principles of the law of conspiracy, for if the celebrated author correctly states the law the indictment under which appellant was convicted falls far short of sufficiency. Granting that the quoted text is not obnoxious to the vigorous protest registered by respondent, it is evident that under the law of this state such conspiracies as that with which we have now to deal must fall within the class designated as attempts in the early part of the excerpts which we have culled from the book. If we take the portion of section 182 of the Penal Code which is set forth above, and add to it the terms of section 184, it is obvious, if also we concede that Mr. Bishop is right, that in this jurisdiction there is no "special evil"—no criminality—"in the combination." If he is right, the test is here met that "the thing contemplated must be such as would be indictable if performed by one." Also, then, "the conspiracy is punishable simply because it is an attempt," and the indictment must be viewed in the light of the law touching attempts. The eighth edition of Bishop's New Criminal Law, from which the greater part of the above quotations is made, was published in 1893. The ninth edition of the same work appeared in 1923—30 years later—and the text of the eighth is repeated verbatim in it. We have made no attempt to ascertain the state of the author's text upon the same subject in editions earlier than the eighth. Without that, the time is more than ripe for a condemnation of Mr. Bishop's language, if he is wrong. In order to ascertain whether he is wrong, we must determine whether, under statutory enactments similar to section 184 of our Penal Code, it was the legislative intent merely to fasten criminality upon several for the performance of acts which would be criminal as "attempts" if performed by one, or whether it was intended to make the test of criminality the performance of acts, as distinguished from the mere meeting of minds in the formation of a conspiracy, even if such acts, when measured by the law concerning attempts, were but acts of preparation and therefore not punishable.

It may be premised without the citation of authority that under the English law, from which, of course, our law of conspiracy is descended, the crime mentioned lay in the combination—in the mere meeting of the minds of the conspirators in an intent to embark upon an illicit enterprise. The requirement that an overt act must be committed in furtherance of a conspiracy before criminality will attach is an American innovation in the law of criminal conspiracy. Statutes in-

augurating the innovation have been enacted by Congress and by the Legislatures of several of the states, including our own. We are therefore to inquire what was the basic object of the departure from the principles of the English law upon the subject, and of the law of the several states in which those principles still obtain.

[1] In order to lay a further foundation for the ascertainment of this basic object, and, further, in order to elucidate more fully certain general observations which we have made above, it is necessary to examine a little more closely into some features of the law of attempts as it exists in the jurisprudence of this state. This purpose will be sufficiently accomplished by the making of quotations from several cases:

"Between preparation for the attempt [to commit a crime] and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made. To illustrate: a party may purchase and load a gun, with the declared intention to shoot his neighbor; but until some movement is made to use the weapon upon the person of his intended victim, there is only preparation and not an attempt. For the preparation, he may be held to keep the peace; but he is not chargeable with any attempt to kill. * * * The attempt contemplated by the statute must be manifest by acts which would end in the consummation of the particular offense, but for the intervention of circumstances independent of the will of the party." *People v. Murray*, 14 Cal. 159.

"Mere intention to commit a specific crime does not itself amount to an 'attempt' as that word is employed in the criminal law. There must, in addition to the wicked intent—the mens rea—be some act done toward the ultimate accomplishment of the proposed crime. But even such acts do not always of themselves amount to an 'attempt,' or to an offense of which human laws will take cognizance, for if they be but acts of preparation, however elaborate, our municipal law * * * would not assume to deal with them. For instance, the construction of the dynamite bomb by the prisoner at his home * * * with the deliberate intention on his part to employ it the next morning in destroying the lives and property of others, atrocious as it was, and indefensible in foro conscientiae, was but an act of preparation, and when perfected did not render him amenable to the municipal law, * * * or punishable by its rules." *People v. Stites*, 75 Cal. 570, 17 P. 693.

"If one deliver to his agent a false instrument with the design that the agent shall utter or pass it, the crime of uttering or attempting to pass is not complete until after some overt act done by the agent to this end, for, until this shall come to pass, in contemplation of law the paper is still within the control of the principal, and all the steps are but steps of preparation." *People v. Compton*, 123 Cal. 403, 56 P. 44.

"An attempt to commit a crime is an en-

deavor carried beyond mere preparation but falling short of execution of the ultimate design. It is an act immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he had the power of carrying his intention into execution, and would have done so but for some intervening cause. The law recognizes a distinction between an intention to commit a crime and an attempt to commit such crime. An intention followed by no overt act cannot be punished." *Ex parte Floyd*, 7 Cal. App. 588, 95 P. 175.

"Generally speaking, the attempt, as distinguished from mere preparation, consists of some direct movement toward the consummation of the intended crime after the preparations have been made. * * * The difficulty generally is in determining the proximity of the overt act or acts to the complete accomplishment of the substantive crime. The acts proximately leading up to the consummation of the intended crime need not include the last proximate act for its completion. It is sufficient if the overt acts reach far enough toward the accomplishment of the intended offense to amount to the commencement of its consummation. That is to say, if the actual transaction has commenced which would have ended in the crime if not interrupted, there is an attempt to commit the crime." *People v. Lanzit* (Cal. App.) 233 P. 816.

These authorities, it will be noted, establish a clear line of distinction between mere acts of preparation, on the one hand, and those acts, on the other, which are more than merely preparatory and which rise to the dignity of actual attempts to commit crime. In ingrafting their innovation upon the principles of criminal conspiracy at common law, did American legislative bodies, in requiring the commission of overt acts before criminality attaches, contemplate the performance of acts which under the law of attempts would be merely preparatory, and therefore innocuous under that law, or did they intend that such overt acts should amount to criminal attempts? Did they, in other words, intend no more than that the law of conspiracy should be so altered that under it the law of attempts should be applied to conspiracies, that by means of the illicit concord of minds all the conspirators should be punished when the attempt was committed by all of them, or by any number less than all, and that short of actual "attempts" by some or one of them, none should be punished? Did they intend so to reframe the law that, again to quote from Bishop, "the conspiracy is punishable simply because it is an attempt"? It will be observed that an affirmative answer to the last two of these questions is to be based only upon the view that, in those jurisdictions in which an overt act is required before criminality appears, a drastic and revolutionary change has been effected in the law of conspiracy.

There are a few decided cases in which the courts, with a greater or less degree of explicitness and precision, have yielded as-

sent to views similar to those of Mr. Bishop, and they have occasionally cited him. In one case the information failed to allege an overt act amounting to an attempt to commit a crime. In passing upon the sufficiency of the pleading the court said:

"An 'overt act' is one done to carry out the intent, and it must be such as would naturally effect that result. Whether a certain act was in pursuance of the conspiracy depends entirely upon what the conspiracy was, and upon whether the parties conspired to accomplish their purpose by the means alleged. Where a conspiracy to commit a crime is established, any act in pursuance of the conspiracy and to effect its object is sufficient to give the court jurisdiction in the county where the act was committed. It is said that a conspiracy to commit a particular crime is essentially of the nature of an attempt to commit the crime."

Portions of the text which we have above set forth from Mr. Bishop's work were then quoted, along with statements substantially to the same effect from Wharton's Criminal Law. The court then said further:

"An attempt to commit a crime can only be made under circumstances which, had the attempt succeeded, would have constituted the substantive offense." *Williams v. State*, 16 Okl. Cr. 217, 182 P. 718.

In another case the following appears:

"It is well settled that the unlawful agreement is the gist of the conspiracy. The unlawful agreement, however, does not become the basis of an indictable offense till one of the parties to such agreement takes a step in furtherance of the execution of it. It is therefore essential, where there is a charge of conspiracy which requires an overt act to be done in execution of it, in order to make the conspiracy indictable, that such overt act should be set out in the indictment. It is not necessary to constitute the offense that it should appear that the object of the conspiracy was attained; a step taken in that direction by one of the parties to the agreement is sufficient. An indictable conspiracy is in its nature an attempt to commit an offense. 2 *Bish. on Cr. Law* (5th Ed.) par. 191." *State v. Hemmendinger* (N. J. Sup.) 126 A. 544.

Although we shall see later that the general trend of decision in the United States courts is to the contrary, one or two of those tribunals have put forth language similar in effect to that employed in the two opinions of the state courts from which quotation has just been made. In a case in which the defendants were charged with a conspiracy to defraud certain corporations which were engaged in a mail order business, a federal district judge said in his instructions to the jury:

"It seems to me that an overt act must be an act which has a tendency at any rate to carry out the object of the conspiracy, or in some way tends to make it effectual. It may not be sufficient of itself to complete the offense, but it should have a tendency to do so.

I do not imagine that any letter which could have no tendency to mislead the corporations which are the alleged victims could be claimed to be an overt act at all. It must be an act having a tendency to effectuate the object of the conspiracy." U. S. v. McLaughlin (D. C.) 169 F. 302.

From the viewpoint of the question here to be decided, this language is not clear, but it seems to import that an overt act must be more than an act of preparation, as that term is understood when applied to the law of criminal attempts. This view is strengthened by other language contained in the judge's charge to the jury. Another judge of the United States District Court has said that—

"A conspiracy to commit an offense, and an act done in pursuance and to effectuate the object thereof, may easily, if it does not necessarily, comprehend an attempt to commit the crime as to which the conspiracy relates." U. S. v. Rachmil, 270 F. 869.

These are all the cases which, so far as we can discover, either directly or indirectly, adopt the view of Mr. Bishop that an overt act under the law of conspiracy must partake of the nature of a criminal attempt. We now turn from them for the purpose of exhibiting the reverse side of the shield.

We doubt whether State v. Hemmendinger, supra, states the law of New Jersey upon the question now under discussion, although we shall not attempt here specifically to resolve the doubt, but shall leave the question to the tribunals of that state, where, of course, it belongs. Certainly, earlier views of the courts of the jurisdiction, expressed in opinions which are not noticed in State v. Hemmendinger, are at war with the attitude assumed in that case. The following dictum appears in an early case:

"[An] overt act may or may not be in itself criminal. The conspiracy is the crime, and the overt act bringing it within the requirement of the statute, *may be a very insignificant affair*. A completed crime is shown on the record before us by the averment of a criminal conspiracy, and the averment of the *doing* of anything, *no matter what*, in furtherance of it. * * *" State v. Young, 37 N. J. Law, 184.

The italics in the quotation are ours.

In another case the Supreme Court of New Jersey, in passing upon a charge of conspiracy, determined that the indictment sufficiently alleged the commission of an overt act, although under the law of criminal attempts the act so characterized would have been a mere act of preparation. The indictment charged that the defendants had conspired to unlawfully and corruptly procure certain persons to vote at an election in a certain election district knowing them not to be qualified electors of the district. The court said:

"The overt acts pleaded are that the defendants in pursuance of their conspiracy, aided and abetted the disqualified persons, whom they had conspired to have vote, to falsely register their names, or the names of others, on a certain registry list, as persons qualified to vote. It is * * * said that there is no charge that such persons voted or offered to vote * * * If there was a design to procure a disqualified person to vote, followed by an overt act in pursuance of that design, the conspiracy was complete, although for some reason its purpose failed and the person did not actually vote. * * * Respecting the essential act in execution of the joint design required by the statute, we think that the registration is such a step in the assertion of the right to vote, and in the equipment of the person asserting the right, with the privilege of voting, that where there is a design to vote fraudulently, then a fraudulent registration is an act taken in the execution of that purpose. It follows that the aiding and abetting in the false registration of W. B. was an overt act in carrying into execution the design to procure W. B. to vote at the following election." State v. Nugent, 77 N. J. Law, 84, 71 A. 485.

At least one decision of the courts of New York casts some light upon the question which now engrosses our attention. The case (People v. Miles, 123 App. Div. 862, 108 N. Y. S. 510, affirmed 192 N. Y. 541, 84 N. E. 1117) is principally noteworthy because the decision rendered is in some measure based upon the language of the New Jersey court in State v. Young, supra.

By far the greater body of the law upon the question now before us is to be found in the decisions of the United States courts. As already hinted, it will be seen that their trend is not in accord with the general expressions contained in the opinions in U. S. v. McLaughlin, supra, and in U. S. v. Rachmil, supra. In a number of the federal cases, without particular reasons being given for the result, charges of the commission of overt acts have been held to be sufficient where, apparently in some instances, certainly in others, the acts would have been nothing more than acts of preparation under the law of criminal attempts. Those cases are U. S. v. Sanche (C. C.) 7 F. 715; Daly v. U. S., 170 F. 321, 95 C. C. A. 107; Donaldson v. U. S., 208 F. 4, 125 C. C. A. 316; U. S. v. Burke (D. C.) 218 F. 83; Witte v. Shelton, 240 F. 265, 153 C. C. A. 191; Gretsche v. U. S., 242 F. 897, 155 C. C. A. 485. There are also, however, cases in which the courts have gone further than merely to uphold charges of that nature. The first of these, so far as our research has enabled us to discover, was decided as early as 1873. The court concluded its opinion thus, italics being ours:

"If, then, an indictment correctly charges an unlawful combination and agreement as actually made, and, in addition, describes *any act* by any one of the parties to the unlawful agreement, as an act intended to be relied on to show the agreement in operation, it is sufficient, al-

though, upon the face of the indictment, it does not appear in what manner the act described would tend to effect the object of the conspiracy. It is sufficient, if the act be so described as to apprise the defendant what act is intended to be given in evidence as tending to show that the unlawful agreement was put in operation, without its being made to appear to the court, upon the face of the indictment, that the act mentioned is necessarily calculated to effect the object of the unlawful combination charged. *It is not the case of an attempt to commit crime.* The crime is committed when the combination is made, and the act of one of the conspirators is not required by the statute to show the intent. That is inferred from the unlawful act of combining to defraud, or to commit an offense, but the object of requiring proof of *some act* in furtherance of the unlawful agreement is, to show that the unlawful combination *became a living, active combination.*" U. S. v. Donau, Fed. Cas. No. 14,983.

This pioneer adjudication has been cited and followed in U. S. v. Benson, 70 F. 591, 17 C. C. A. 293; Gantt v. U. S., 108 F. 61, 47 C. C. A. 210; U. S. v. Greene (D. C.) 115 F. 343; Ex parte Black (D. C.) 147 F. 832; U. S. v. Shevlin (D. C.) 212 F. 343; Collier v. U. S., 255 F. 328, 166 C. C. A. 498. Two of these cases made substantial addition to the language employed in the opinion of U. S. v. Donau.

"The policy of Congress was, not to introduce a new element into the crime, but to allow a period of grace, an opportunity for repentance, after the plot had been perfected, and before any decisive act had been done in furtherance of it. Therefore, the courts are required to differentiate sharply *between the agreement per se* [italics ours] and acts in furtherance of the agreement." Ex parte Black.

"To complete the crime denounced by the statute there must be *some action* in addition to the *mental one* of jointly agreeing or assenting to participate in the commission of the crime. Nothing in the language of the statute indicates an intention to require that that additional action be calculated or have a tendency to accomplish the object of the conspiracy. It is enough if it is done with the purpose or intention of putting the *unlawful agreement into operation*, whether it is or is not effective towards that end." Collier v. U. S. The italics are ours.

We have now given the result of our research among the adjudications of outside jurisdictions which touch upon the question here under scrutiny. If we turn to the opinions of our own courts we find nothing which materially aids us in our quest. In People v. Daniels, 105 Cal. 262, 38 P. 720, it happened that the overt act alleged and proved amounted to an attempt to commit the crime which was the object of the conspiracy. People v. Compton, 123 Cal. 403, 56 P. 44, is not a conspiracy case. Both People v. Johnson, 22 Cal. App. 362, 134 P. 339; and People v. Cory, 26 Cal. App. 735, 148 P. 532, relate to phases of the law concerning overt acts in conspiracy cases, but neither of them touch-

es the present question. In People v. Beck, 60 Cal. App. 417, 213 P. 61, the overt acts alleged apparently would have been nothing more than acts of preparation under the law of attempts. The allegations were held to be sufficient, but the specific question now under investigation was not discussed. The overt act charged in People v. Rodriguez, 61 Cal. App. 69, 214 P. 452, was an attempt to commit the crime contemplated in the formation of the conspiracy. People v. Silbello, 61 Cal. App. 92, 214 P. 462, was a companion case with People v. Rodriguez.

It becomes material now to examine the statutes of other jurisdictions making necessary the commission of overt acts in conspiracy cases before criminality will attach, in connection with section 184 of our Penal Code. The latter enactment, it will be remembered, provides:

"No agreement amounts to a conspiracy, unless some act, beside such agreement, be done * * * to effect the object thereof. * * *"

The statute of Oklahoma (Rev. Laws 1910, § 2234) is to the effect that "the crime of conspiracy to commit a felony or misdemeanor is not complete 'unless some act besides such agreement be done to effect the object thereof. * * *'" Williams v. State, supra. The New Jersey enactment (Revision 1877, p. 261) provides in part, that "no agreement to commit any offense other than [certain designated ones] shall be deemed a conspiracy unless some act in execution of such agreement be done to effect the object thereof. * * *" Wood v. State, 47 N. J. Law, 180. The cognate section of the Penal Code of New York (section 171) is to this effect:

"No agreement except to commit [certain specified crimes] amounts to a conspiracy, unless some act besides such agreement be done to effect the object thereof. * * *" People v. Miles, supra.

The enactment upon which most of the decisions of the United States courts are based, although some of them relate to special statutes concerning the law of conspiracy, reads, in part:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable. * * *" Rev. Stats. U. S. § 5440 (U. S. Comp. St. § 10201).

Two of these foreign enactments, those of Oklahoma and New York, are practically identical with section 184 of our Penal Code. It requires no extended examination or argument to justify the assertion that the other two, those of New Jersey and the United States, although couched in somewhat different language, are not different from ours in legal effect. All of the cases which we have cited are therefore in point and we may fol-

low that one of the opposing lines of decision which appears to us to be in accord with the better reason.

[2] It is plainly apparent from the list of cases we have spread upon the foregoing pages that the weight of authority is to the effect that, in pleading an overt act under the law of conspiracy, an information or indictment need not aver an attempt to commit the crime which is the object of the conspiracy and that the text of Mr. Bishop, and perhaps of other law writers, to the contrary, is unjustified and incorrect. Does the better reason lie in the same direction? Before proceeding to a line of argument which to our minds positively demonstrates the necessity of an affirmative answer to the question, we shall pause to consider the language of section 184 of the Penal Code, which seems to lead to the same end. That enactment, with a resort to italics, provides that no agreement "amounts to a conspiracy, unless *some act, beside such agreement*" be done to effect the object of the agreement. With these words before us, it seems extremely doubtful that the "some act" required by the law to stamp the agreement with criminality must be an attempt to commit the offense contemplated by the conspirators. The overt element of the crime, in so far as it is an element therein, is not to be merely "some" act, but it must be, as well, an act "beside" the agreement. Does not this concatenation of words indicate a legislative intent merely to distinguish, or to draw a line, between the mental activity evident in the meeting of the minds of the conspirators and the first outward manifestation of an intent to put into operation their concord upon the illicit purpose of the conspiracy—their first "act"? The fact that the overt act must tend to "effect the object" of the agreement does not interfere with an affirmative answer. Every act of the conspirators in and about the subject-matter of the conspiracy, even an act which under the law of criminal attempts would be but an act of preparation, must in some degree tend to effectuate the object of the illicit enterprise. In truth, the meeting of the minds of the conspirators, even if strictly not an act, tends toward the consummation of the unlawful purpose. It is the first step, the first movement, taking both these words in a figurative sense, toward the object of the wrongful concord. The situation is this: The meeting of the minds is a mental phenomenon. The overt manifestation must be physical. It seems to us that there is great reason, from the very language of section 184, for adopting the view that the Legislature intended to draw a line between the mental phenomenon exhibited in the formation of the agreement and the first nonmental, the first physical and therefore the first outward, manifestation by any conspirator of the will to put the illicit purpose of the

conspiracy beyond the terms of thought and into terms of action—to make it, in the language of one of the United States courts, "a living, active combination."

[3] We come now to what we deem a controlling and conclusive consideration in the solution of the question to which we have given such extended attention. If the position of appellant, based upon the text of Mr. Bishop, be a tenable one the law of conspiracy becomes a dead letter, as an effective instrumentality for the punishment, as conspirators, of those who engage in unlawful combinations. This is a startling statement. We must at once explain its meaning and establish its truth. It is evident that under the terms of section 184 of the Penal Code the agreement or combination is the gist of a criminal conspiracy. The negative mandate of the section, if we may employ a contradiction of terms, that "no agreement amounts to a conspiracy" unless an overt act be performed in furtherance of it, must surely, when an overt act is performed, resolve itself into the affirmative that the agreement thereupon amounts to a conspiracy. This view is in accord with the law in the jurisdictions generally in which the performance of an overt act is necessary to fasten criminality upon those who conspire to consummate a forbidden purpose. At common law the combination was the gist of the conspiracy. Under the authorities the situation is not changed by statutes requiring the performance of an overt act in order to complete the crime. The agreement is still the gist of the offense. The decisions of the United States courts upon this particular point, a few of which are among those cited above, but many more of which are not cited, are uniform in their effect. With the adoption of appellant's view all this is changed. It is not too much to say, as we have already said, that the law of conspiracy, properly so called, then practically disappears. The requirement that there be an overt act is no longer an innovation in the law of conspiracy. It but works an extension of the law of attempts and makes operative an innovation in that law. The attempt becomes the gist of the offense contemplated by the change in the law and the attempt is the real crime. Therefore, strictly speaking, the combination or agreement is no longer a conspiracy in the older sense, but is merely a means provided by law whereby a group of individuals may be so tied together that they all may be punished for a plain and ordinary "attempt" committed by any number of them less than all. Such is the effect—not only the effect, but the indubitable meaning—of the statement of Mr. Bishop that "the conspiracy is punishable simply because it is an attempt." We cannot perceive that the Legislature has employed language apt to work such a result. We are convinced that the better reason accompanies the weight of au-

thority upon the question now under examination.

[4] We are therefore satisfied that the indictment before us is amply sufficient in the face of the attack upon it with which we have dealt. Many "acts" are charged in it, following the allegation that they were done after the illicit combination "and in the course of said conspiracy and in furtherance thereof." These acts are, in part, at least, the taking out of the insurance policy; the procuring of the boat, the Catalina Flyer, from McAfee; the procuring of the garb with which to disguise Wiley; and the embarkation upon the Catalina Flyer. We are satisfied that these allegations, taken together, and without pointing to any one act which is alleged, as distinguished from the remainder, meet completely the requirements of section 184 of the Penal Code.

[5] It is contended by appellant that the indictment is uncertain in that it cannot be ascertained therefrom whether the defendants were charged with a conspiracy to commit the crime denounced by section 532 of the Penal Code, or to commit the crime punishable under section 549 of that enactment. The demurrer to the indictment presented only the general ground. It is therefore extremely doubtful whether the point now urged is properly before us, but we do not decide that particular question. The penalties prescribed by the two sections mentioned are different and, therefore, if there be such an uncertainty in the indictment as that which is claimed to exist the substantial rights of appellant are affected by it. For that reason, and because the attorney-general has joined issue with appellant in argument of the question suggested, we shall for the purposes of this case, only, concede that it is properly before us and shall decide it. The point presented is one of substantial moment. Section 182 of the Penal Code "denounces the crime of conspiracy to commit particular offenses, and indictments under it must be so framed as to point out the separate offense which persons are charged with conspiring to commit." *People v. Barnard*, 63 Cal. App. 562, 219 P. 756. Section 532 of the Penal Code reads, in part:

"Every person who * * *, by any false or fraudulent representation or pretense, defrauds any other person of money, * * * and thereby fraudulently gets possession of money * * *, is punishable * * *"

Parts of section 549 are as follows:

"Every person who presents * * * any false or fraudulent claim, or any proof in support of any such claim, upon any contract or policy of insurance * * * for the payment of any loss, or who prepares, makes or subscribes any account, * * * proof of loss, or * * * writing, with intent to present or use the same * * * in support of any such claim, is punishable. * * *"

A brief survey of the indictment will convince that it charges a conspiracy to violate the provisions of one of these sections and not of the other; in fact, that there is nothing substantial in it to indicate a purpose to base the charge upon the terms of that other. Viewed as a pleading founded upon section 532, it will be observed that the indictment charges a conspiracy "to obtain money and property by false pretenses * * * as follows, to wit: That * * * said defendants * * * did * * * conspire, * * * by divers unlawful, false and fraudulent representations and pretenses to obtain the sum of ten thousand dollars * * * upon the false and fraudulent representation and pretense" that John Dexter Wiley had been drowned and that Belle Wiley was entitled to receive the sum mentioned as proceeds of the policy of insurance which had been issued. Then follow the allegations showing the various things done pursuant to the conspiracy, including the following: That two of the conspirators induced McAfee to allow them to use the Catalina Flyer "for the purpose of making a false, fraudulent and fictitious showing and representation" that Wiley had been drowned; that several things were done for the purpose of assisting the conspirators "in effectuating and making the said false and fraudulent claim to the" insurance company that Wiley had been drowned; that during the cruise of the Catalina Flyer Belle Wiley did "falsely and fraudulently represent and pretend" to those on the boat that Wiley had fallen overboard; and that Wiley then made the same false and fraudulent representation and pretense. Viewed as an effort to charge a conspiracy to violate the provisions of section 549 the indictment is barren. The most that can be said of the pleading on that head is that in it the word "claim," a word also found in section 549, is employed. That circumstance, considering the manner and the connection in which the word is used, is utterly insufficient to make it a charge founded upon that section. Taking the indictment as a whole, it appears to us plainly, singly and with certainty to charge a conspiracy to violate the terms of section 532. There is nothing in it which could have misled appellant to the view that the charge was based upon section 549.

[6] It is contended that at the trial there was no evidence of the formation of the conspiracy. On the contrary, however, the evidence of the conspiracy was unusually full and complete. It is often difficult to make proof of the formation of the unlawful combination in conspiracy cases, but that difficulty was not experienced in any marked degree in the present instance. There was ample evidence from which the jury was justified in finding that the following was the sordid story of the unusual and bizarre crime charged in the indictment: Appellant, introducing himself under the assumed name

of Spear, opened negotiations with McAfee for the use of the Catalina Flyer and for the services of McAfee himself, who was the captain of the boat, in the consummation of the illicit enterprise. The pretended Spear, after a preliminary and introductory exchange of remarks, asked the captain if he desired to make \$2,000 easy money. The skipper inquired how he could enrich himself to that extent. Appellant then said that he was connected with an insurance company, that he had a party who was insured, and that, to quote McAfee, "he [the insured] wanted to go around the island with me on my boat and pull off a fake drowning, and with my reputation there," McAfee having lived on the island of Catalina for eighteen years, "if I reported him as drowned, you know, the money would be paid in the neighborhood of forty-eight hours after the case was taken into their office, and that after the money was paid from the insurance company that I would be paid \$2,000 in Liberty Bonds." McAfee said he would think the proposed plan over. The two had dinner together on the evening of the day of this first meeting, when McAfee says that appellant "continued his talk on what the case would be, in regard to having a man that he had insured, and the man apparently would fall overboard." During this second conversation appellant referred to the insured man as one Cameron. Appellant said to McAfee that he would take up the matters they had talked about with Cameron. McAfee later had conversations with appellant and Wiley together, but in the meanwhile McAfee had made the authorities acquainted with the pending plot, and it was arranged that he should appear to fall in with the plans of appellant and Wiley and that he should apparently aid in the monstrous scheme to defraud the insurance company. From that time forward the conspiracy proceeded under the surveillance of officers of the law. At the conversations between the appellant, Wiley, and McAfee, details were arranged for the carrying out of the plot. Mrs. Wiley, who has not yet appeared in this story of the unfolding of the plot, was to play an important part in the consummation of the plan, under the arrangement made by the three men. We shall not describe the plan, but shall proceed to relate what was done pursuant to it, as McAfee testified that it was carried out as contemplated. It is well to say here, by way of interpolation, that during the conferences between the three men appellant and Wiley disclosed to McAfee their true names. Some days before Wiley was to be "drowned" he and McAfee went to sea in the latter's boat and put on a "dress rehearsal" of the prospective descent of Wiley into a watery grave. Finally, and after all these preliminaries, the great day arrived. The stage was set, the actors were in their places, and the calcium threw its spot on the

scene of histrionic endeavor. Even an "audience" was present, for the Catalina Flyer was an excursion boat and the general public was not on this occasion denied the right to partake of the joys of the cruise. Some of the audience knew that the trip was to be enlivened by the production of a "farce," to lapse again into the language of the "boards," for several detectives, thoroughly interested "first-nighters," were in the loges and boxes. Appellant was also present at the "production." All that now occurred followed closely the "script" of the play, as composed by Messrs. George, Wiley, and McAfee. A number of the excursionists, including Wiley and his wife, were on the forward deck of the boat, when McAfee ordered them all aft and below. This was done for the alleged reason that the weather had become so rough as to make the position of the forward passengers dangerous. All obeyed the order, but Mrs. Wiley left behind her a purse which she had been carrying. When all the forward passengers were settled aft, Mrs. Wiley conveniently "discovered" that the purse was missing. She exclaimed that she had left it forward and rushed to obtain it. She was accompanied by her husband, who, like the redoubtable Dick Deadeye in "Pinafore," another epic of the sea, was vigilant to aid "a female in distress." When the leading man and the leading woman reached their position up stage, Wiley threw overboard two chairs, the purse, and a straw hat which he had worn and which had the initials of his name inside it. But Wiley did not himself plunge into the raging main. Not he! The "drowning" was not to approach that near to realism. Instead, he plunged down the forward hatchway, which had been left open for the purpose, and hid himself in the forward part of the vessel. The other actors in the drama proceed with their parts. Mrs. Wiley runs aft in tears, actual or apparent, calling out that her husband has fallen into the sea. McAfee yells "Man overboard!" and "brings to" the boat. They cruise about the spot for a time, to the accompaniment of the lamentations of Mrs. Wiley—and McAfee says she played well her part—and amid the great confusion which reigns among the passengers; but as they have the "body" of Wiley with them they do not find it in the water. They do, however, fish out the initialed hat, as mute evidence of this latest catastrophe of the sea! After a time the boat returns to Avalon, the port of Catalina island, apparently Wileyless. The passengers, no male Wiley among them, are put ashore in a small boat. Mrs. Wiley is cared for in the hour of her bereavement by some of the kindly disposed passengers, and they eventually escort her to the mainland. After the coast is clear, McAfee returns to the Catalina Flyer and takes off Wiley in disguise. That individual also proceeds to the mainland, where he finds appel-

lant awaiting him. There they are both put under arrest. Could there have been plainer proof that appellant and Mr. and Mrs. Wiley had conspired as charged in the indictment? If there could be plainer proof, it was not necessary. There was enough. It was, of course, proved, in addition to what is above set forth, that the insurance policy was taken out as charged, that the life of Wiley was insured under it, and that Mrs. Wiley was the beneficiary.

[7] It is contended that the trial court erred in giving an instruction to the jury to the effect that the defendants were to be found guilty if the jury was satisfied beyond a reasonable doubt that the illicit combination was formed, for the reason that the particular instruction did not inform the jury as to the necessity of proof of an overt act. There are two answers to this objection: (1) Other instructions which were given by the court properly covered the law as to overt acts; (2) the uncontradicted evidence was so complete upon the subject of overt acts that the jury could not have found that no overt act was committed.

Various other points are made by appellant. They are, however, answered by what we have already said, or they fall of their own weight. It is particularly to be noted that the error of Mr. Bishop, doubtless justifiably concurred in by appellant's counsel, runs through and colors most of the questions presented upon the appeal.

Judgment and order affirmed.

We concur: FINLAYSON, P. J.;
CRAIG, J.

74 Cal. App. 518

STRONG v. OLSEN et al. (Civ. 5261.)

(District Court of Appeal, First District, Division 2. California. Oct. 3, 1925. Hearing Denied by Supreme Court Nov. 30, 1925.)

1. Carriers $\S$ 347(6)—Evidence of contributory negligence of one riding on outside of bus held properly submitted to jury.

In action for injuries received by passenger of automobile bus, evidence showing that plaintiff had been riding outside on fender, though there were vacant seats inside of bus, held properly submitted to jury on question of plaintiff's contributory negligence.

2. Carriers $\S$ 348(5)—Instruction that, if jury found that, if plaintiff had ridden inside of bus instead of outside, he would not have sustained injuries, verdict must be for defendant, held proper.

In action for injuries received by passenger in collision of bus, instruction that, if jury found there was room for plaintiff inside, and if he had ridden inside he would not have suffered injuries, and that his act in riding outside contributed proximately to injury, verdict must be for defendants, held proper.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Joseph Theodore Strong, by Joseph A. Strong, his guardian ad litem, against Leander Olsen and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Hearing denied by Supreme Court; Myers, C. J., not participating, Lawlor, J., voting for the granting of the petition.

Kelby & Lawson and Samuel M. Garroway, all of Los Angeles, for appellant.

Joe Crider, Jr., and W. I. Gilbert, both of Los Angeles, for respondents.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment denying compensation for personal injuries received while riding upon an automobile bus owned and operated by the defendants. The defendants pleaded that the plaintiff was guilty of contributory negligence, proximately causing his injury, and the questions raised upon the appeal relate to the sufficiency of the evidence to justify the jury in finding a verdict for the defendants and the propriety of a certain instruction which will be considered hereinafter.

There are some conflicts in the evidence, but most of the facts appear by uncontradicted testimony of several witnesses, and in our statement we shall emphasize, as we must, the testimony which supports the verdict. Plaintiff was a boy 15 years of age and a student at the high school at Alhambra, Cal., which was about four miles from his home. He and other students were transported between their homes and the school by means of an automobile bus owned and operated by the defendants. On the day of the accident, plaintiff boarded the bus at the school. He was inside of the bus at first, but later took a position upon the running board, either standing or lying over a fender, although there were several vacant seats inside of the bus in the rear. While he was occupying this position upon the running board, there occurred a collision between the bus and an automobile truck, and the plaintiff's leg was broken, and his foot was so badly crushed and torn as to necessitate amputation.

[1, 2] With this evidence in the record, the trial court submitted to the jury the question of plaintiff's contributory negligence. Certainly it was a question for the jury, and the appellant here is, in effect, asking this court to declare that, as a matter of law, there was no contributory negligence under the facts recited. The instruction submitting this question is the only other subject of attack upon appeal. It is as follows:

"I instruct you that, if you find from the evidence that there was room for plaintiff to have ridden inside of the bus, and that, if plaintiff had ridden inside of the bus instead of at the

point where you find he was riding, he would not have suffered the injuries which you find he suffered, and if you find further that, under the circumstances as they existed at the time of the accident and immediately before the accident and in and around the bus, an ordinarily reasonable, prudent, and careful person of like age, experience, and intelligence would not have ridden at the place where you find plaintiff was riding when the accident occurred, and if you find further that plaintiff's act in so riding contributed proximately to the injury which he suffered, then your verdict must be in favor of both of the defendants."

The objection which the appellant makes to this instruction is:

"That it misled the jury to believe that the plaintiff, in taking the position on the bus that he did, assumed all the increased risk attendant thereon, including the negligence of the driver of the bus."

The instruction carefully states that, to find for the defendants, the jury must believe that the injury was proximately caused by the unusual position of the plaintiff. In other words, it permitted the jury to find, if it could, that the injury was caused proximately by the negligence of the driver—that it would have been caused if the plaintiff had been inside the bus. But the facts and circumstances and the nature of the plaintiff's injuries were such that the jury did not and could not reasonably so find.

There are no other questions involved, and the judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

74 Cal. App. 524

BROWN v. JERNIGAN, Sheriff. (Civ. 5169.)

(District Court of Appeal, Second District, Division 1, California. Oct. 8, 1925.)

1. Execution §171(1)—Injunction to prevent enforcement of judgment because of matters arising prior or subsequent thereto proper.

Injunctive relief may be granted to prevent enforcement of judgment because of matters arising prior or subsequent thereto, which renders its execution inequitable.

2. Mandamus §5—Sheriff cannot be compelled by mandamus to sell property taken on execution, where superior court in exercise of its discretion had enjoined sale.

Sheriff is not subject to mandamus to compel him to sell property taken on execution, where judgment debtor has brought action wherein he sought to state equities entitling him to injunction, and court in exercise of its discretion granted restraining order or temporary injunction.

3. Mandamus §4(3)—Writ of mandamus should not be used as writ of error to interfere with order of injunction made by court within its jurisdiction.

Writ of mandamus to compel sheriff to proceed despite injunction should not be used as writ of error to interfere, where court was acting within its jurisdiction, even though such action was erroneous.

Application by W. H. Brown for writ of mandamus to be directed to Sam Jernigan, as Sheriff, requiring him to advertise and sell property under execution. Writ denied.

H. L. Sacks, of Los Angeles, for petitioner.
L. A. West, of Santa Ana, for respondent.
Bruns & Mooney, of Los Angeles, amici curiae.

CONREY, P. J. On application of petitioner this court issued a writ of mandate requiring the respondent, as sheriff of Orange county, to advertise and sell property on which levy has been made under an execution, or show cause why he should not so proceed. Respondent by his answer seeks to justify his refusal by showing that he has been enjoined and restrained by an injunction issued out of the superior court of Orange county.

In March, 1915, in the superior court of Los Angeles county, a money judgment was entered in favor of W. H. Brown, plaintiff, against Walter C. Rowell and Ethel Rowell, defendants. The execution was issued on the 1st day of July, 1925, pursuant to an order of the superior court of Los Angeles county. Prior to the injunction the sheriff levied upon personal property and also upon real property as property of the defendants.

After the levy made under the execution the defendants Rowell commenced an action in the superior court of Orange county by verified complaint, wherein they alleged facts whereby they sought to show that it was inequitable to permit the enforcement of said judgment against them. On presentation of that verified complaint and an undertaking approved by the court, the superior court of Orange county granted a temporary restraining order and an order on Brown and his attorney and the sheriff of Orange county, defendants, requiring them to appear and show cause why an injunction should not be granted. At the hearing of that matter, on August 7, 1925, the court granted the temporary injunction, and at the same time allowed plaintiff five days to amend the complaint. That amendment was filed on August 12, 1925. Said complaint, with the amendment thereto, and certain affidavits and other documents which were before the superior court of Orange county at the hearing on August 7, are to be found in respondent's return herein and in the supplemental petition of petitioner

Brown filed herein on August 10, 1925. At the hearing of this proceeding before this court on August 24, 1925, it was stipulated that said supplemental petition may be considered the same as if it had been filed prior to the issuance of the alternative writ of mandate.

[1] The facts, as above stated, raise a question concerning the extent and the limits of power of a superior court to interfere with the execution of the judgment of another superior court. A like problem was presented in *Von Der Kuhlen v. Cline*, 38 Cal. App. 545, 176 P. 883, where this court granted a peremptory writ of mandate requiring the sheriff to sell property levied upon by him under an execution, notwithstanding that under a third-party claim the claimant had filed an action in claim and delivery against the sheriff, and in that action had obtained an order purporting to enjoin and restrain the sheriff from selling the property. Observing that the action in claim and delivery was purely an action at law, in which the complaint did not state any facts upon which equitable relief should be grounded, it was held that the case was not one in which the superior court had authority to grant an injunction; that such party could not by an injunction thus obtained interfere with the execution of process under a lawful judgment between other parties. But the court further said:

"The only exception to this rule must be found in some case of an equitable nature wherein a third-party claimant's cause of action itself furnishes ground of equitable relief."

[2, 3] The quoted sentence was not intended to limit such rights to third-party claims. The intention was to recognize the principle, about which there is no doubt, that one of the most clearly recognized grounds for injunctive relief is the prevention of the enforcement of a judgment because of matters arising prior or subsequent thereto which render its execution inequitable. 14 Cal. Jur. 188. The same subject was before the Supreme Court at an early date in *Buffandeau v. Edmondson*, 17 Cal. 436, 79 Am. Dec. 139. The court there said:

"It is unnecessary to consider whether the bill of complaint showed a proper case for an injunction, or whether the injunction was regularly granted or not. It was enough for the sheriff to know that a court of competent jurisdiction had made the order, and then it became his duty to obey it. It is no part of a sheriff's duty to sit in judgment upon judicial acts,

and reform the errors or revise the orders of the judge. As the execution is only an order of the court, it would be strange if the sheriff were held under onerous penalties to obey its commands, and yet be absolved from the duty of yielding obedience to an order made directly by the judge, touching the same subject-matter. The injunction, so long as it remained in force, operated as a supersedeas to the execution; the legal authority to sell the property was withdrawn by the same authority which had given it, to wit, by the act of a competent court; and the sheriff had no more legal justification for his act than if he had proceeded to sell after the execution had been quashed."

See, also, *Baines v. Zemansky*, 176 Cal. 369, 373, 168 P. 565, where it was held if the superior court has jurisdiction, upon any possible state of facts, to prohibit or enjoin the performance of an act, the sufficiency of the petition or complaint upon which that court acts, so far as the facts stated therein are concerned, cannot be inquired into by the Supreme Court in a collateral proceeding, such as an application for a writ of mandate.

So here it is likewise unnecessary to consider whether the complaint in the superior court shows a proper case for an injunction. For the present purpose it is enough that the nature of that action, as shown by the complaint, is that the plaintiff therein has sought to state equities which he claims entitle him to an injunction, and that that court in the exercise of its discretion has held that the complaint on the face of it states facts which entitle the plaintiff to a restraining order and a temporary injunction, which will hold the property and the levy in status quo until the merits of that action can be determined. If that were clearly and solely an action at law (as in *Von Der Kuhlen v. Cline*, supra), wherein the court clearly had no power to grant an injunction, we agree that an injunction granted therein would not affect the duty of the sheriff to proceed under the execution, and he would be subject to mandamus to compel him to proceed. But we think that the writ of mandamus should not be used as a writ of error to interfere with an order of injunction made by a court where the court was acting within its jurisdiction, even though such action may be erroneous.

The alternative writ is discharged and the peremptory writ denied.

We concur: CURTIS, J.; HAHN, Justice pro tem.

197 Cal. 448

**COUNTY SANITATION DIST. NO. 4 OF
LOS ANGELES COUNTY v. PAYNE,
Auditor. (L. A. 8780.)**

(Supreme Court of California. Nov. 20, 1925.)

1. Statutes §225½ — Statutes, dealing specifically with particular subject, not controlled by general statutes.

Ordinarily, statutes dealing specifically with particular subject are not controlled or affected by general statutes.

2. Health §4—Publication of resolution of intention to form sanitation district sufficient.

Under County Sanitation District Act, St. 1923, p. 498, amended by St. 1925, p. 4, publication of resolution declaring intention to form sanitation district, in newspaper of general circulation within district proposed to be created, designated by board of supervisors, held sufficient notwithstanding Pol. Code, § 4458, especially where no paper was published on printing press within limits of proposed district.

3. Health §4—Statutes, relating to notice by publication, not applicable to sanitary district.

In proceeding to form sanitary district under County Sanitation District Act, St. 1923, p. 498, amended by St. 1925, p. 4, publication of notice of intention under section 2 of act is not governed by rules of Pol. Code, §§ 4458, 4459, 4460, 4462, 4463, which were passed many years before adoption of Sanitation Act.

4. Health §4—Supervisors of sanitation district entitled to publish notice of intention in county newspaper outside of district; "political subdivision."

Supervisors of sanitation district, being county officers under Pol. Code, § 4013, could publish notice of intention to form district in newspaper of general circulation in county notwithstanding sections 4458 or 4460; sanitation district not being a "political subdivision" within meaning of section 4458, and, if it were, strict compliance with section 4460 would make impossible creation of sanitary districts within which no newspaper is published, thereby violating County Sanitation District Act, § 22.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Political Subdivision.]

5. Evidence §25(2)—Court will take judicial notice that there are many thickly populated rural settlements not in police jurisdiction of incorporated city and in which no newspaper is published.

The court will take judicial notice that there are many rural settlements and residence districts thickly populated which are not within the police jurisdiction of any incorporated city or municipality, and in which no newspaper is published or printed.

6. Health §16(1)—Publication of notice of bond issue in newspaper other than designated by board of supervisors of sanitary district does not comply with law.

Publication of resolution calling a bond election for a sanitation district, under County Sanitation District Act, St. 1923, p. 498, amended by

St. 1925, p. 4, in a newspaper not designated by board of supervisors of district, is not in compliance with law.

7. Health §16(1)—Publication, of resolution calling bond election, in 5½ point type, substantial compliance with statute.

Publication of resolution calling bond election for sanitation district, under County Sanitation District Act, in 5½ point type, instead of 6 point, as required by Pol. Code, § 4459, held substantial compliance with Pol. Code, § 4459, especially where 6 point slug was used.

In Bank.

Application by County Sanitation District No. 4 of Los Angeles County for writ of mandamus directed to H. A. Payne, Auditor of County Sanitation District No. 4 of Los Angeles County, to compel him to sign certain bonds. Writ granted.

Hugh Gordon, of San Francisco, for petitioner.

Edward T. Bishop, County Counsel, of Los Angeles, for respondent.
Edward T. Bishop, County Counsel, and J. F. Moroney, Deputy County Counsel, both of Los Angeles, for defendant.

SEAWELL, J. This is an application for a writ of mandamus to compel the respondent, H. A. Payne, who, as auditor of the county of Los Angeles, under the provisions of the "county sanitation district act" (Stats. 1923, p. 498, chap. 250; amended Stats. 1925, p. 4, chap. 8), is ex officio auditor of sanitation district No. 4, county of Los Angeles, to affix his official signature to certain bonds, as required by said act; the issuance thereof having been authorized in the sum of \$240,000 for sewage and sanitation purposes, at an election called and held in said district March 1, 1925. There is no dispute as to the facts.

Two reasons are urged by the auditor, either of which, it is claimed, is sufficient to justify him in withholding his official signature from said bonds, to wit: First, that the resolution adopted by the board of supervisors declaring its intention to form said district was not published according to law; second, that the resolution adopted by the board of supervisors calling said election, at which the proposition of the bonded indebtedness of the district was to be submitted to a vote of the electors of said district, was not published according to law.

[1, 2] The specific objection first made is that the publication of the resolution of intention did not comply with section 2 of the county sanitation district act, nor with the provisions of section 4458, Political Code. Section 2 is a part of a comprehensive act specially providing for the creation of sanitation districts, while section 4458, supra, is general. The rule of construction is that statutes dealing specifically with a particular

subject are not ordinarily controlled or affected by general statutes. Section 2 of said act provides that the board of supervisors desiring to create a sanitation district shall adopt a resolution of its intention so to do, and said resolution "shall, prior to the time of hearing, be published at length twice in at least one of the newspapers of general circulation in the proposed district and *brief notices* of the passage of such resolution and the time and place of hearing provided thereby *may* be published in one or more of the daily and weekly newspapers published and circulated in said proposed district." (Italics supplied.) It is admitted that no newspaper was composed, printed, and issued from a printing press operated within the limits of the proposed district, and that the newspaper which was designated by the board of supervisors, to wit, Los Angeles Daily Journal, in which the resolution was published, was a newspaper of general circulation within the district proposed to be created, and it was also the newspaper in which the official notices and publications are usually printed on behalf of both the city and the county of Los Angeles. Clearly the statute deals with two separate and distinct matters, to wit, the publishing at length of the resolution of intention in a newspaper of general circulation in the proposed district, to be designated by the board, and for the publication of brief notices of the passage of said resolution of intention and the time and place of hearing thereof in one or more of the daily and weekly newspapers *published and circulated* in said proposed district. The language of said section, taken in a literal sense, means simply this: The resolution of intention shall be published at length in a newspaper to be named by the board of supervisors, which has a general circulation within the proposed district, but the board is not required to publish said resolution in a newspaper which is published and circulated in the district even if such a newspaper should be so published and circulated. If the board, in its discretion, in addition to making the mandatory publication, which seems necessary to jurisdiction, should also determine that brief notices of the passage of the resolution of intention to form said proposed district and notices stating the time and place of hearing ought to be published, it may publish the same in one or more of the daily and weekly newspapers *published and circulated* in said district. If the word "published" as used in conjunction with "circulated," providing for discretionary action upon the part of the board as to the giving of publicity by brief notices of the passage of the resolution and the time and place of hearing, may be said to be used in the sense that said notices, if given, may be published only in a newspaper the mechanical work of producing which is performed wholly within the proposed dis-

trict and circulated therein, the board, by the language of the statute, was, in the instant case, deprived of the privilege of exercising its discretion inasmuch as no newspaper so produced was printed or published or circulated within the boundaries of the proposed district. The mandatory portion of said section was literally complied with by the publication of the resolution of intention as actually made by the order of the board of supervisors of the county.

[3] It is the contention of respondent that said section 2 of the County Sanitation District Act must be construed with sections 4458, 4459, 4460, 4462, and 4463, Political Code. Respondent's arguments are chiefly grounded upon the provisions of sections 4458 and 4460 of said Code. The first in numerical order provides as follows:

"Whenever any publication, or notice by publication, or official advertising is required to be given or made by the provisions of this Code, the Civil Code, the Code of Civil Procedure, the Penal Code, or by any law of the state, by any officer now existing, or any hereafter created, in this state, or any political subdivision thereof, or by any officer of any court, or officer of a county, city, and county, or town in this state, such publication or notice by publication, or official advertising shall be given or made only in a newspaper of general circulation, where such a newspaper is published within the jurisdiction of such official. Where no newspaper of general circulation is published within the jurisdiction of such official, then such publication or notice by publication, or official advertising, shall be given or made in a newspaper of general circulation, published nearest thereto."

The last clause of the section above set out furnishes the grounds for the argument that, since there was no newspaper of general circulation, as the same is defined by the Code, within the proposed district, the publication of the resolution of intention should have been made in a newspaper of general circulation published nearest thereto, of which there were two published nearer to the boundary lines of said proposed district than the Los Angeles Daily Journal. In considering the application of statutes or laws we must take notice of the persons, things, and conditions not intended to be affected thereby as well as the persons, things, or conditions which it was the evident intention of the Legislature that such laws should affect or operate upon. The section last above cited defines the duty of an officer of a political subdivision or of any court, county, city, and county, or town in this state who by virtue of his office is charged with the duty of giving notices by publication as required by law in the administration of his official duties. If the section be given a literal interpretation, the members of the board of supervisors being county officers (Pol. Code, § 4013), the board was authorized to make publication of the resolution of intention in the

Los Angeles Daily Journal, a newspaper of general circulation, published within the jurisdiction of such officials, to wit, county of Los Angeles. While this conclusion is sustainable under the language of the Political Code sections cited, we feel satisfied that as those sections were enacted many years before the adoption of the sanitation act under consideration, it was not intended that they should have application to a county sanitation district. While it is not necessary, in our view of the law of the case, to interpret the phrase "or any political subdivision thereof," as found in section 4458, supra, this court held in *Bettencourt v. Industrial Accident Commission*, 175 Cal. 559, 166 P. 323, that reclamation districts, which surely partake in a greater degree of the nature of political or governmental powers than a sanitation district, possess no political nor governmental powers and are not public corporations but mere "governmental mandatories or agents vested with limited powers to accomplish limited and specific work." From the foregoing it follows that petitioner is not within the phrase or clause of the section of the Code last above referred to.

[4, 5] If section 4460, Political Code, which defines "a newspaper of general circulation" to be one "established, printed and published at regular intervals, in the state, county, city, city and county, or town, where such publication, notice by publication, or official advertising is given or made," etc., is to govern section 2, County Sanitation District Act, and the jurisdiction of the board of supervisors which is as broad as the limits of the county which it serves, is to be cut down to come within section 4458, supra, as contended by respondent, then it would not be possible, as respondent frankly admits, to organize a sanitation district within any area, however populous or extensive its limits may be, in which no newspaper is "established, printed and published." Such a construction would have the effect of defeating the creation of sanitation districts in very many instances. We may take judicial notice of the fact that there are many rural settlements and residence districts thickly populated which are not included within the police jurisdiction of any incorporated city or municipality and in which no newspaper is published or printed as in the instant case. The construction contended for, if accepted, would lead to harsh results and would be violative of section 22 of said act, which provides:

"This act, and every part hereof, shall be liberally construed to promote the objects hereof, and to carry out its intents and purposes."

[6] It is next urged that the Hollywood News, the newspaper designated by the board of directors of said district to publish the resolution calling the bond election, used in publishing said resolution 5½ point type in-

stead of 6 point type, and this departure from the statute, it is claimed, renders the election invalid. The statute provides that such a publication must be set in type not smaller than nonpareil, which is 6 point type, and must be preceded with words printed in black-face type, not smaller than nonpareil, describing the notice intended to be given. Sections 4459, Pol. Code. It is admitted that the resolution was printed in the Hollywood Citizen, a newspaper circulated within the proposed district, and printed in type of legal size and for the period prescribed by law. The Hollywood Citizen, however, was not designated as the newspaper to make such publication. For that reason the publication as made by that newspaper was not in compliance with law. *Donnelly v. Tillman*, 47 Cal. 41; *Napa v. Easterby*, 61 Cal. 509; *Wade on Notice*, §§ 1106, 1108, 1123.

[7] The question remaining is whether or not the publication of the resolution in 5½ point type instead of 6 point is a substantial compliance with the requirements of section 4459, supra. The difference in size between 5½ point type and 6 point type is exceedingly slight. In the instant case, however, a 6 point slug was used which had the effect of making the resolution stand out quite as prominently and attractively as if 6 point had been used. Construing this section as to the requirement of "black-face type," which is closely analogous to the point here made, this court in *Clark v. City of Los Angeles*, 160 Cal. 43, 116 P. 722, thus disposed of the question:

"Another objection is that the publication of the ordinance was insufficient because it was not preceded by words in black-face type describing in general terms the purport or character of the notice intended to be given, as directed by section 4459 of the Political Code. See *Derby v. Modesto*, 104 Cal. 523, 38 P. 900. The ordinance was preceded by its title, which clearly described its purport. We do not regard the fact that it was not printed in black-face type of sufficient importance to warrant a holding that the proceedings were thereby invalidated, even if the section cited was applicable to the election notice in question, which we do not decide."

The plain letter of statutes in such cases should not be departed from, and by our holding in the instant case that there was a substantial compliance with the statute and no injury resulted therefrom we do not mean to be understood as encouraging departures from legislative requirements, under any circumstance. Such departures or omissions, though seemingly slight, might in some cases compel the annulment of the entire proceeding or cause a reversal of the cause.

Let the peremptory writ of mandate issue.

We concur: MYERS, C. J.; RICHARDS, J.; SHENK, J.; WASTE, J.; LAWLOR, J.

PEOPLE v. SMITH. (Cr. 1255.)

(District Court of Appeal, First District, Division 2, California. Oct. 2, 1925. Hearing Denied by Supreme Court Nov. 30, 1925.)

1. Robbery ☞26—Jury must determine whether identification by general description was sufficient.

Where one accused of robbery was not positively identified as one of parties, but general description tallied with that given by witnesses, it was for jury whether this method of identification was sufficient.

2. Robbery ☞24(1)—Possession of stolen articles after robbery, and failure of accused to answer written accusation made by companion, are circumstances which jury may take into consideration.

Possession by one accused of robbery of stolen articles immediately after commission of offense, and failure to make answer to written accusation made by companion at time of apprehension, clearly involving him in commission of robbery, were circumstances which jury were justified in taking into consideration in fixing on accused responsibility for crime.

3. Robbery ☞24(1)—Evidence held sufficient to sustain conviction.

In prosecution for robbery, evidence showing that accused had attempted to dispose of property stolen, and that he was related to one of servants who might have admitted persons committing robbery, and that he failed to deny accusation made in his presence by companion, held sufficient to sustain conviction.

4. Criminal law ☞753(2)—Instruction advising jury to return verdict of not guilty properly refused, where evidence would warrant jury in arriving at verdict of guilty.

Where there was sufficient evidence to warrant jury in arriving at verdict of guilty, instruction advising jury to return verdict of not guilty was properly refused.

5. Criminal law ☞814(18)—Instruction properly refused, which would not have been applicable to any particular incident in trial.

Instruction relating to degree of credit which should be given to various witnesses, particularly to right of jury to reject entire testimony of witness shown knowingly to have testified falsely on trial, held properly refused, where there was no single incident in course of trial to which such instruction would have been applicable.

6. Criminal law ☞404(3)—Pistol identified as one used in robbery, ownership of which was not denied by accused, properly admitted in evidence.

Pistol, which was discovered in presence of accused at time of arrest, ownership of which was not denied by accused, when companion identified it as his, which pistol was later identified as one used in commission of robbery, held properly admitted in evidence.

7. Robbery ☞23(1)—Evidence of relation of servants in home robbed to accused properly admitted.

Admission of testimony that servants in home which was robbed were related to accused was proper, as showing method by which parties gained entrance to home for purpose of committing robbery.

8. Criminal law ☞829(13)—Instruction that statement of companion of accused could not be taken as evidence against accused properly refused, in view of instructions given and statement of judge at time of admission.

Refusal of instruction that written statement of companion of accused at time of arrest, which had been read to accused while under arrest, could not be taken as evidence against accused of facts therein, but used solely for purpose of evidencing conduct of accused, while it was being read to him and thereafter, was proper, when such instructions were covered in statement of judge at time of introduction of statements and in former instructions.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

John Smith was convicted of robbery, and he appeals. Affirmed.

Leslie Hubbard and Hubbard, Hubbard & McClellan, all of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

NOURSE, J. The defendant was convicted upon information charging him and one Edward Egan jointly with the crime of robbery. The two were separately tried, and the defendant has appealed from the order denying him a new trial and from the judgment.

The facts of the case are that on the 28th day of October, 1924, the complaining witnesses, Mr. and Mrs. P. I. Jacoby, returned to their home in Jackson street, in the city and county of San Francisco, at about 12 o'clock midnight, and retired to their sleeping apartments upon one of the upper floors of the building. Their home had two entrances, one in the front of the house, through which they entered, and another in the rear, which was known as the tradesman's entrance, and was used by servants of the family. When the Jacobys entered their sleeping apartment, two men, both masked and armed with black automatic pistols, confronted them, and, after robbing them of jewelry of the value of over \$12,000, locked them in a closet, and left without disturbing anything else in the house. When the Jacobys escaped from the closet, they telephoned to the police, and immediately gave them a description of the bandits and of the jewelry which had been taken. They then examined the premises, and found that none of the doors or windows had been disturbed,

but that the rear door, or the tradesman's entrance, was unbolted. At this time the Jacobys had in their employ two servants, namely, Delia Cooney, a cook, and Maria Beraudiere, a second maid. The Jacobys had left their home at 7 o'clock that evening, with the intention of spending the evening with friends, and the two servants were the only other occupants of the house at the time.

Three days after the night of the robbery the defendant, Egan, and one Harry Wright were arrested while seated in a Ford sedan, which was parked outside of Wright's cleaning and pressing establishment. At the time they were talking to a woman by the name of Mamie Manning. The three men and the woman were all taken into Wright's place of business, and following a search the Jacoby jewels, with one exception, were found in Wright's pocket. At that time, in answer to the question from the police officers, Wright stated, in the presence of both the defendant and Egan, that he had obtained the jewels from those two. Of this accusation neither the defendant nor Egan made any denial. At the same time, upon a search of the premises, a black automatic pistol was found, as to which Wright stated at the time that he had seen the pistol in Egan's possession that morning. To this no reply was made by either the defendant or Egan. On the same day, while all the parties were present at the police station, Wright made a written statement which directly charged defendant and Egan with the robbery. This statement was later read to both the defendant and to Egan in Wright's presence, and these two were asked whether they had anything to say regarding it, and both failed to make answer. At the same time it was brought out that Delia Cooney, the cook in the Jacoby home, was a sister-in-law of Egan, and that a short time before the robbery the two Jacoby servants had visited a home in the city, where they had met Egan and Mamie Manning, the woman who was with the defendant and Egan at the time of their arrest.

At the trial all the facts were placed before the jury for the purpose of showing the circumstances surrounding the condition of the robbery and the methods by which the participants of the crime were able to gain entrance into the Jacoby home and conceal themselves for the single purpose of obtaining the jewelry which the Jacobys were wearing at the time. Evidence was also offered that upon the day before defendant's arrest he had approached one Abe Cohn, a pawnbroker, telling him that he knew some people who had some jewels to sell, describing them as a string of real pearls, bracelets, rings, and earrings (the identical articles which were the subject of the robbery), and endeavored to persuade Cohn to either purchase or arrange for the purchase of the same. When the

parties were arrested on October 31st, they were seated in a Ford sedan, which was similar to one which a witness testified he had seen parked in front of the Jacoby place at about 7:30 on the evening of the robbery, and again at 11:30 of the same night. Though the complaining witnesses were not able to positively identify either the defendant or Egan as the bandits who had attacked them on the evening in question, the description of them, given at that time, closely tallied with the defendant and Egan, and it was upon this description that the police officers were able to identify the two whom they subsequently arrested. It appears that on the day following the arrest both Mr. and Mrs. Jacoby were taken to the police station for the purpose of identifying the defendant and Egan as being the participants in the robbery. When Mrs. Jacoby was confronted by the defendant and Egan, she stated, in answer to the question by one of the police officers, that she did not recognize them, but "maybe they recognize me." Whereupon both defendant and Egan "snickered," but made no further reply.

[1-3] The main attack of the appellant is based upon the ground that the evidence is insufficient to support the verdict. At the outset it may be conceded that the evidence connecting the appellant with the commission of the crime is scanty, as is usually the case in cases of this nature, where the party committing the crime by masking his features partially conceals his identity. But, as said in *People v. Willard*, 150 Cal. 543, 553, 89 P. 124, 128:

"This court cannot disturb a verdict, unless there is no evidence to support it, or where the evidence relied on by the prosecution is apparently so improbable or false as to be incredible, or where it so clearly and unquestionably preponderates against the verdict as to convince this court that its return was the result of passion or prejudice on the part of the jury."

All the evidence in this case was offered by the prosecution. The defendant did not, at the time of the trial or at any time subsequent to his arrest, make any effort to explain the suspicious circumstances in which he was involved. Though he was not positively identified as one of the parties to the crime his general description tallied with that given by the witnesses, and it was for the jury to determine whether this method of identification was sufficient. His possession of the stolen articles immediately after the commission of the offense—that is to say, his efforts to dispose of the jewelry, and his failure to deny the accusation of Wright that the jewelry had been given him by appellant and Egan, and his failure to make answer to the written accusation, later made by Wright, clearly involving him in the commission of the robbery—were all circumstances which the jury was justified in tak-

ing into consideration in fixing upon the appellant the responsibility for the crime. As we look upon the entire record, we are unable to say that the evidence is any less convincing than that which was before the court and held to be sufficient in *People v. Cataline*, 54 Cal. App. 36, 200 P. 1060; *People v. Reed*, 58 Cal. App. 7, 207 P. 1025; *People v. Deases*, 60 Cal. App. 170, 212 P. 407; *People v. Peterson*, 61 Cal. App. 63, 214 P. 247; and *People v. Ross*, 61 Cal. App. 61, 214 P. 267.

While it is true that possession of the stolen property immediately following a robbery is not in itself sufficient evidence to warrant a verdict of robbery, nevertheless slightly corroborative evidence of other inculpatory circumstances, taken with the evidence of possession of the stolen property, is sufficient to support a conviction. *People v. Cataline*, 54 Cal. App. 36, 200 P. 1060. Putting it in another way, possession of stolen property, if unexplained, "is an item to be taken into consideration by the jury, together with other incriminating circumstances in arriving at a verdict." *People v. Reed*, 58 Cal. App. 8, 207 P. 1026. Appellant has cited *People v. Fitzsimmons*, 144 App. Div. 211, 128 N. Y. S. 996, *People v. Mullen* (Cal. App.) 231 P. 588, and *State v. Campbell*, 69 Iowa, 556, 29 N. W. 604, as holding that the evidence in each case was insufficient to sustain the conviction. It would serve no purpose to analyze these cases, for in each instance the holding was merely that there was no evidence of any nature to connect the particular defendant with the commission of the crime of which he was charged. Cases of this nature all depend upon their own facts, and in reaching a conclusion as to whether those facts will sustain a verdict of conviction "we must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence." *People v. Tom Woo*, 181 Cal. 315, 326, 184 P. 389, 393. For these reasons we hold that the evidence is sufficient.

[4, 5] Criticism is also made of the action of the trial judge in refusing to give certain instructions proposed by the appellant. Instruction No. 1 advised the jury to return a verdict of not guilty. It is evident, of course, that, if there was sufficient evidence to warrant the jury in arriving at a verdict of guilty, this instruction would have been improper. Objection is also made to the failure of the trial judge to give instruction No. 7, relating to the degree of credit which should be given to the various witnesses, and particularly to the right of the jury to reject the entire testimony of a witness shown knowingly to have testified falsely on the trial. The Attorney General concedes that this instruction was a proper one, and that it should have been given, but insists that its refusal does not constitute prejudicial error. We have read the entire record with

care, and are satisfied that no prejudicial error arose from the failure to give this instruction, and in fact this seems to be conceded by the appellant, as he has not pointed to a single incident in the course of the trial to which the instruction might have been applicable.

[6, 7] Objection is also made to the action of the trial judge in admitting in evidence the pistol which was found in the shop of the witness Wright at the time of the arrest of the appellant and Egan. In this connection *People v. Mullen* (Cal. App.) 231 P. 588, is cited, and it is argued that the cases are parallel. We see a clear distinction between the *Mullen* Case and this, inasmuch as in this case the pistol was discovered by the arresting officer in the presence of the appellant and his codefendant, and at that time, and while all of these parties were present, Wright told the police officer that the pistol belonged to Egan. No denial was made by either Egan or the appellant, and the pistol was later identified as one used by the parties in the commission of the robbery. It thereupon became a material link in the chain of circumstances and was properly admitted in evidence. We see no error in the admission of the testimony covering the relationship of Egan and Della Cooney, the cook at the Jacoby home, as this evidence went to show the methods by which the parties gained entrance to the Jacoby home for the purpose of committing the robbery.

[8] Objection is also made to the refusal of the trial judge to give to the jury appellant's proposed instruction No. 8, to the effect that the written statement of Harry Wright, which had been read to the appellant and his codefendant while they were under arrest, should not be taken as evidence against the appellant of the facts stated therein, but that it should be used solely for the purpose of evidencing the conduct of the appellant while it was being read to him and thereafter. When the written statement was offered in evidence, it was distinctly stated that such was the purpose of the offer, and at that time the trial judge clearly informed the jury that it was an accusatory statement, only to show the conduct of the appellant at the time, and nothing else, "and they are not to consider any of these facts, as being proven, or that this statement in any way tends to prove the facts." In closing his formal instructions the trial judge advised the jury regarding the evidence of a defendant standing mute in the face of an accusation, and "that the reason for admitting the accusation in such cases is to explain the conduct of the accused," and again, "regarding statements which may have been read, that they are not, of themselves, to be taken as independent evidence of the facts therein contained." We see no prejudicial error resulting from the refusal to give the instruction as requested by appellant.

Other grounds urged by the appellant do not require consideration.

Judgment and order affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

74 Cal. App. 494

SPITZER v. SUPERIOR COURT OF ALAMEDA COUNTY et al. (Civ. 5222.)

(District Court of Appeal, First District, Division 1, California. Oct. 1, 1925. Hearing Denied by Supreme Court Nov. 30, 1925.)

1. Judgment $\S$ 948(1)—Former adjudication, interposed as defense, must be presented by pleading or evidence.

Former adjudication is generally an affirmative defense, which must be presented either by pleading or evidence.

2. Judgment $\S$ 948(1)—Benefit of prior adjudication as bar may be waived by failure to plead or present it.

The bar of former adjudication may be waived by failure to plead or present it.

3. Judgment $\S$ 948(4)—Judgment, not available until after entry of interlocutory decree in subsequent action, may be presented before entry in final decree.

Where no opportunity existed at commencement of action to plead bar of former adjudication, owing to fact that it did not become final until after entry of interlocutory decree in subsequent action, the judgment may be presented before entry of a final decree therein.

4. Judgment $\S$ 948(1/2)—Interposition of former adjudication to whole cause of action is not plea to jurisdiction, but one in bar.

The interposition of a former adjudication against entry of final decree in subsequent proceeding is not a plea to the jurisdiction, but a plea in bar or in estoppel, and cannot deprive court of jurisdiction.

5. Judgment $\S$ 822(1)—Full faith and credit clause provision in Constitution does not establish rule affecting jurisdiction of court in which judgment is offered in evidence.

The provision in U. S. Const. art. 4, § 1, that full faith and credit shall be given in each state to judicial proceedings of every other state, establishes a rule requiring enforcement of such judgments without investigation of the merits, and not a rule affecting jurisdiction of court in which judgment is offered in evidence.

6. Judgment $\S$ 823—Foreign judgment, though in rem, not executory in another state.

A foreign judgment, though in rem, is not executory in another state.

7. Divorce $\S$ 326—Trial court's determination as to legal effect of foreign judgment held act in exercise of its jurisdiction over parties and cause.

In divorce action by wife, trial court has jurisdiction to determine legal effect of foreign

judgment procured by husband, which became final after institution of instant action in bar of which such judgment was interposed.

8. Divorce $\S$ 59—Court in which action pending not deprived of jurisdiction to hear and determine cause by reason of decree of another court adjudging dissolution on merits becoming final during pendency of subsequent action.

A court in which action for divorce is pending, and which has jurisdiction of the parties and cause, is not deprived of jurisdiction to hear and determine that cause by the fact that a decree of another court adjudging the dissolution of the marriage has become final during the pendency of the subsequent action.

9. Appeal and error $\S$ 456 — Supreme Court has inherent power to prevent, in a proper case, any action by the lower court which would render appeal ineffective.

The Supreme Court has inherent power to prevent, in a proper case, any action by the lower court which would render an appeal ineffective.

10. Prohibition $\S$ 3(2)—Prohibition does not lie to prevent error, where appeal furnishes adequate remedy.

Prohibition does not lie to prevent error, where appeal furnishes adequate remedy.

11. Prohibition $\S$ 3(3)—Appeal, by petitioner, from erroneous determination by trial court of legal effect of foreign judgment interposed by petitioner against wife's action for divorce, held adequate remedy.

Appeal, by petitioner, from erroneous determination by trial court of legal effect of foreign judgment in divorce action interposed by petitioner, under Code Civ. Proc. § 473, against entry of final decree in bar of wife's action for divorce, held adequate, under section 963, subd. 1, precluding issuance of writ of prohibition.

Application by Sidney Spitzer for prohibition to be directed to the Superior Court in and for the County of Alameda, Hon. T. W. Harris, as Judge, and others. Writ denied.

Courtney L. Moore and Grant H. Smith, both of San Francisco, for petitioner.

Annette Abbott Adams, of San Francisco, for respondents.

CASHIN, J. An original application for a writ of prohibition to prevent the entry by the superior court in and for the county of Alameda of a final decree of divorce in an action pending therein entitled "Hazel M. Spitzer, Plaintiff, v. Sidney Spitzer, Defendant."

The defendant, who is the petitioner herein, and plaintiff, intermarried in the territory of Hawaii during the year 1917 and lived together therein until the month of June, 1920, when a separation occurred; petitioner remaining in that territory, while his wife, with the minor child of the marriage, came to California, and has since resided in

the county of Alameda. It is alleged in the petition—and there have been filed herein exemplified copies of the proceedings—that petitioner on March 2, 1922, commenced in the circuit court of that territory an action for divorce, alleging desertion by his wife, who appeared therein and contested the action; that on December 5, 1923, judgment was therein entered granting a divorce to petitioner, awarding the custody of the child to its mother, and providing for the payment by petitioner of certain sums for the support of the child, and which judgment—an appeal (which was thereafter dismissed) having been taken therefrom by petitioner—became final on July 29, 1924.

In the meantime, on September 6, 1923, Hazel M. Spitzer filed in respondent superior court an action for divorce against petitioner on the ground of cruelty, wherein service of summons was had pursuant to sections 412 and 413 of the Code of Civil Procedure. Petitioner, who at all times mentioned herein has been a resident of Hawaii, failed to appear therein except in the manner herein-after stated, or to answer the complaint, whereupon his default was entered and an interlocutory decree of divorce granted to plaintiff therein on March 11, 1924, and from which decree no appeal was taken.

On December 11, 1923, petitioner, assuming that respondent court was without jurisdiction, appeared therein for the special purpose of moving a dismissal of the action on that ground, in that there was then pending the action mentioned in the Hawaiian court. The moving papers having been stricken out on motion by plaintiff, petitioner moved no further therein until after the entry of the interlocutory decree mentioned, when, on October 14, 1924, he filed therein his motion for relief under the provisions of section 473 of the Code of Civil Procedure, and for an order of respondent court vacating the interlocutory decree and permitting petitioner to answer the complaint, filing therewith his verified answer thereto, wherein was pleaded the decree of the circuit court mentioned as a bar to the action. This motion was by respondent court denied, and from the order an appeal, which is now pending and undetermined, was taken by petitioner to the Supreme Court of the state of California.

It is further alleged that thereafter, on February 26, 1925, petitioner, anticipating an application by plaintiff for a final decree, filed therein certain affidavits, alleging the entry and effect of the Hawaiian decree, with exemplified copies of the judgment and proceedings in that action, and with a notice directed to respondent court and Hazel M. Spitzer that petitioner would and did oppose the entry of such final decree. An order was thereupon made by respondent court fixing a day for the hearing of petitioner's

objections, and directing that notice of such hearing be served upon plaintiff therein or her attorney. It does not appear that plaintiff or her attorney was present at such hearing, or that any motion or application had or has been made by her for such final decree; but it is admitted that upon such hearing documentary evidence was introduced, which we assume included copies of the proceedings in the Hawaiian court, and that the court signified its intention to grant a final decree in the action should application therefor be made.

It is not contended here that the complaint in the action last mentioned did not state facts sufficient to constitute a cause of action for divorce against petitioner, or that respondent court failed to obtain jurisdiction to hear and determine the cause; but it is urged that the circuit court of the territory of Hawaii has by its decree adjudged the dissolution of the marriage of the parties; that respondent was thereby deprived of jurisdiction to proceed further in the action before it; and that, the fact of such judgment appearing to this court, respondent should be prohibited from entering a final decree therein.

[1-4] A former adjudication as a defense is generally regarded as an affirmative one, which must be presented, whether by pleading or evidence, by the one relying upon it (*McLean v. Baldwin*, 136 Cal. 565, 69 P. 259; *Brown v. Campbell*, 110 Cal. 644, 43 P. 12; *Estate of McNeil*, 155 Cal. 333, 100 P. 1086); and the benefit of a prior adjudication constituting a bar may be waived by failing to plead or present it in the subsequent action (15 Cal. Jur., Judgments, § 233; *Freeman on Judgments*, § 808 [5th Ed.]). Where it appears, however, that there was no opportunity to plead a judgment urged as a bar, owing to the fact that it did not become final until after the entry of an interlocutory decree in a subsequent action, it may be presented before the entry of a final decree therein. *Penfield v. Potts & Co.*, 126 F. 475, 61 C. C. A. 371; *Bradley, etc., Co. v. Eagle Mfg. Co.*, 57 F. 980, 985, 6 C. C. A. 661; *Freeman on Judgments*, § 798 (5th Ed.). It is not a plea to the jurisdiction, but, where it is pleaded to the whole cause of action, is a plea in bar, or, if to a particular fact or issue, a plea in estoppel, but cannot be given the effect of depriving the court of jurisdiction. *Fields v. Walker*, 23 Ala. 155; *Granger v. Sup. Ct.*, 159 Cal. 2, 112 P. 854.

[5, 6] The provisions of article 4, section 1, of the Constitution of the United States, that "full faith and credit shall be given in each state to the * * * judicial proceedings of every other state" established a rule requiring the enforcement of such judgments without an investigation of the merits of fact, and not a rule affecting the jurisdiction of the court in which the judgment is

offered in evidence (*Anthony v. Tarpley*, 45 Cal. App. 72, 187 P. 779; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 291, 8 S. Ct. 1370, 32 L. Ed. 239); and such judgments, though in rem, are not executory in another state (*Andrews v. Andrews*, 188 U. S. 14, 23 S. Ct. 237, 47 L. Ed. 366; *Thompson v. Whiteman*, 18 Wall. 457, 21 L. Ed. 897; *Rose v. Himeley*, 4 Cranch, 241, 2 L. Ed. 608).

[7] The fact of a judgment urged as a bar, the identity of the parties, jurisdiction to render it, and the legal effect to be given it, are matters for determination in the first instance by the trial court, are questions on which the party against whom the judgment is urged has the right to be heard, and such determination, though erroneous, and hence not an act in the proper exercise of its jurisdiction, would nevertheless be an act in the exercise of its jurisdiction over the parties and the cause.

[8] While in the case of *Gloyd v. Sup. Ct.*, 44 Cal. App. 39, 185 P. 995, it was held that the death of one of the parties to an action for divorce (in that case an admitted fact), after the entry of an interlocutory decree which adjudges only that a divorce should be granted, deprives the court of jurisdiction to enter a final decree, and that prohibition will lie unless it appears that an appeal will afford a plain, speedy, and adequate remedy, it is also the rule that the court in which an action is pending, wherein it has jurisdiction of the parties and the cause, is not deprived of jurisdiction to hear and determine the cause by the fact that a decree of another court adjudging the dissolution of the marriage has become final during the pendency of such action. *Granger v. Sup. Ct.*, supra; *Davis v. Davis*, 70 Colo. 37, 197 P. 241. In the instant case it is not alleged or contended that the interlocutory decree does more than to adjudge the right of the plaintiff in the action to a decree dissolving the marriage, or that the entry of a final decree therein, assuming the Hawaiian decree to be valid and to have the legal effect contended by petitioner, would effect a change in the status of the parties.

[9] The court in which is pending the appeal mentioned has inherent power to prevent, in a proper case, any action by the lower court which would render the appeal ineffectual. *Carit v. Williams*, 67 Cal. 580, 8 P. 93; *Weldon v. Rogers*, 154 Cal. 632, 98 P. 1070; *Rogers v. Sup. Ct.*, 158 Cal. 467, 111 P. 357; *Bryan v. Sup. Ct.*, 169 Cal. 761, 763, 147 P. 938.

[10, 11] Where appeal furnishes an adequate remedy, prohibition will not lie to prevent error (*Van Hoosear v. Railroad Commission*, 189 Cal. 228, 207 P. 903; *High on Extraordinary Remedies*, § 772; *McGregor v. Board of Trustees*, 159 Cal. 441, 447, 114 P. 566; *Kinard v. Police Ct.*, 2 Cal. App. 179,

83 P. 175), and should respondent erroneously determine the fact and the legal effect of the alleged adjudication in the Hawaiian court, and enter a final decree in the action, from that judgment an appeal would lie, which would afford petitioner under all the circumstances shown by the petition a plain, speedy, and adequate remedy (*Reynolds v. Reynolds*, 191 Cal. 435, 216 P. 619; *Gloyd v. Sup. Ct.*, supra; 9 Cal. Jur., *Divorce and Separation*, p. 776; § 963, subd. 1, *Code Civ. Proc.*).

It is our conclusion that the proceedings of respondent court are within the exercise of its jurisdiction over the parties and the cause, and that for any error therein petitioner has and will have, so far as shown, a plain, speedy, and adequate remedy by appeal.

The petition for a writ of prohibition is denied.

We concur: TYLER, P. J.; KNIGHT, J.

74 Cal. App. 500

GRAVES v. RICKERSHAUSER et al.
(Civ. 5253.)

(District Court of Appeal, First District, Division 2, California. Oct. 1, 1925.)

1. Appeal and error ⚡1010(1)—**Judgment, based on uncontradicted evidence, which is not improbable, not disturbed.**

In action by creditor against debtor, who had executed a declaration of trust, to recover alleged beneficial interest of debtor in trust property, which beneficial interest creditor had purchased, wherein defendants contended that alleged beneficial interest resulted from excess payment to trustees for trust property in order to conform to error in deed, *held*, that as defendants' contention is uncontradicted and is not improbable, judgment in defendants' favor will not be disturbed.

2. Creditors' suit ⚡46—**Other property not subjected to creditor's claim merely on suspicion, where no hidden assets shown.**

In creditor's bill seeking to discover hidden assets, when there is no testimony indicating that there are any hidden assets, other property may not be subjected to creditor's claim merely on suspicion.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action for money by Amy Graves against Florence E. Rickershauser and others. Judgment for defendants, and plaintiff appeals. Affirmed.

C. Franklin Baxter, of Los Angeles, for appellant.

Schweitzer & Hutson, of Los Angeles, for respondents.

LANGDON, P. J. The controversy between the parties hereto out of which this

appeal grows has been before this court on other appeals. They are all concerned with the attempt of the plaintiff to collect money due her from the defendant Florence E. Rickershauser. A very brief recital of facts will indicate how tortuous has been the road to that end.

In the year 1915 the defendant Florence Rickershauser, being heavily indebted, transferred all her property to the defendant Thomas McMahan, who executed a declaration of trust, declaring that he held same for the benefit of certain creditors of Florence Rickershauser, named therein, whose aggregate claims amounted to \$28,978. The plaintiff, Amy Graves, was not included in this list of creditors. She brought an action against Florence Rickershauser in the superior court of Los Angeles county, and obtained a judgment for \$3,474.24. Thereafter, in August, 1917, plaintiff purchased at the sale under execution issued upon said judgment the beneficial interest of Florence Rickershauser in said trust property, if any there was, after the satisfaction of the purposes of the trust; i. e., the payment of the debts specified therein. The net purchase price of said interest—\$2,583.56—was credited upon plaintiff's judgment. It was found that in July, 1917, McMahan, as trustee, sold the trust property to the defendants Susie M. Kibbe, Frank Rickershauser, and Charles Rickershauser, children of Florence Rickershauser, for the sum of \$33,641.85. The court found that this amount was necessary to discharge the purposes of the trust. It appears that debts amounting to nearly \$29,000 were specified in the trust instrument, and the testimony is that the balance was consumed in legal fees and expenses in connection with litigation involving the trust property and other legitimate expenses connected with the administration of the trust. There is nothing to contradict this testimony, and the trial court accepted it as true. It is, perhaps, not so satisfactory as if the items had been specified in detail by the witness, but it is, nevertheless, the only testimony on the subject appearing in the record.

Appellant contends that, even though the amount allowed for taxes, interest, and expenses be conceded to be correct, there is still \$3,000 representing Mrs. Rickershauser's beneficial interest which should belong to the plaintiff because of her purchase of such beneficial interest. This claim is made because the trustee actually received \$36,641.85, or an excess of \$3,000 over and above the amount necessary for the debts and expenses. Appellant asserts that this \$3,000 was actually part of the consideration for the trust property, and, being in excess of the debts to be paid by the trust fund, it represented the beneficial interest of Florence Rickershauser, plaintiff's debtor.

The trial court resolved this disputed question in favor of the defendants, holding

that this \$3,000 which was returned to the purchasers of the property was never intended as a part payment therefor, but was always the property of the purchasers, and was returned to them as such and not as the beneficial interest of Florence Rickershauser. This determination is supported by uncontradicted testimony of defendant Frank Rickershauser that the trustee had made repeated unsuccessful efforts to sell the trust property, and finally the children of Florence Rickershauser concluded to purchase it for an amount sufficient to pay the debts secured by the trust deed, the expenses, etc. These items were estimated by the trustee to aggregate \$33,641.85. The trustee lived in Montana, but came to California to consummate the transaction. The deed was made, executed, and recorded before the full consideration was paid, the purchaser having previously advanced \$13,000 of the consideration to pay urgent claims against Florence Rickershauser. When the deed was returned from the recorder's office, Frank Rickershauser saw it for the first time and noticed that the amount of the consideration was erroneously stated therein to be \$3,000 more than agreed upon, or \$36,641.85. He immediately called attention to this fact, and a consultation was had with the attorney representing the trustee, who advised that the consideration stated in the deed should be paid, and that the excess should be returned later to the purchasers. This method of overcoming the difficulty was adopted, because the deed had already been recorded. The purchasers owned some property in Alma, Kan., which was sold by the trustee for their account, and the proceeds therefrom, amounting to about \$24,000, was remitted directly by a bank in Kansas to the trustee in Montana. This remittance, together with the \$13,000 previously advanced, completed the amount specified in the deed, \$36,641.85. About a month later the trustee returned to the children of Florence Rickershauser the \$3,000 excess which they had paid, in accordance with the agreement between the parties.

[1] If this testimony be true, the \$3,000 in dispute was the sole property of the defendant Frank and Charles Rickershauser and Susie Kibbe, and never represented any interest or property of the debtor, Florence Rickershauser, and plaintiff has no claim upon it. The testimony just recited stands uncontradicted in the record, and supports the finding of the court unless it is inherently improbable, and we think it does not merit such description. The trial court saw and heard the witnesses and believed this uncontradicted testimony, and we are powerless to interfere merely because it may seem peculiar that the consideration in the deed should have been stated incorrectly.

[2] Like the trial court, we appreciate the hardship under which a plaintiff labors in a

creditor's bill, seeking to discover hidden assets, but if there is no testimony in a record which indicates there are any hidden assets of a debtor, other property may not be subjected to the creditor's claim merely upon suspicion.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

74 Cal. App. 521

FOSTER v. ABRAHAMS. (Civ. 5246.)

(District Court of Appeal, First District, Division 2, California. Oct. 5, 1925.)

1. Attorney and client ⇨124—Attorney's retention of ring of client until her note and his fee and expenditures in her divorce case were paid held not shown to violate statute.

Attorney retaining client's ring, deposited as collateral, until note of client and his fees and expenditures in her divorce case were paid to him held not shown to have violated Civ. Code, § 2235, where client did not plead a violation of statute, and trial court was not asked to make, and did not make, any finding on the subject, and it did not appear that attorney was retained by client on date when note was executed, or that fee allowed attorney by trial court was unreasonable.

2. Pledges ⇨19—Holder held entitled under note to apply collateral to other claims held by him against maker.

Where note recited that collateral had been deposited by maker with payee for payment of this or any other liability of maker to payee or other holder due or to become due, or that may be hereafter contracted, holder held entitled to apply collateral to other claims held by him against maker.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Louise Foster against A. L. Abrahams, with cross-complaint by defendant. Judgment for defendant, and plaintiff appeals. Affirmed.

Kemp & Clewett and E. L. Foster, all of Los Angeles, and Lester R. Godward, of Maricopa, for appellant.

Paul Barksdale D'Orr and Minor Moore, both of Los Angeles, for respondent.

STURTEVANT, J. The plaintiff commenced an action in replevin to recover a diamond ring. The defendant appeared and answered, and also filed a cross-complaint. The plaintiff answered the cross-complaint, and a trial was had in the lower court without the intervention of a jury. The trial court made findings on all of the issues on which evidence was introduced in favor of the defendant. The plaintiff moved for a new trial,

the motion was denied, and the plaintiff has appealed, bringing up a bill of exceptions.

In the earlier part of the year 1921 Louise Foster and E. L. Foster were man and wife. In July of that year Mrs. Foster engaged Mr. Abrahams to act as her attorney in obtaining a divorce for her. He commenced the action, and, after the papers were served on Mr. Foster, the latter appeared and moved that the venue be changed from Los Angeles county to Kern county. The motion was granted. After the divorce case was transferred to Kern county, such proceedings were had that Mr. Kaye, an attorney at law residing at Bakersfield, in Kern county, was substituted as attorney for Mrs. Foster in the place of Mr. Abrahams. Some time in the month of July, 1921, Mrs. Foster called on Mr. Abrahams, and borrowed \$100. Later she called again and borrowed \$200. At the time of the second loan she produced a diamond ring as security. A note was made out in favor of W. N. Hamaker as payee. The note was dated August 3, 1921, payable 90 days after date, and bore interest at 8 per cent. per annum. It was on a printed form, and is what is commonly called a collateral note. Among other provisions the note contained the following:

"And I hereby deposit with said W. N. Hamaker as collateral security for the payment of this or any other liability or liabilities of mine to said W. N. Hamaker or other holder hereof, due or to become due, or that may be hereafter contracted, the following property, viz.: One diamond (3 large stones and several small stones) ring, platinum setting.
* * *"

After signing the note, Mrs. Foster delivered the note and ring as security into the hands of Mr. Abrahams for Hamaker. However, it is not controverted but what Hamaker was a naked trustee for Abrahams. In accordance with the undisputed testimony, the trial court found that the note was indorsed and delivered by Hamaker to Mr. Abrahams before the maturity of said note.

Prior to the 2d day of November, 1921, Mr. Abrahams sent to Mrs. Foster a bill in the divorce action, which included his fee and costs paid, amounting to \$260. On the date last mentioned Mrs. Foster caused to be tendered to Mr. Abrahams \$300 and interest, and demanded the return to her of the note and the ring. Mr. Abrahams refused to return the ring, claiming that he had the right under the terms of the note to retain the ring until the principal and interest on the note were paid, and also the amount of his fee as an attorney, and the amount of his expenditures, made in the divorce case, were paid to him.

[1] In her brief the appellant makes several points, claiming that the defendant, while acting as her attorney, violated the provisions of section 2235 of the Civil Code. We think these contentions are not supported by the

record. By his cross-complaint the defendant set forth all of the facts, and asked a decree establishing the amount of his lien, and that the ring be sold, etc. In her answer to the cross-complaint Mrs. Foster did not plead a violation of any of the provisions of the section cited, and the trial court was not asked to make, and did not make, any finding on the subject. In the next place, the record presented to us does not disclose the data from which we can ascertain whether Mr. Abrahams was the attorney for Mrs. Foster on the 3d day of August, 1921, the date when the note was executed, or whether at that time Mr. Kaye had been substituted. Furthermore, by his pleading Mr. Abrahams stated that the amount of his fee had not been agreed upon, and he asserted that he was entitled to a reasonable fee, and submitted the question as to the amount thereof to the determination of the trial court. There is nothing in the record showing that the finding made by the trial court holding that \$260 was a reasonable charge was not sustained by the evidence.

[2] The appellant earnestly urges many reasons why the note should not be construed as providing security to Mr. Abrahams for his fee and expenditures in the divorce action; but that it should be construed as providing security for the \$300 and the interest thereon. The point is a new one in the state of California. The appellant cites no case that rules the point. The respondent cites and relies on the case entitled *Oleon v. Rosenbloom*, 247 Pa. 250, 93 A. 473, L. R. A. 1915F, 968, Ann. Cas. 1916B, 233. In that case two notes were involved. Each one contained a passage as follows:

"Having deposited herewith as collateral security for payment of this or any other liability or liabilities of * * * to the holder hereof now due or to become due, or that may be hereafter contracted, the following property."

The Supreme Court of Pennsylvania stated that there was no case in Pennsylvania that exactly ruled the point and then that court cited and discussed certain cases in other jurisdictions, and thereafter reached the conclusion that an indorsee of a note for the security of which collateral is pledged is entitled to the benefit of a provision in a note that the collateral is security for the payment of this or any other liability or liabilities to the holder hereof now due or to become due so that he can apply the collateral to other claims held by him against the maker.

On the authority of that case we think that the judgment of the trial court should be affirmed. It is so ordered.

We concur: LANGDON, P. J.; NOURSE, J.

PEOPLE v. HAY. (Cr. 872.)

(District Court of Appeal, Third District, California. Sept. 29, 1925.)

1. Intoxicating liquors $\hookrightarrow$ 238(2)—Whether accused was in possession of premises on which liquor was found held for jury.

Whether accused, who had a lease on a building containing two compartments, leased to individual the compartment in which liquor was found, as claimed by accused, or whether such individual was merely an employee of accused, held for jury.

2. Criminal law $\hookrightarrow$ 742(1)—Jury may reject any testimony.

The jury may reject testimony in exercise of their right to pass on question of credibility of witnesses.

3. Criminal law $\hookrightarrow$ 1159(3)—When evidence, separated from evidence conflicting with it, is sufficient to support verdict, question becomes one of fact upon which decision of jury in trial court is final.

Where evidence which bears against accused, considered alone, is sufficient to support verdict, question of guilt becomes one of fact upon which jury's decision is conclusive.

4. Intoxicating liquors $\hookrightarrow$ 236(6½)—Evidence held to support conviction for unlawful possession of intoxicating liquor.

Evidence held to support conviction for unlawful possession of intoxicating liquor.

5. Criminal law $\hookrightarrow$ 304(2)—Common knowledge that Chinese person living in small community of Chinese knows every other Chinaman residing in same community and knows his occupation and place of employment.

It is common knowledge that in small communities, where Chinese population is limited, every Chinese is acquainted with every other Chinese residing in such community, and knows his occupation and place of employment.

6. Criminal law $\hookrightarrow$ 400(10)—Testimony of police officer as to envelopes found in room in which liquor was found, bearing address of accused, held admissible.

In a prosecution for unlawful possession of liquor testimony of police officer that envelopes found in room in which liquor was found, containing letters written in Chinese, bore the name of accused written in English, held admissible without producing or proving original envelopes, under Code Civ. Proc. § 1845, as proof of fact which witness knew from his own knowledge or through his perceptions; sections 1829, 1830, 1855, 1919, and 1937 not applying.

7. Criminal law $\hookrightarrow$ 1169(2)—Objection to testimony of witness as to finding of photograph on ground latter constituted best evidence was swept away by subsequent introduction of photographs.

Objection to testimony of witness as to finding of photographs on ground latter constituted best evidence was swept away by subsequent introduction of photographs.

8. Criminal law ☞706—Certain question asked accused could not be held prejudicial misconduct, in absence of showing it was not made in good faith.

In prosecution for unlawful possession of liquor, the issue being whether person in possession of compartment in which liquor was found was lessee, or merely employee of accused, question by district attorney whether accused, after his arrest, had not in sheriff's presence directed a colored girl in his employ to sell groceries situated in that part of building, held not prejudicial misconduct, in absence of showing that the question was not propounded in good faith.

Appeal from Superior Court, Yuba County; Ernest Weyan, Judge.

Joe Hay was convicted of unlawful possession of intoxicating liquor, and he appeals. Affirmed.

W. H. Carlin and W. P. Rich, both of Marysville, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant, a Chinese, was convicted by a jury in the superior court of the county of Yuba of the crime of unlawfully having in his possession, on or about the 19th day of March, 1925, a quantity of intoxicating liquor, of the prohibited alcoholic content, such possession not being for nonbeverage purposes, under an information charging said crime, and also charging two previous convictions of a like offense, one in the police court in and for the city of Marysville, county of Yuba, and the other in the superior court in and for said county.

A motion by the accused for a new trial upon a number of the statutory grounds was denied, and this appeal is from the judgment of conviction and the order denying the motion for a trial de novo.

The complaint against the result reached below is that the verdict fails of sufficient evidentiary support, and that the court erroneously, and with prejudice to the rights of defendant, admitted certain evidence, and also permitted inquiry to be made by the district attorney into a matter having no pertinent relation to the case, and which tended to prejudice the accused in the minds of the jurors.

[1] The evidence discloses that the defendant had under lease for a term of five years a certain building situated and fronting on First street, near Oak street, in the city of Marysville. This building was divided into two large rooms or compartments, and the entrances thereto from the street were separate from or independent of each other. One was numbered "318" and the other "320." In No. 318 the defendant conducted the business of a restaurant. The other, No. 320, was, for a time from February or March, 1924, to a date not shown by the record, oc-

cupied by one Frank Donnelly under a lease from defendant, made either in February or March, 1924, and for a period of time, including the date of the discovery by the officers of the intoxicating liquor for the alleged possession of which the defendant was arrested and prosecuted to conviction under the information, in the possession, so defendant testified, of and occupied by one McGee. It appears also that a man named McKeevey had something to do with the premises (No. 320) after Donnelly gave up possession thereof, but was not in charge or present at the time the liquor was found in the place.

Taking up now the point that the verdict is without sufficient support, it should be explained that there are several small rooms in the rear of the building, all separated from the two larger or main rooms by a partition; that the room in which the liquor was found by the officers making the "raid" on the premises was situated directly in the rear of the part of the building occupied by the defendant—No. 318 First street; that there was a door opening into one of the smaller rooms from the Donnelly compartment (No. 320); that this door (No. 320) was always kept bolted by a spring lock, and could be opened in no other way than by means of a string attached to the spring lock extending through the partition into and ending in the defendant's compartment, where only the string could be manipulated so as to unlatch the lock. The smaller room so referred to was situated directly back of or in the rear of defendant's compartment from which, as stated, said smaller room was separated by a partition. As counsel for the defendant say in their brief:

"The evidence showed that, while a person in room No. 320, where gambling and drinking were going on, could, by pushing the button, signal a man standing in the small rooms 'X' and 'Y' (thus two of the smaller rooms above referred to were designated on the plat prepared by the county surveyor and used at the trial) and into which the defendant could enter from his room, No. 318, yet there was no way whereby a person could signal in the reverse order—that is, from either room 'X' or 'Y,' or from the compartment, No. 318, to compartment 320."

It was also made to appear that the smaller rooms could be entered from the rear of compartment 320. This entrance led into a small room, thence into several other small rooms, including the one in which the liquor was found. At the time of the "raid," a small room immediately in the rear of the Donnelly or 320 compartment (a room other than the one in which the particular liquor in question here was found) contained a stock of liquors of various kinds. The evidence further shows that an electric bell was maintained in the room situated directly back of the defendant's compartment, and in which the liquor referred to in the information was found. In

brief, the interior of the lower floor of the building had been and was with evident design so arranged as to facilitate the successful prosecution clandestinely of a "bootlegging" business until such time, at least, as the authorities might, by an investigation pursued with more than the usual alertness and vigor, discover the unlawful traffic in intoxicants which had unquestionably been carried on therein.

Police Officer Allen, who led the raid on the premises on the occasion in question, testified that in the room in which there was found a quantity of intoxicating liquors he also saw numerous other articles of personal property, including a bed, with bedclothing, "junk, Chinese medicine, shoes, hats, Chinese stamps, and several photographs of Joe Hay (defendant), and several letters addressed to Joe Hay." The envelopes containing the letters referred to were addressed in English, but the letters themselves were in the Chinese language.

The defendant was not in any of the smaller rooms or in compartment No. 320 at the time of the raid, and, when arrested shortly after the raid, was in the restaurant conducted by him in the larger room, numbered 318 First street. The defendant testified that Frank Donnelly, above mentioned, had under lease all of compartment 320 and all the smaller rooms in the rear of both compartments. Explaining the presence in the small room referred to of the bed and the letters, photographs of himself, and other personal property belonging to him, he testified in effect that he indifferently suffered said articles to "lie around" anywhere about the premises, and not because, at the time of the raid, or for some time prior thereto, he occupied said room as his sleeping apartment; that a Chinese cook, employed at "some club" in the city of Marysville, had been and was at the time of the raid occupying the room as his sleeping apartment. He did not give the name of the "Chinese cook."

[2, 3] The evidence, of which the substance is above presented, while not of a direct character as in proof of the guilt of the accused, is circumstantially such as to preclude the declaration by this court that it does not afford sufficient support to the verdict. The defendant was admittedly the lessee of the entire building, and since, as seen, Donnelly, to whom he sublet the No. 320 compartment, had, previous to the raid and the arrest, abandoned his lease and possession of said compartment, it was for the jury to determine the vitally important question whether Donnelly had transferred his sublease and rights thereunder to the said Magee, or the defendant, upon Donnelly's surrender of possession, sublet to Magee, or whether the latter was a mere employee of defendant at the time of the raid. This was really the pivotal question in the case so far as the defendant's defense was concerned; and, the jury hav-

ing found the defendant guilty, it must be assumed that they rejected his testimony as to Magee's possession of No. 320, the same being wholly uncorroborated, except in so far as the fact of the maintenance of a partition between the two compartments might be regarded as corroborative of his testimony in that respect. The jury, of course, had the right to reject that testimony, or, for that matter, any testimony given in the case, not arbitrarily, however, but in the exercise of their right and duty to pass upon the question of the credibility of the witnesses, or, which is the same thing, the weight to which their testimony was entitled. Viewing, then, as we may, the testimony offered in support of the defense as having been rejected by the jury as unworthy of belief, we have left in this record nothing but circumstances singularly incriminatory as against the accused, and from which, indeed, the jury, if accepting them as verity, as evidently they did so accept them, could well have been persuaded to the conviction, beyond a reasonable doubt, that the defendant was guilty under the information. At all events, while the defendant's testimony would, if believed and accepted by the jury, have exonerated him, the facts and circumstances presented by the people in support of the charge are not so wanting in persuasive force or not characterized by any such inherent weakness or improbability as to make the case, so far as the evidence is concerned, one of law, or one that would warrant this court in declaring, as a matter of law, that the verdict is devoid of sufficient support. The rule is too well settled hardly to require repetition that, where, in a criminal case, the evidence which bears against the accused, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict, "the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive." *People v. Emerson*, 130 Cal. 562, 62 P. 1069. See, also, *People v. Rongo*, 169 Cal. 71, 145 P. 1017, in which a conviction was obtained entirely upon circumstantial evidence no more powerful in probative force, apparently, than the evidence pointing to guilt in this case.

[4, 5] We are firmly of the conviction that the case here, as to the evidentiary phase thereof, is peculiarly one which should be left where the jury left it. The finding of the personal belongings of the defendant in the small room furnished with sleeping conveniences constituted a circumstance which, when considered with the admitted fact that he was the lessee of the entire building, and also the undisputed fact that the lower floor thereof was arranged for the evident purpose of circumventing discovery by the officers of the law of the unlawful business therein conducted, tended strongly to show that, at the time of the raid, the defendant was occupy-

ing, as his sleeping apartment, said room, and was therefore in possession thereof and its contents, including the liquors therein found. Indeed, that circumstance would itself warrant the inference that he was in possession of the whole of the premises and all that they contained. Moreover, his testimony that said room—the room in which his letters, photographs, and other articles of personal property were found—was not occupied by him or in his possession is anything but satisfactory, even as it is presented here. He said, as we have seen, that the room had been and was occupied by a Chinese employed as a cook for “some club,” and that the box containing the articles belonging to him was left in that room as a matter of convenience; at least, that was the natural inference from his testimony in that particular. He did not, however, give the name of the Chinese cook, or the name of the club at which he was employed, or where it was located. The jury could justly have concluded, as it is probable they did conclude, that, if the defendant’s testimony in that regard was true, he would have known and, if not directly asked a question calling for it, have voluntarily given the name of the “Chinese cook,” and probably the place at which he was then employed. As a matter of common knowledge, it is known that in small communities, where the Chinese population is limited to a comparatively few persons, every Chinese is acquainted with every other Chinese residing in such communities, and knows his occupation and place of employment. It is also worthy of note, in this connection, that the Chinese so referred to by defendant was not called as a witness in the case, nor was there any explanation given for the failure to call him, if, in point of fact, he was not a mythical individual conjured up by the defendant to sustain an equally mythical alibi, so to speak.

[6] It is next contended that it was error prejudicial to the rights of the accused to allow the police officer who made the raid to testify that the envelopes found in the room in which some of the liquors were found, and which contained letters written in Chinese, bore the name, written in English, of the defendant. The ground of the objection to that testimony was and is that it contravened the mandates of section 1937 of the Code of Civil Procedure, which provides, *inter alia*, that, where a writing is sought to be proved, the original thereof “must be produced and proved, except as provided in sections 1855 and 1919.” See, also, sections 1829 and 1830, Code Civ. Proc. It is clear that the testimony objected to here does not come within the purview of said sections. This was not a case of proving the contents or terms of a writing, but one where the purpose was to prove a fact which the witness knew from his own knowledge or of which he derived knowledge from or through his own perceptions. Code Civ. Proc. § 1845. As reasonably

might it be contended that, to prove an inscription on a stone monument or a name or words carved on a boulder of great weight and imbedded in the ground, it would be necessary to produce in court the stone or boulder itself. The rule invoked by the defendant against the legal propriety of the testimony here objected to is founded upon the proposition that, where a writing or its terms are vital to the determination of the ultimate fact or issue, the instrument itself, if available to the party relying upon it, must be produced, since it affords the greatest certainty of its real terms or contents, thereby averting the necessity of relying, for proof of the instrument as written, upon the treacherous human memory or the testimony of designing persons interested to prove an instrument of vitally different import from that intended or upon a copy from which, either advertently or inadvertently, important provisions may have been deleted. It is obvious that the reason for the rule can have no application in the present instance.

[7] A like objection was made to the testimony of the same witness that he found in said room a number of photographs of the defendant. The ground of the objection was subsequently swept aside by the introduction in evidence of the photographs themselves. It may parenthetically be observed that the objection that the photographs themselves constituted the best evidence of the fact that they were of the accused lines up nearer to the rule requiring the best evidence of a fact of which the case is susceptible than is the like objection as to the name written on the envelopes.

[8] The defendant was asked on cross-examination, and over his objection was required to answer, the question whether shortly after his arrest on the charge alleged in the information, at the sheriff’s office, in the presence of the sheriff, he directed a colored girl, who was in his employ, to sell certain groceries then situated in No. 320 First street. The answer was that, on the occasion mentioned, he directed the girl to sell certain sugar and coffee which he had in his own part of the building. The asking of the question was at the trial, and is here assigned as prejudicial misconduct on the part of the prosecutor. It does not appear that the district attorney asked the question with knowledge of the fact, if it was a fact, that the defendant when directing the sale of the sugar and coffee as indicated, had reference to sugar and coffee situated in his part of the premises and not in the part known as No. 320. It is therefore to be assumed that he had no such knowledge at the time he propounded the question and asked it in good faith. We cannot, therefore, say that the asking of the question involved misconduct. If it was true, however, that the defendant, at the time stated, directed groceries or other personal property situated, when he was ar-

rested, in No. 320, to be sold, the question constituted proper cross-examination upon his denial of having possession or control of that part of the building, since that fact would tend in a measure to show that he did at the time of the raid have some personal interest in the business conducted in No. 320, a fact which would tend in some degree to show that the liquors therein found were in his possession, whether solely or jointly with some other person is of no consequence, for, whether the unlawful possession of the liquors by the defendant was several or joint, he would in either case be subject to punishment for such unlawful possession.

No other points than those above considered are made.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

74 Cal. App. 556

PEOPLE v. ROCHE. (Cr. 1256.)

(District Court of Appeal, First District, Division 1, California. Oct. 14, 1925.)

1. False pretenses — 49(1)—Evidence held to sustain conviction for passing fictitious check with intent to defraud.

Evidence held to sustain conviction for passing fictitious check with intent to defraud, under Pen. Code, § 476.

2. False pretenses — 7(1)—Essence of offense of passing fictitious check with intent to defraud stated.

Essence of offense of passing fictitious check with intent to defraud, within Pen. Code, § 476, is the passing with intent to defraud to another of fictitious check purporting to be check for payment of money of nonexistent individual, knowing check to be fictitious.

3. False pretenses — 49(4)—Testimony of assistant manager of bank on which check was drawn held prima facie evidence of fictitious character of check.

Testimony of assistant manager of bank on which check was drawn that person whose name was signed thereto had no account in bank was prima facie evidence of fictitious character of check.

4. False pretenses — 49(4)—Testimony of officer who conducted search held to establish prima facie that person named as drawer of check did not exist.

In prosecution for passing fictitious check, under Pen. Code, § 476, testimony of officer that person named as drawer of check could not be found in place where accused stated he lived, though not showing means used or thoroughness of inquiry, held prima facie to establish that no person of that name existed.

5. False pretenses — 51—Accused's intent to defraud and knowledge that check passed by him was fictitious held for jury.

In prosecution for passing fictitious check in violation of Pen. Code, § 476, accused's in-

tent to defraud and knowledge of fictitious character of check were for jury under the evidence.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

J. W. Roche was convicted of passing a fictitious check with intent to defraud, and he appeals. Affirmed.

H. D. Perry, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

CASHIN, J. An information was filed in the superior court in and for the county of Alameda charging appellant, J. W. Roche, with having violated section 476 of the Penal Code in passing a fictitious check with intent to defraud, and, further, that prior to the commission of that offense he had been convicted in the superior court in and for the county of Santa Clara of the crime of forgery, and that pursuant to the judgment upon such conviction had served a term of imprisonment in the California state prison at San Quentin. Appellant pleaded "guilty" to the second, but entered a plea of "not guilty" to the first charge in the information, on which charge he was tried and convicted, and by the judgment of the court sentenced to imprisonment in the state prison at Folsom. A motion for a new trial having been denied, he appeals from the order denying the motion for a new trial and from the judgment, urging as ground for reversal that the evidence was insufficient to support the verdict.

[1] The facts as shown by the evidence adduced by the prosecution were that appellant on December 1, 1924, in the county of Alameda, indorsed and delivered to one Wong Loy, a Chinese restaurant keeper, an instrument in form a check dated on that day, purporting to have been drawn by one J. C. Bauwer on the Seventh street branch of the Oakland Bank of Savings, for the sum of \$49.65, made payable to the order of L. C. Bailey, representing it to be "a good check," and requesting payment to appellant of the amount thereof. The check, though not indorsed by the payee named therein, was accepted by the restaurant keeper, who, not having at the restaurant sufficient money to pay the entire amount, paid to appellant the sum of \$10; it being agreed that the balance should be paid on the following day. Thereafter inquiry was made at the banking house of the drawee named, and the fact ascertained, as testified by the assistant manager of the bank and the restaurant keeper, that the bank had no account with J. C. Bauwer. The restaurant keeper thereupon visited appellant at his place of residence, which had been noted by appellant on the back of the

check at the time of the indorsement, and demanded repayment of the sum advanced. Appellant agreed to repay when he could procure the sum necessary, but subsequently on the same day, in response to demands of the restaurant keeper, ordered him from the premises with threats of bodily harm. According to the testimony of a police officer appellant stated, following his arrest, that the check had been given to him by a friend residing in the city of Oakland (the name of the person referred to does not appear from the record), and stated, as testified by the officer, that the person named had a telephone. The officer further testified that the name given could not be found in the telephone directory of the city of Oakland, and that appellant stated further that the transaction in the restaurant resulted from the fact that he was then under the influence of intoxicants. It was further testified that search had been made in the city of Oakland and neighboring cities for a person bearing the name of the drawer appearing on the check, but without success. According to the testimony of appellant the check was not written by him, but was indorsed and delivered as security for the payment of the sum advanced by the restaurant keeper, and which sum he agreed and intended to repay on the following day; no denial being otherwise made of the facts testified by the witnesses for the prosecution.

[2-5] The essence of the offense charged in the information was the passing with intent to defraud another of a fictitious check purporting to be a check for the payment of the money of an individual, when, in fact, there was no such individual in existence, knowing the check to be fictitious. Section 476, Pen. Code; *People v. Eppinger*, 105 Cal. 36, 38 P. 538. The testimony of the assistant manager of the bank on which the check was drawn was prima facie evidence of the fictitious character of the check (*People v. Eppinger*, supra; *People v. Walker*, 15 Cal. App. 400, 114 P. 1009; *People v. Bernard*, 21 Cal. App. 56, 130 P. 1063); and the testimony of the officer that search for the person named as the drawer of the check had been made at the places stated within the county of Alameda, while it does not show the means used therefor or the thoroughness of the inquiry, was sufficient prima facie to establish the fact that no individual of that name existed (*People v. Bernard*, supra). The intent to defraud and appellant's knowledge of the fictitious character of the check were questions for the jury, and such intent and knowledge were facts which might reasonably have been inferred by them from the circumstances shown by the evidence. *People v. Walker*, supra; *People v. Thal*, 61 Cal. App. 48, 214 P. 296; *People v. Hamby*, 55 Cal. App. 37, 202 P. 907.

The verdict was supported by the evidence, and the judgment is therefore affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

74 Cal. App. 562

FOTHERINGHAM v. MOORE. (Civ. 5141.)

(District Court of Appeal, Second District, Division 1, California. Oct. 14, 1925.)

1. Appeal and error ⇨782—Appeal from unappealable order must be dismissed as matter of course.

Appeal from unappealable order must be dismissed as matter of course.

2. Appeal and error ⇨430(2)—Plaintiff's application for relief from consequences of mistake in specifying unappealable order as subject of appeal held not to entitle her to relief prayed for.

Plaintiff's application for relief from consequences of a mistake in specifying order denying motion for new trial as the subject of the appeal, instead of the judgment, held not to entitle her to relief prayed for, when considered with affidavit upon which application rested and counter affidavits of defendant.

Appeal from Superior Court, Los Angeles County; Wm. C. Doran, Judge.

Action by J. H. Fotheringham against Presley E. Moore. Judgment for defendant, and plaintiff appeals. On defendant's motion to dismiss appeal. Appeal dismissed.

Cooper, Collings & Shreve, of Los Angeles, for appellant.

Jones, Wilson & Stephenson, of Los Angeles, for respondent.

CONREY, P. J. [1, 2] This case came before the court on motion to dismiss plaintiff's appeal from the order denying his motion for a new trial. As the purported appeal is not taken from an appealable order, of course it must be dismissed. At the hearing of the motion appellant attempted to show that the notice of appeal was intended to be a notice of appeal from the judgment; and that by inadvertence and excusable neglect, and a resulting clerical error, the notice failed to specify the judgment as the subject of appeal. Thereupon respondent, at said hearing of the motion, waived notice of application for relief from the default resulting from failure to include an appeal from the judgment in said notice of appeal, and consented that the application for relief be heard forthwith. The matter was then submitted on affidavits.

Let it be assumed that upon sufficient showing of facts in excuse of the plaintiff's error, this court could grant relief to plaintiff from the consequences of the stated error in his notice of appeal. See *Yolo Water & Power Co. v. Edmonds*, 45 Cal. App. 410, 187 P. 755.

Plaintiff's application for relief rests upon the affidavit of the secretary of the firm of attorneys who represented plaintiff in the action. She says that Mr. Collings, of said firm, instructed her to prepare "said notice of appeal," and that by her error, inadvertence, and mistake she worded said notice to the effect that said appeal was from the order instead of from the judgment of the court. She does not in direct terms assert that Mr. Collings instructed her to prepare a notice of appeal from the judgment. After considering said affidavit, together with the counter affidavits filed on behalf of defendant, we think that plaintiff is not entitled to the demanded relief.

Plaintiff's application is denied, and the appeal is dismissed.

We concur: HOUSER, J.; CURTIS, J.

74 Cal. App. 560

BRACKLEY v. BRACKLEY. (Civ. 5266.)

(District Court of Appeal, First District, Division 2, California. Oct. 14, 1925.)

Husband and wife ⚭133(1)—Evidence held to sustain finding that wife was sole owner of property.

In action by husband to have declared his interest in property claimed by wife, evidence held to sustain finding that wife was sole owner.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by Frank A. Brackley against Daisy May Brackley. Judgment for defendant, and plaintiff appeals. Affirmed.

John C. Miles, of Los Angeles, for appellant.

M. G. Ferrahian, of Los Angeles, for respondent.

STURTEVANT, J. The appellant and respondent, husband and wife, shortly before this action was commenced, separated and thereafter continued to live separate and apart. On the 17th day of August, 1921, the husband commenced the action, and in the second amended complaint alleged that the plaintiff and the defendant are husband and wife; that the plaintiff and the defendant are the owners of certain real estate (describing two lots in the city of Hawthorne, county of Los Angeles); that said real estate stands of record in the name of the defendant, but said property is the joint property of the plaintiff and the defendant; that the value of said real estate is \$4,000; that the plaintiff is the owner of an undivided one-half interest therein, and that the defendant claims to own the whole of said property and

that the said property is her separate property. On the foregoing facts the plaintiff asked a decree establishing his title of record. The defendant filed an answer in which she denied any ownership rested in the plaintiff, and alleged that she was the sole owner, and that on the 24th day of August, 1920, about two months prior to her marriage, that she bought the property from J. I. Yorke for the sum of \$2,950 and paid down \$1,750, and gave a mortgage back to said J. I. Yorke for the sum of \$1,200, and that said mortgage was being paid in monthly installments of \$35 or more. The case was tried before the judge of the trial court sitting without a jury. The trial court made findings in favor of the defendant, and from a judgment entered thereon the plaintiff has appealed under section 953a, Code of Civil Procedure, claiming that the findings are not sustained by the evidence.

On the trial of the case the defendant was called as a witness, and testified that she was formerly the wife of Harry F. Squire residing at Joliet in the state of Illinois. Later Mr. Squire obtained a divorce. In the settlement of their affairs Mr. Squire paid to her in the year 1920 in July \$250, and in August \$250, and in the latter part of September \$2,500. On the 24th of August, 1920, she paid, as the first payment on the lots, \$250. Thereafter, on the 1st day of October, 1920, she made another payment of \$1,500, received her deed, and executed a mortgage back to the former owner. She testified that all of the payments were made by her out of the moneys so received by her from Mr. Squire. Under her contract she agreed to make the deferred payments in the sum of \$35 per month. The defendant further testified that thereafter she made the payments, and that she had so paid \$546, and that there remained due \$654.

The plaintiff and the defendant intermarried on the 4th day of October, 1920. Thereafter the plaintiff was employed on a weekly salary of \$39.50 or less. After the parties married the plaintiff worked on the premises making alterations and repairs and additions. The defendant testified that all bills for materials were paid by her out of the moneys which she had received from Mr. Squire. The labor done and performed by the plaintiff consisted of painting, calsomining, building a chicken yard, laying a sidewalk, and other minor matters. There is no testimony in the record to the effect that the parties agreed that the services of the plaintiff were to be paid by the wife. The contention of the plaintiff is that he advanced to the defendant \$200 to make the initial payment, and that out of the proceeds of his time checks the defendant made the deferred payments above mentioned. In this connection the plaintiff does not give testimony regarding any specific item except the \$200 which he claimed went into the initial payment. In her testi-

mony the defendant flatly contradicted all of the husband's statements regarding any payments being made by him, or out of moneys given to her by him, or out of moneys earned by him. In this condition of the record it cannot be said that the finding of the trial court was not sustained by the evidence, but on the other hand it must be frankly stated that the evidence preponderated in favor of the respondent.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

74 Cal. App. 567

KINSEY v. RYAN et al. (Civ. 2918.)

(District Court of Appeal, Third District, California. Oct. 14, 1925. Rehearing Denied Nov. 13, 1925.)

Sales 475—Assignee of conditional sales contract from bank holding it only as security did not acquire title thereto.

Where, after seller's assignment to bank of conditional sales contract covering automobile as security for advances, automobile was attached in suit against purchaser, and where, on filing of claim by seller under Code Civ. Proc. §§ 689, 689a, 689b, attaching party paid amount remaining due on contract to assignee bank and took from it an assignment of all its right and interest therein, *held*, in suit by buyer against sheriff to recover automobile after termination of attachment suit in his favor, that attaching party did not become owner of contract on bank's assignment, with right to declare buyer's interest in automobile at an end for nonpayment of installments.

Appeal from Superior Court, Sonoma County; Ross Campbell, Judge.

Action in claim and delivery by W. T. Kinsey against John M. Boyes, as Sheriff of Sonoma County, and the Fidelity & Deposit Company of Maryland, wherein J. F. Ryan was substituted for the defendant Sheriff. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

E. J. Dole, of Petaluma, for appellant.

E. S. Page, of Oakland, for respondents.

PLUMMER, J. On the 20th day of January, 1923, the plaintiff and one J. H. Madison entered into a conditional contract of sale, whereby the said J. H. Madison conditionally sold to the plaintiff a certain Nash automobile for the sum of \$900, \$360 payable in cash, and the remainder thereof as follows: \$108 on February 15, 1923; \$108 on March 15, 1923; \$108 on April 15, 1923; \$108 on May 15, 1923; and \$108 on June 15, 1923. Possession of the automobile was then and there delivered to the plaintiff.

The conditional contract of sale provided, first, that, if the monthly payments were not made as provided therein, they should bear interest at the rate of 1 per cent. per month until paid. It was also further conditioned that the purchaser should keep the property insured, and take other precautions for its safety, and keep it within the territorial limits of the state of California. It was then provided, that, if the purchaser failed to make the payments as stipulated, the party of the first part might, at his option, retake possession of said automobile, including all new parts added thereto by the buyer, and that the rights of the purchaser should thereupon terminate, and action might be begun for the collection of the remaining installments set forth in the contract and then remaining unpaid, or might waive the conditions of the contract, consider the sale absolute, and sue for the balance due, or take possession of the automobile, sell the same, apply the proceeds toward the payment of the balance due and, in case of deficiency, proceed against the buyer for the amount due thereon, or that the seller might avail himself of any and all rights, privileges, or elections which are or may be granted to a seller by operation of law. On the 23d day of January, 1923, said J. H. Madison, for the purpose, as shown by the testimony, of giving collateral security for general advances to be made to him by the Sonoma County National Bank, assigned his interest in said contract to the Sonoma County National Bank by a written assignment in the following words:

"For value received, J. H. Madison hereby transfers, assigns, and sets over all its right, title, and interest in and to the within contract and in and to the property therein described, and to all of the moneys payable thereunder to Sonoma County National Bank, and hereby guarantees the payment of all moneys due or to become due under the said contract, and also the full performance by the second party therein named of all the second party's promises and covenants and it hereby consents that the time of payment of any of the said installments therein provided may be extended at the request of the second party, notice of which is hereby waived.

"Dated, the 23d day of Jan., 1923.

"J. H. Madison."

Thereafter and on the 13th day of April, 1923, in an action instituted by the Sterling Lumber Company against the said W. T. Kinsey, wherein an attachment was levied, the defendant John M. Boyes, as sheriff of the county of Sonoma, levied upon the automobile herein mentioned. Thereupon and on the 20th day of April, 1923, the seller mentioned in the conditional contract herein referred to, filed his third party claim as owner of said automobile in the following words and figures, to wit:

(Title of Court and Cause.)

"Notice of Claim Under Conditional Sale Contract.

"State of California, County of Sonoma—ss.:

"J. H. Madison, being first duly sworn, deposes and says: That he is the owner of that certain Nash automobile, engine number 13856, state license number 121,680, taken under attachment issued in the above-entitled cause from the defendant W. T. Kinsey; that said W. T. Kinsey is in possession of said automobile under a conditional sale contract dated Petaluma, California, January 20, 1923, for the total sum or price of \$900.00; that there is now due affiant from defendant the installment due on the 15th day of April, 1923, amounting to \$108.00, together with interest from the date of the contract at the rate of 8 per cent. per annum; that there will accrue on the 15th day of May and the 15th day of June, 1923, respectively, installments of \$108.00 together with like interest; that affiant hereby demands of the sheriff either the possession of said car or that said sheriff shall pay to affiant the above installments now due and to accrue in full in cash within five days from the receipt of this notice and affidavit.

"This notice and affidavit is given in accordance with sections 689, 689a, and 689b of the Code of Civil Procedure of the state of California, and affiant hereby claims and demands all of the right accorded to him under said provisions of the law. J. H. Madison.

"Subscribed and sworn to before me this 18th day of April, 1923. [Seal.] E. J. Dole, Notary Public in and for the County of Sonoma, State of California.

"(Indorsed) Received in the sheriff's office of Sonoma Co., Cal. Apr. 20, 1923, at 35 min. past 9 o'clock A. M."

Following the filing of this claim, a representative of the Sterling Lumber Company went with said Madison and the sheriff to the place of business of the Sonoma County National Bank, where the said representative of the Sterling Lumber Company paid to the Sonoma County National Bank the unpaid portion on said contract, then amounting to the sum of \$324, and received from said Sonoma County National Bank said contract, with the following indorsements thereon:

"For value received, we hereby transfer, assign, and set over all our right, title, and interest in and to the within contract and in and to the property therein described and to all of the moneys payable thereunder to the Sterling Lumber Company.

"The Sonoma County National Bank,

"By A. P. Behrens, Cashier.

"[In pencil:] W. T. Kinsey made the following payments:

February 15, '23.....	\$108 00
Mar. 15, '23.....	108 00
Sterling Lumber Company paid the balance, April 23, '23.....	324 00
	\$540 00"

The sheriff then stored the automobile and retained possession thereof up to the time of the trial of this action.

The Sterling Lumber Company was unsuccessful in its attachment suit, judgment being entered in favor of the said W. T. Kinsey, the defendant in that action and the plaintiff in this. After the rendition of judgment in favor of the defendant in the attachment suit, the plaintiff in this action, demand was made upon the sheriff for the return of the attached automobile. This demand not being complied with by the sheriff, this action was begun for its recovery, or for the value thereof. The complaint is in the usual form of claim and delivery for personal property. The defendants in this action admitting the attachment of the property, set up in their answer the conditional contract of sale, to which we have referred, and, among other things, alleged as follows:

"That on or about the 23d day of January, 1923, said J. H. Madison assigned, transferred, and set over said contract to the Sonoma County National Bank, a corporation. That after defendant sheriff had levied on said automobile, to wit, on the 20th day of April, 1923, a third party claim was filed with defendant sheriff claiming title to said automobile under and by virtue of said contract of conditional sale with J. H. Madison and Sonoma County National Bank. That thereupon, said Sterling Lumber Company, in pursuance of law, paid the amount unpaid under said conditional sale contract, and said contract of conditional sale was assigned and transferred by said Sonoma County National Bank to said Sterling Lumber Company. That said Sterling Lumber Company is now the owner and holder thereof."

It is further pleaded by defendants that the said W. T. Kinsey, the plaintiff herein, did not make the three payments provided to be made on the 15th day of April, 15th day of May, and 15th day of June, respectively, and that the whole of said sums remained unpaid and that, pursuant to the terms of the contract of conditional sale, the Sterling Lumber Company had declared all rights of said W. T. Kinsey in and to said automobile to be at an end.

There is no testimony in the record showing that such payments have not been made by the plaintiff, nor is there any testimony in the record showing that the Sterling Lumber Company has exercised any election whatever in the matter of the forfeiture of the plaintiff's ownership or right to the automobile in question, or has taken any proceedings whatever under and by virtue of the terms of the conditional sale contract herein referred to. It may be here stated that the conditional sale contract does not provide by any of its terms that, upon failure of the buyer to make payments as therein provided, the buyer's rights in and to the automobile shall ipso facto terminate and thereafter be considered as ended. It provides simply, as we have hereinbefore stated, for certain remedies which the seller may take upon his election. The court, in its findings found that the defendant sheriff is in

possession of the automobile in question, that he had refused to deliver the same to the plaintiff, that his withholding thereof is not unlawful, and then the execution of the conditional contract of sale, as we have stated. The court also made the following findings:

"That on or about the 23d day of January, 1923, said J. H. Madison assigned, transferred, and set over said contract to the Sonoma County National Bank, a corporation. That after defendant sheriff had levied on said automobile, to wit, on the 20th day of April, 1923, a third party claim was filed with defendant sheriff claiming title to said automobile under and by virtue of said contract of conditional sale with J. H. Madison and Sonoma County National Bank. That thereupon, said Sterling Lumber Company paid the amount unpaid under said conditional sale contract, and said contract of conditional sale was assigned and transferred by said Sonoma County National Bank to said Sterling Lumber Company. That said Sterling Lumber Company is now the owner and holder thereof."

It is then further found that the said W. T. Kinsey had not paid the last three payments mentioned in said conditional contract of sale, and that, by reason of said default in making said payments, the Sterling Lumber Company had declared all rights of said W. T. Kinsey to said automobile to be at an end; that said Sterling Lumber Company was the owner of said automobile and entitled to the possession thereof. Conclusions of law were drawn to the effect that the Sterling Lumber Company was the owner of said automobile, and judgment that the plaintiff take nothing by his action was entered. From this judgment the plaintiff appeals.

It is insisted by the appellant that under the terms of section 689b, Code of Civil Procedure, and as alleged in defendant's answer, when the Sterling Lumber Company, in pursuance of law, paid the amount unpaid on said conditional contract, the absolute and unconditional title to the automobile in question immediately passed to the plaintiff in this action. That section, after setting forth the manner in which property subject to a conditional sale may be attached and requiring the deposit or payment of the unpaid portion of the contract, concludes, "then the title shall pass to the buyer and the property may be sold as in this chapter provided, free of all lien or claim of the seller"; the contention being that, immediately upon the payment of the \$324, as hereinabove stated by the Sterling Lumber Company, the absolute title to the automobile under the last clause of said section became vested in the purchaser of the automobile named in said contract, to wit, the plaintiff herein. To support this contention, our attention is expressly called to the case of *Carstenbrook v. Wedderien*, 7 Cal. App. 465, 94 P. 372, wherein this court was considering sections 2969 and 2970

of the Civil Code, where the procedure is set forth for attaching personal property, covered by a chattel mortgage. The mortgagee had been paid the amount of his claim, and satisfaction of the mortgage had been entered of record. This court, under such circumstances, held that the action to cancel the satisfaction of the mortgage and subrogate the plaintiff to the rights of the mortgagee could not be had, and, in referring to section 2970, Civil Code, held as follows:

"It is obvious that said section is intended to furnish the exclusive method for the reimbursement of said creditor as the preceding section prescribes the condition by compliance with which he may, under process, take possession of the property."

No assignment of the chattel mortgage was had in that case, nor was there any attempt made to subrogate the plaintiff to the possession or rights held by the mortgagee. In this particular the facts are dissimilar to those in the case at bar. Here there appears an assignment by the bank to the lumber company. It seems to us evident that, if no attachment had been levied, the Sterling Lumber Company might have taken an assignment from the bank of all the interests it held in and to the conditional contract, and we do not perceive any valid reason why such assignment should not be made or taken at any time before the plaintiff had made final and full payment thereon, but, for the reasons herein stated, we do not need to decide the question of where the absolute ownership of the automobile vested upon the performance of the acts which we have narrated. The stipulated evidence of the seller of the automobile, J. H. Madison, is to the effect that the conditional contract was assigned to the bank as collateral security for general advances made and to be made to him by the bank. The record also shows that three months after such assignment to the bank Madison was the one who filed the third party claim setting forth his ownership of the attached automobile. This affidavit and claim of ownership was acted upon by all parties. It is thus apparent that the bank never acquired the ownership of the automobile. This exact question was before the Supreme Court of Washington in *Bank of California v. Danamiller*, 125 Wash. 255, 215 P. 321, 36 A. L. R. 573. We quote from that case as follows:

"We are convinced that the mere assignment for security of a conditional sales contract does not vest in the assignee the title to the property covered by the contract, and which title is reserved in the vendor. There is, it seems to us, a clear-cut distinction between a purchaser of such a contract and one who receives it only as security. One who purchases outright places himself in the stead of him from whom he purchases. The money he pays represents the value of the property itself, plus the rights

of the vendor in the contract. The assignee, being in the shoes of the vendor, must be considered as having taken the title to the property in order that he may comply with the terms of the contract made between the vendor and vendee. The very transaction itself indicates that it was the intention of the parties to transfer the title to the property covered by the contract. Such is the rule of the case of the State Bank of Black Diamond v. Johnson, 104 Wash. 550, 177 P. 340, 3 A. L. R. 235, supra. An assignment of such a contract to a purchaser is, in effect, in the nature of a bill of sale covering the property contracted for. Whether such a transfer of the title to the property, there being of record no bill of sale or other evidence of the transfer to give constructive notice, would be good as against a bona fide purchaser of the subject-matter of the contract, we need not here decide. But one who takes an assignment of the contract only for the purpose of security is in no true sense a purchaser either of the contract or of the property covered by it. He receives only the right to collect and apply to the payment of the debt secured the money which the vendee has obligated himself to pay. When the debt which the assignment is given to secure has been discharged, the interest of the assignee in the contract is also discharged, and he must surrender it to his assignor. The purpose of the assignment having been accomplished, the interest of the assignee in the contract necessarily ceases. The very nature and purpose of the transaction negatives the idea that the assignee receives the actual title. It follows from what we have said that the appellant could not maintain this action on the ground of its ownership of the truck as alleged in its complaint."

No assignment was taken from Madison by the lumber company, and all the title which it received was at the utmost only the title held by the bank. What right and title the Sterling Lumber Company acquired under the contract, and what right or title it now possesses, or what claim or lien, if any, it has against the automobile, need not be decided, and any statement concerning the same would be obiter, for the simple reason that the record does not show a word of testimony concerning such claim, nor is the Sterling Lumber Company a party to this action, but the figures show that the bank at the utmost could not have had a claim or lien against the automobile in excess of the sum of \$324, the unpaid balance at the time of the attachment, and therefore could not have assigned to the Sterling Lumber Company a claim or right or lien against the property, or interest in the contract in excess of that sum.

It follows from what we have said that the judgment of the trial court should be, and the same is hereby, reversed, and the cause remanded for a new trial.

We concur: FINCH, P. J.; HART, J.

197 Cal. 443

TAYLOR v. EXNICIOUS et al. (S. F. 10744.)

(Supreme Court of California. Nov. 13, 1925.)

Receivers  212—Surety on bond under void order of court not liable.

A surety of a receiver on a bond, predicated on and given in compliance with an order appointing the receiver, which court had no jurisdiction to make, *held* not liable.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Charles W. Taylor, trustee in bankruptcy for the Goewey Investment Company, against John Exnicious and the Aetna Casualty & Surety Company. From a judgment dismissing the action as against the defendant last named on its demurrer, plaintiff appeals. Affirmed.

Edwin H. Williams, of San Leandro, for appellant.

Redman & Alexander, of San Francisco, for respondents.

WASTE, J. Plaintiff, as trustee in bankruptcy of the Goewey Investment Company, a corporation, brought an action to recover certain sums of money, together with interest, from the defendant Exnicious, as receiver of the investment company, and the Aetna Casualty & Surety Company, as surety on the receiver's bond. The allegations of the complaint, in substance, are that in an action brought by a stockholder against the Goewey Investment Company the superior court purported to make its order appointing Exnicious as receiver of the company, but that the court had no jurisdiction in the action, "and that said order was and is in excess of the jurisdiction of said court and utterly void and of no effect." The Aetna Casualty & Surety Company executed a receiver's bond for Exnicious in the usual form in the sum of \$25,000. Thereupon Exnicious, assuming to act as receiver under the order of the court, seized the assets and business of the investment company, and retained possession thereof until he turned part of the property over to the plaintiff, who had in the meantime been appointed trustee in bankruptcy upon an adjudication that the investment company was bankrupt. While in possession of the property of the invest-

ment company, Exnicious received certain sums of money which he has refused and neglected to turn over to plaintiff. During the same period he operated the business of the company at a net loss, and depleted its capital assets to the extent of \$7,758.78. The prayer of the complaint is that plaintiff have judgment against Exnicious and his surety for the last-mentioned sum, with interest and costs of suit, and for such other and further relief as may be meet and equitable in the premises.

A demurrer to the complaint interposed by the defendant Exnicious was overruled, and he was given time to answer. The demurrer of the defendant Aetna Casualty & Surety Company was sustained. The plaintiff failing to amend, his default and judgment in favor of the defendant surety company and against him were entered. Thereupon plaintiff appealed.

The real question in the case is that presented by the demurrer of the respondent surety company in the court below, and urged by it on appeal, that the complaint does not state a cause of action against it because of the specific allegation that the superior court had no jurisdiction in the action to make the order appointing the receiver, and that the order was and is in excess of the jurisdiction of the court, and utterly void and of no effect. Its contention is that, as the court had no jurisdiction to appoint the receiver or to require the bond, the order was invalid, there was no consideration for the execution of the bond, and the surety cannot be held upon it. It cannot be successfully denied, of course, that, if the superior court had no jurisdiction to appoint a receiver, the appointment was in excess of its jurisdiction, and void. *Sullivan v. Gage*, 145 Cal. 759, 768, 79 P. 537. The appellant contends, notwithstanding, that it makes no difference, so far as the question of substantive law is concerned, whether the order for the appointment of the receiver was irregular, in the sense that the defect was not jurisdictional, or whether the defect reached to the jurisdiction of the court. He contends for a general rule that the sureties on a bond given by a designated officer or fiduciary, to enable him to exercise the functions of his office, will not be relieved from liability on the bond because of the invalidity of the appointment. While there are cases from other jurisdictions which appear to follow the rule contended for by appellant, this court has consistently adhered to a different doctrine. It was held at a very early date that a bond exacted by a court which had no authority to require it was void. *Benedict v. Bray*, 2 Cal. 251, 255, 56 Am. Dec. 332: see, also, *People v. Cabannes*, 20 Cal. 525. In a much later case action was brought upon the official bond of a receiver. It appeared from the complaint that the appoint-

ment was made by a court commissioner, instead of by the court or judge. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, the plaintiff failing to amend, judgment went for the defendant. On appeal, this court held that, as the court commissioner had no jurisdiction to appoint a receiver, the bond given by the receiver was void, and affirmed the judgment. *Quiggle v. Trumbo*, 56 Cal. 626. In *Coburn v. Townsend*, 103 Cal. 233, 235, 37 P. 202, it was held that bonds exacted and given under an unconstitutional provision of the Code were void, and a recovery could not be had against the sureties. See, also, *City & County of San Francisco v. Hartnett*, 1 Cal. App. 652, 82 P. 1064. In *Reay v. Butler*, 118 Cal. 113, 115, 50 P. 375, it was held that a bond purporting to stay execution, but not given in a case provided by the statute, was void, and the sureties were not liable. See, also, *McCallion v. Hibernia S. & L. Society*, 98 Cal. 442, 33 P. 329.

We take it therefore to be the well-settled law of this state that a surety upon a bond given pursuant to an order of court or pursuant to a statute becomes such in contemplation of a valid order or valid statute, and not otherwise. If the order appointing the receiver be void, a material consideration for the execution of the bond has failed, and the surety cannot be held upon it. The same rule holds in many other jurisdictions. See *Cornant v. Newton*, 126 Mass. 105; *Mitnacht v. Kellermann*, 105 N. Y. 461, 12 N. E. 28; *Olds v. State*, 6 Blackf. (Ind.) 91; *Alexander v. Silbernagel*, 27 La. Ann. 557; *Walker v. Fetzer*, 62 Ark. 135, 34 S. W. 536; *Alderson on Receivers*, p. 188; 34 Cyc. 505, 506; 9 C. J. pp. 27-29.

The condition and obligation of the bond in the instant case is that:

"Whereas, an order was made on the 26th day of June, 1919, by the superior court of the city and county of San Francisco, state of California, appointing the above-named principal receiver in the above-entitled cause, and requiring that a bond be executed by said receiver in the sum above named: Now, therefore, if the said John Eknicious, as such receiver, shall faithfully perform the duties of his office, according to law and the orders of said court, then this obligation to be void, otherwise to remain in full force and effect."

The bond is squarely predicated upon and is given in compliance with an order which

the court had no jurisdiction to make. In *Shaughnessy v. American Surety Co.*, 138 Cal. 543, 69 P. 250, 71 P. 701, a contractor's bond recited that it was given pursuant to section 1203 of the Code of Civil Procedure requiring contractors for the erection of buildings to secure their contracts by bonds. The section was declared unconstitutional, and the bond was held to be void. The contention that the bond might be considered a common-law undertaking was denied consideration. In *Loop Lumber Co. v. Van Loben Sels*, 173 Cal. 228, 235, 159 P. 600, the court held that, as the legislative act requiring the giving of the bond in suit was ineffectual for that purpose, the bond was without consideration and void.

The appellant has cited a number of cases, for the most part from other jurisdictions, but they do not overcome the weight of authority supporting the rule which prevails in this state. *Baker v. Bartol*, 7 Cal. 551, is not in point. In that case application was made to a court, having jurisdiction for the appointment of a receiver. In order to avoid that being done, the defendant consented to the court making an order requiring him to give a bond to secure his accounting for the property in his possession. Such a bond was given, and in a subsequent action against the sureties the court held that the bond was executed as a voluntary act on the principal's part, based upon a good consideration, and was good as a common-law obligation. So in *Smith v. Fargo*, 57 Cal. 157, 159, an attachment bond did not conform to the requirement of the statute, but was given voluntarily upon a sufficient consideration, and was held good as a common-law bond. We deem it futile to further discuss the authorities relied upon by appellant. Those from other jurisdictions will be found collected in the citations contained in an extensive note in 18 A. L. R. 274. No California case is there cited, and we have found none which in our opinion supports the position of the appellant.

The conclusion we have reached on the main issue presented by the appeal renders it unnecessary to consider the other points relied upon by respondents to further support the action of the court below.

The judgment is affirmed.

We concur: MYERS, C. J.; LAWLOR, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; LENNON, J.

74 Cal. App. 404

Ex parte NICHOLS. (Cr. 1290.)

(District Court of Appeal, First District, Division 1, California. Oct. 2, 1925.)

1. Municipal corporations ⇨639(1)—Municipality may maintain prosecution for violation of its ordinances in name of people of state.

In view of Const. art. 6, § 20, and Pen. Code, § 684, and San Francisco Charter, art. 5, c. 8, §§ 2, 3, the city and county of San Francisco, which adopted a charter under provisions of Const. art. 12, § 8, may prosecute violation of its ordinances in name of people of state of California.

2. Municipal corporations ⇨597—Methods for conveyance of sewage from private dwellings within branch of police power pertaining to public health; "plumbing."

Regulations by ordinance of methods and devices for conveyance of sewage from private dwellings is an exercise of branch of police power pertaining to public health, and word "plumbing," as used in plumbing law of city and county of San Francisco, includes the pipes, fittings, and fixtures for conveyance of such sewage.

[Ed. Note.—For other definitions, see Words and Phrases, Plumbing.]

3. Municipal corporations ⇨591, 597—Ordinance requiring permit for installation of sewage systems in private dwellings to be granted by board of health held valid and not delegation of city's power.

There being no provision in charter of city and county of San Francisco, art. 2, c. 2, § 1, article 6, c. 1, § 9, subds. 1, 2, 5, or article 10, §§ 3 and 4, regulating the installation or alterations of sewage systems in premises privately owned, requirements of plumbing law that permit therefor be granted by board of health is not in conflict with powers of board of public works, or delegation to former of power to legislate thereon.

4. Municipal corporations ⇨111(4)—Statutes ⇨64(1)—Possible invalidity of independent provision cannot affect validity of other provisions.

The possible invalidity of an independent provision in an act or ordinance cannot affect validity of other provisions therein, unless giving of such partial effect would accomplish purpose not intended by lawmaking power, or unless no one part could be eliminated without destroying force of whole act.

5. Habeas corpus ⇨92(1)—Sufficiency of evidence to sustain conviction not reviewable.

In habeas corpus seeking release from custody after conviction of violation of plumbing law of San Francisco, questions as to effect or sufficiency of evidence to sustain conviction cannot be reviewed.

6. Municipal corporations ⇨597—Sewer pipe in building forming part of sewage system held part of "plumbing" of such building.

Sewer pipe, forming part of system for conveyance of sewage from a building, held to constitute "plumbing" in such building, within

meaning of plumbing law of San Francisco, requiring permit before installation or alteration thereof.

Application by George V. Nichols for writ of habeas corpus, prayed to be directed to the Sheriff of the City and County of San Francisco, to secure the release of petitioner from custody after conviction of violation of plumbing law. Writ dismissed, and petitioner remanded.

Chas. W. Kitts, of San Francisco, for petitioner.

R. M. J. Armstrong, of San Francisco, for respondent Sheriff of City and County of San Francisco.

Matthew Brady, Dist. Atty., of San Francisco, for respondent Barendt, representing Board of Health.

CASHIN, J. Petitioner was convicted in the police court of the city and county of San Francisco of a misdemeanor; as a punishment was sentenced to pay a fine, and in default of such payment to be imprisoned. Having been committed pursuant to the judgment, he has applied for a writ of habeas corpus.

The complaint in the action, which was prosecuted in the name of the people of the state of California, charged a violation of an ordinance of the city and county known as the "Plumbing Law," making it a misdemeanor for any person to install or to alter the plumbing in any new or old building or in any premises therein without first obtaining a permit from the board of health of the city and county; the complaint alleging that petitioner installed and changed certain sewer pipe on premises described therein by reference to a street and number in that city and county without first obtaining a permit as provided by the ordinance mentioned.

[1] It is contended by petitioner that, the city and county of San Francisco having adopted, under the provisions of section 8 of article 11 of the Constitution of the state of California, a charter for its own government, any prosecution for a violation of its ordinances can be maintained only in the name of the municipality and not in the name of the people of the state of California.

A violation of the ordinance in question being made an offense punishable by both fine and imprisonment, petitioner's contention is met, not only by the provisions of such charter (sections 2 and 3, c. 8, art. 5), giving to the police court exclusive jurisdiction of all prosecutions for the violation of ordinances, and requiring that the proceedings in that court shall be conducted in accordance with state laws regulating proceedings in justices' and police courts, but by the constitutional and statutory requirement that criminal actions shall be prosecuted in the name of the people of the state. Article 6, § 20, Const. of Cal.; sec-

tion 684, Pen. Code; *In the Matter of Clark*, 24 Cal. App. 389, 141 P. 831; *Santa Barbara v. Sherman*, 61 Cal. 57.

It is further urged that the provisions of the ordinance requiring the procurement from the board of health of permits for the doing of work of the character mentioned are void as an attempt to confer on that board powers which by the charter are vested in the board of public works. It is provided by subdivision 1, section 9, c. 1, of article 6 of the charter, that the board of public works shall have charge, superintendence, and control, under such ordinances as may be adopted by the supervisors, of all public streets and places, with exclusive authority in that connection to prescribe rules and grant permits in conformity with such ordinances for the construction, laying down, and taking up of sewers and drains therein; and while by subdivisions 2 and 5 of the same section that board is given charge, superintendence, and control under such ordinances "of all sewers, drains and cesspools and of the work pertaining thereto or to the drainage of the city and county," and "the supervision of any and all building construction in the city and county," it is granted exclusive authority to issue permits only in connection with the construction, taking up and laying down of such sewers and drains in public places.

The board of supervisors has general power to enact all necessary sanitary laws and regulations (charter, art. 2, c. 2, § 1), and it is further provided that the board of health shall have the control of all matters pertaining to the preservation, promotion, and protection of the lives and health of the inhabitants of the city and county, it being made the duty of the latter board to enforce all ordinances, rules, and regulations adopted by the board of supervisors for the protection of the public health (charter, art. 10, §§ 3 and 4).

[2] Regulation by ordinance of methods and devices for the conveyance of sewage from private dwellings in municipalities is recognized as an exercise of that branch of the police power which pertains to the public health; and the word "plumbing" is held to include the pipes, fittings, and fixtures for the conveyance of such sewage. 31 Cyc. p. 890; *Bregman v. Winkler*, 120 Misc. Rep. 483, 198 N. Y. S. 758.

[3] No provision being made by the charter regulating the installation or alteration of such systems in premises privately owned, or for the granting of permits therefor or inspection by the authorities of such work either during its progress or upon completion, and such regulation being within the powers granted to the supervisors, the requirement that a permit therefor be granted by the board of health, and that there be an inspection thereof by officers duly authorized, is not in conflict with the powers of the board of public works, or a delegation to the board of health of the power to legislate as to the terms or conditions upon which a permit

should issue, but a proper preliminary requirement in order that it may be ascertained that the work or alteration proposed would be in accordance with the sanitary regulations of the board of supervisors, and may at the proper time be inspected to the end that the public health be preserved and protected. *In re Holmes*, 187 Cal. 640, 203 P. 398; *Laurelle v. Bush*, 17 Cal. App. 409, 119 P. 953; *Ex parte Fiske*, 72 Cal. 125, 13 P. 310.

[4] It is further urged that certain provisions of the ordinance requiring those who would engage in the business of plumbing to submit to examination by the board of health as to their qualifications, to pay certain fees, and file an undertaking with that board for the faithful performance of duty, as conditions precedent to registration as plumbers, and making it unlawful to engage in the business of plumbing without procuring a certificate of registration, render the ordinance invalid in that the power to require such examination, if it exists, is vested in the board of supervisors and could not be delegated to the board of health.

The question of the validity of these provisions of the ordinance is, however, not necessary to be determined in this proceeding. Petitioner was not charged with having been engaged in the business of plumbing in violation of the ordinance, but with the doing of certain acts without the permit required to be obtained by all persons, whether registered plumbers or others, who would perform the acts therein mentioned.

The provision of the ordinance requiring the permit here in question had no necessary relation to the provisions thereof fixing the qualifications of those engaged in the business of plumbing, and was directed solely to enforcing compliance with sanitary regulations as to the methods and devices to be used in the conveyance of sewage and the inspection of the system as installed or changed.

The possible invalidity of an independent provision in an act cannot affect the validity of other provisions therein unless the giving of such partial effect would be to accomplish a purpose not intended by the lawmaking power, or unless all the parts of the act are so interdependent as that no one part can be eliminated without destroying the force of the whole act. *In re Spencer*, 149 Cal. 396, 86 P. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105; *In re Mitchell*, 19 Cal. App. 567, 126 P. 856; *Roberts v. Police Court*, 148 Cal. 131, 82 P. 838.

[5, 6] Petitioner urges further as a fact conceded at the trial that the act alleged to have been done in violation of the ordinance was the alteration of a certain sewer without, though alleged in the complaint to have been situated within, a described building; and that the word "plumbing" as used in the ordinance does not properly include sewers either within or without a building, though a

part of the system used in the conveyance of sewage therefrom.

The question of fact suggested cannot be considered in this proceeding. Petitioner having been found guilty as charged in the complaint, questions as to the effect or sufficiency of the evidence cannot be here reviewed (In re Leonardino, 9 Cal. App. 690, 100 P. 708; In re Gutierrez, 46 Cal. App. 94, 188 P. 1004); and we are of the opinion that a sewer pipe within and forming a part of a system for the conveyance of sewage from a building may reasonably and should be held to constitute within the meaning of the ordinance a part of the plumbing in such building.

The complaint having stated a public offense of which the police court had jurisdiction, the proceedings and process being regular in form, and the provisions of the ordinance under which the conviction was had not being shown to be invalid, the writ is dismissed and petitioner remanded.

We concur: TYLER, P. J.; KNIGHT, J.

74 Cal. App. 540

PEOPLE v. PARKER. (Cr. 1253.)

(District Court of Appeal, Second District, Division 2, California. Oct. 13, 1925.)

1. Infants $\S$ 20—Statute defining offense held to create exception to statute relating to punishment where more than one penalty authorized.

Pen. Code, $\S$ 288, declaring it a felony for any person to commit any lewd or lascivious act on the body of a child under the age of 14 years, with intent of arousing, appealing to, or gratifying sexual desires of such person or child, but excluding from its purview acts constituting offenses otherwise punished, creates an exception to section 654, declaring act punishable under different provisions of Code may be punished under either of such provisions.

2. Criminal law $\S$ 29—That certain of defendant's acts constituted statutory rape held not to preclude conviction for preceding lewd acts.

That certain of defendant's acts may have constituted crime of statutory rape held not to preclude conviction for preceding lewd and lascivious acts, under Pen. Code, $\S$ 288.

3. Rape $\S$ 16(5)—Assault with intent to commit rape on female under age of consent may be committed notwithstanding her actual consent.

Assault with intent to commit rape on female under age of consent may be committed notwithstanding her actual consent.

4. Rape $\S$ 16(1)—Existence of specific intent is essential to offense of assault with intent to commit rape.

Existence of specific intent is essential to offense of assault with intent to commit rape.

5. Rape $\S$ 16(1)—Intent and overt act essential to crime of attempt to commit rape.

Intent, and an overt act falling short of execution of ultimate design, are essential to crime of attempt to commit rape, though overt act need not be last proximate act to consummation of contemplated rape.

6. Rape $\S$ 16(1)—The overt act essential to offense of attempt to commit rape must be something more than mere preparation.

The overt act essential to offense of attempt to commit rape must be something more than mere preparation.

7. Infants $\S$ 20—Finding that defendant's acts did not constitute offense under another statute warranted, and conviction under statute for lewd conduct with child sustained.

In prosecution, under Pen. Code, $\S$ 288, for lewd and lascivious conduct with a child under 14, held that, though intent necessary to make act otherwise punishable might be assumed, jury were warranted in finding no such intent accompanied preceding acts as would make them punishable under some other section, and that conviction under such section was warranted.

8. Criminal law $\S$ 738—It is province of jury to determine whether intent essential to offense charged existed.

Where intent is essential element of offense charged, it is province of jury to determine whether it existed in accused's mind when he committed act.

9. Criminal law $\S$ 29—Separate crimes may be committed, though so connected in point of time that evidence relating to each cannot be separated.

One may commit two separate and distinct crimes, though they are so closely connected in point of time that it is impossible to separate the evidence relating to them.

10. Criminal law $\S$ 29—That evidence relating to lewd conduct and subsequent rape inseparable not bar to conviction for former.

That lascivious conduct constituting violation of Pen. Code, $\S$ 288, was so closely followed by act of rape that it was impossible to separate evidence relating to the two offenses does not bar conviction under named section.

11. Criminal law $\S$ 29—That rape committed following lewd conduct is not bar to conviction for latter.

That crime of rape was committed following lewd and lascivious conduct, in violation of Pen. Code, $\S$ 288, does not bar conviction for latter offense.

12. Infants $\S$ 20—In prosecution for lewd conduct with child, weight to be given child's testimony exclusively for jury.

In prosecution for lewd and lascivious conduct with child, it is exclusive province of jury to determine weight to be given complaining witness' testimony.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

J. M. Parker was convicted of lewd and lascivious acts on and with the body of a

female child under the age of 14 years, and he appeals. Affirmed.

Wm. & Guy Lewis, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. Defendant was charged under section 288 of the Penal Code with committing certain lewd and lascivious acts upon and with the body of a female child under the age of 14 years, with the intent specified in that section. He was found guilty as charged, and now appeals from the judgment of conviction and from an order denying his motion for a new trial.

Section 288 reads, in part:

"Any person who shall wilfully and lewdly commit any lewd or lascivious act, other than the acts constituting other crimes provided for in part two [one]" [as authority for the substitution of "one" for "two" see *People v. Troutman*, 187 Cal. 313, 201 P. 928] "of this Code, upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to or gratifying the lust or passions or sexual desires of such person, or of such child, shall be guilty of a felony. * * *

[1] The provision to the effect that lewd and lascivious acts, to be punishable under this section, must be "other than the acts constituting other crimes provided for in part two [one] of this Code" constitutes an exception to the general rule announced in section 654, wherein it is declared that:

"An act or omission which is made punishable in different ways by different provisions of this Code may be punished under either of such provisions."

Appellant's main contention is that the acts committed by him, as testified to by the complaining witness, amounted to the crime of rape, as defined by subdivision 1 of section 261 of the Penal Code, the crime of attempt to commit rape, punishable under section 664, and the crime of assault with intent to commit rape, punishable under section 220 of that Code, each of the two last-mentioned crimes being necessarily included within the crime of rape. 22 Cal. Jur., article "Rape," pars. 13 and 14; *People v. Horn*, 25 Cal. App. 583, 592, 144 P. 641; *People v. Babcock*, 160 Cal. 537, 117 P. 549. Wherefore it is claimed that the evidence fails to support the charge of a violation of section 288, which makes punishable only such acts of a lascivious nature as do not constitute other crimes provided for in part 1 of the Code.

The testimony of the little girl is of so loathsome a nature that we find it preferable to set forth no more of her sordid story than will suffice for an adequate consideration of the questions presented. The evidence educed by the people tends to show the following: Appellant is a man of mature years.

The victim of his lust, a girl 11 years of age at the time of the offense, lived with her mother in the city of Los Angeles. On January 8, 1925, appellant took the girl to Long Beach. Arriving in that city, he proposed that they "rest for awhile." He then engaged a room in a hotel, which the two occupied during the remainder of the day and all of the following night. Soon after entering the room appellant pulled down the folding bed and told the girl to lie down and "rest for awhile." Thereupon they both lay on the bed, close together, facing each other. While in this position appellant put his arms around the girl, kissed her, and rubbed his hand on her bloomers—a garment which she wore under her dress in lieu of drawers. He then pulled down her bloomers "to get inside," as she described it. After this there followed an act of sexual penetration, which, though slight—it was not enough to rupture the hymen—was penetration nevertheless.

From the foregoing it will be seen that appellant's conduct, from the time he commenced fondling the girl, consisted of a number of separate and distinct acts, performed in sequence and of such a character that they may be grouped in three distinct categories, as follows: (1) Fondling the girl in a manner calculated to arouse appellant's passions and sexual desires—i. e., embracing and kissing her while the two lay close together on the bed and rubbing his hand on her bloomers; (2) pulling down the bloomers so as "to get inside"; and (3) sexual penetration.

[2] In determining whether appellant is punishable under section 288 we shall consider these three classes of acts in their inverse order. Without doubt, the last act, sexual penetration, constituted the crime of rape. Pen. Code, § 261, subd. 1, and section 263. As rape is one of the "other crimes provided for in part two [one]" of the Code, it is manifest that on the trial of appellant for violating section 288 he could not be punished for the last of the above enumerated series of acts. But it does not necessarily follow that he could not be punished under section 288 for any one of the preceding acts. See *People v. Lind* (Cal. App.) 229 P. 990, where we held that one who has committed lewd and lascivious acts leading up to the consummation of the crime of sodomy may be punished for his preliminary acts under this section of the Code.

If all of the acts which preceded actual sexual penetration, i. e., all of those which are included within the first and second of our three categories, must be held necessarily to have constituted the crime of attempt to commit rape, or the crime of assault with intent to commit rape, then appellant is not punishable under section 288. But if there be any one of those antecedent acts of lewd and lascivious conduct which, when viewed in the light of all that happened, does not nec-

essarily constitute an attempt to commit rape, or an assault with intent to commit rape, then the jury was free to convict appellant of the crime for which he was on trial. The question, then, resolves itself into this: Are the circumstances of the case such that if the jurors found that appellant committed all of the lewd and lascivious acts which preceded the final act of sexual penetration, they necessarily must also have found that each and every essential element of the crime of attempt to commit rape, or of the crime of assault with intent to commit rape, existed as to each of such antecedent acts? Before undertaking to answer this question we shall briefly consider the elements which constitute the crime of assault with intent to commit rape, and likewise those which constitute the crime of attempt to commit rape, where the victim is under the age of consent.

[3] It is the established law in this state that where the female is under the age of consent there may be an assault with intent to commit rape notwithstanding her actual consent. The reason is that in such cases the female cannot consent to the assault. The law resists for her. *People v. Verdegren*, 106 Cal. 211, 39 P. 607, 46 Am. St. Rep. 234; *People v. Roach*, 129 Cal. 33, 61 P. 574; *People v. Babcock*, supra. In *People v. Babcock*, supra, the court says:

“ * * * One who lays his hands upon such a female, with the intent and for the purpose, then and there, to accomplish an act of sexual intercourse with her, is by so doing guilty of an assault with intent to commit rape, even though he does not use or intend in any event to use any force or violence, and the female in fact offers no resistance whatever, or even expressly consents to all he does. The offense is complete when he has thus laid his hands upon her with the intention of then and there accomplishing such purpose, and it is entirely immaterial that he subsequently voluntarily desists, without accomplishing his purpose.”

[4] But though it is not necessary in such cases that force should be used or resistance made, and it is of no consequence that the female expressly consents, the existence of a specific intent in the mind of the accused then and there to have carnal connection with the girl is an essential element of the crime of assault with intent to commit rape. Indeed, the intent with which the accused touches the person of the female child is said to be the vital consideration in all such cases. As said in *People v. Dowell*, 136 Mich. 306, 99 N. W. 23:

“The intent is the gist of the offense, and every laying on of hands upon a female under the age of consent, even though improper, does not necessarily imply an intent to have sexual intercourse. Indecent liberties may be taken with a child without any such intent.”

In such cases the laying of hands upon the female and the intent to have intercourse

with her must concur as to time. 33 Cyc. p. 1435.

[5, 6] The crime of attempt to commit rape upon a girl under the age of consent is compounded of two elements, viz., the intent to have sexual intercourse with her, and a direct act done towards its consummation but falling short of the execution of the ultimate design. The overt act need not be the last proximate act to the consummation of the contemplated rape. It is sufficient if it be an act apparently adapted to produce the result intended. See *People v. Lanzit* (Cal. App.) 233 P. 816. The act must, however, be something more than mere preparation. Acts of preparation—acts not proximately leading up to the consummation of the intended crime—will not suffice to establish an attempt to commit the crime. For instance, in *People v. Murray*, 14 Cal. 159, it was held that declarations of an intent to enter into an incestuous marriage, followed by an elopement for the purpose and sending for a magistrate to solemnize the ceremony, were mere acts of preparation, and did not constitute an attempt to commit the crime. There the court says:

“Between preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made.” (Italics ours.)

To make the act an indictable attempt “it must be a cause, as distinguished from a condition.” *Patrick v. People*, 132 Ill. 534, 24 N. E. 620, citing *Wharton on Criminal Law*. To constitute an attempt to commit rape upon a female under the age of consent, the intention to know the girl carnally must have existed in the mind of the accused at the very time when he did the overt act or acts, for there can be no attempt to commit a crime unless the intent to commit it exists at the time when the attempt is made. “Intention formed subsequent to the attempt,” says Mr. Wharton, “will not be enough, as where a party having in his possession indecent prints (not procured for publication) takes it into his head to publish them, but does not actually publish them.” 1 *Crim. Law* (11th Ed.) § 215.

Reverting now to the two groups of acts which preceded the act of sexual penetration, and considering them in their inverse order in the light of the foregoing: As to the act included in the second of our three categories—the act of pulling down the girl’s bloomers “to get inside”—we shall assume, for the purpose of this decision only, that an act of that character is one from which the jury, under all the circumstances here disclosed, necessarily must have inferred that it was done by appellant with the specific intent then and there to have carnal connection with the girl.

We also shall assume, for the purpose of this decision only, that this preliminary act reached so far forward toward the accomplishment of the intended crime of rape as to amount to the commencement of its consummation. If these assumptions be indulged, the act constituted both the crime of attempt to commit rape and the crime of assault with intent to commit rape, and therefore it could not be punished under section 288.

[7, 8] No such assumptions as we have made with respect to the act included in the second category can be made with respect to those acts which we have grouped in the first category; i. e., putting arms around the child, kissing her, and rubbing a hand over her bloomers. Those acts, sufficient of themselves to constitute the lewd and lascivious conduct which section 288 denounces (*People v. Rossi*, 37 Cal. App. 778, 174 P. 916; *People v. Dabner*, 25 Cal. App. 630, 144 P. 975), were not of such an unequivocal character that it necessarily must be concluded therefrom, even when they are considered in the light of what ensued, that appellant then and there fully intended to follow them with one of sexual penetration. In cases where, as here, the specific intent with which an act was done is the all-important element of the crime, it is the peculiar province of the jury to determine, from all the circumstances of the case, the particular intent existing in the mind of the accused when he committed the act. "In such a case the intent is to be determined by and from the acts committed, and it is not for the judge, but for the jury, to say what particular intent follows from those acts." *People v. Barker*, 137 Cal. 557, 70 P. 617. The jury in this case undoubtedly would have been warranted in finding that when appellant was hugging the girl, kissing her, and rubbing his hand over her bloomers, he did so with the intent then and there to have carnal connection with her. But the existence of that specific intent at those particular moments is not the only possible conclusion which may reasonably be deduced from the circumstances of this case. It cannot be said with absolute certainty that when appellant put his arms about the girl, kissed her, and rubbed his hand over her bloomers he then and there intended to follow those acts with one of actual sexual penetration. The jury may well have concluded that at this stage of his dastardly conduct appellant intended only to fondle his victim as a means of gratifying his lustful passions, and that later, emboldened by his success and further inflamed with passion, he conceived the nefarious intent to penetrate her body. The jurors, who saw appellant and thus had an opportunity to judge the character of his perverted instincts, were in a position to determine the nature of the intent which actuated him to fondle the girl in the manner he did. What was said in *Draper v. State* (Tex. Cr. App.) 57 S. W. 655, is apposite:

"* * * Appellant may have had a morbid sexual desire; he may have fondled prosecutrix; he may have manipulated her parts with his hands; but evidently he did not intend to penetrate her female organ with his penis. * * * As stated before, he may have been afflicted with that form of sexual disease known as fetichism, where the victim, laboring under venereal excitement, simply desires to gratify his lust by contact of his genital organs with any part of the body of a woman. * * * See this question of sexual diseases discussed in 2 Witthaus & B. Med. Jurisp., pp. 493-518."

But irrespective of whether appellant was or was not a sexual pervert of the kind referred to by the Texas court, it is quite possible that the intent to penetrate the girl sexually was not definitely formed until, by fondling her person, he had so inflamed his demoniacal passions that he then for the first time became willing to throw all discretion to the winds and give to unbridled lust an unconstrained license. If this was the real state of things, and the jury may well have inferred that it was, then the antecedent acts of which we are now speaking would not constitute either an attempt to commit rape or an assault with intent to commit rape, and therefore appellant could properly be convicted for those acts under section 288 of the Penal Code.

[9, 10] The fact that appellant's preliminary acts of lascivious conduct, in violation of section 288, were so closely followed by an act of rape that it is impossible to separate the evidence relating to the two crimes does not necessarily raise an insuperable barrier to his conviction of the former crime. It is well settled that one may commit two separate and distinct crimes, even though they are so closely connected in point of time that it is impossible to separate the evidence relating to them. *People v. Devlin*, 143 Cal. 128, 76 P. 900; *People v. Bentley*, 77 Cal. 7, 18 P. 799, 11 Am. St. Rep. 225. In *People v. Devlin*, supra, the court says:

"After one has entered a building with intent to commit any other felony than grand or petit larceny, he has committed burglary, but he may then find that it is impossible, for various reasons, to commit the felony which it was his intention to commit when he entered, and conclude to commit larceny by stealing some article of value in the building. He thus, in rapid succession, commits two crimes."

In the *Bentley* Case, supra, the court, quoting from *Teat v. State*, 53 Miss. 456, 24 Am. Rep. 708, says:

"It is believed that no well-considered case can be found where a putting in jeopardy for one act, or a conviction for one act, 'was held to bar a prosecution for another separate and distinct one, merely because they were so closely connected in point of time that it was impossible to separate the evidence relating to them.' * * * If the offenses do not possess the same elements, although both relate to the same transaction, it would seem that both may be punished."

[11] The next point urged by appellant is that the court erred in refusing to give, at his request, the following instruction:

"You are instructed that if you find from the evidence presented, beyond a reasonable doubt, that the private parts of defendant entered those of the prosecuting witness to any degree, then you shall return a verdict of acquittal."

The refusal to give this instruction was not error. As we already have shown, there was evidence to warrant the jury in finding that, in addition to the crime of rape which occurred when the actual sexual penetration took place, there also was a preceding separate and distinct crime of lewd and lascivious conduct, punishable under section 288. It would have been improper, therefore, to instruct the jurors to acquit if they found that the crime of rape was committed.

[12] Finally, it is urged that the story of the complaining witness is improbable, and that the entire evidence in the case preponderates in appellant's favor. A review of the record satisfactorily shows that the testimony of the prosecutrix, if believed by the jury, was amply sufficient to sustain the verdict. As in prosecutions for other crimes, it is the peculiar and exclusive province of the jury in a prosecution for lewd and lascivious conduct with a child to determine what weight shall be given to the testimony of the complaining witness. *People v. Lopez*, 51 Cal. App. 476, 197 P. 144; *People v. Hinrich*, 53 Cal. App. 186, 199 P. 1058. Though the record presents a sharp conflict in the evidence, as is usual in this class of cases, there is, as we have said, substantial evidence to support the verdict. The case therefore comes within the well-established rule that—

"If the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive." *People v. Emerson*, 130 Cal. 562, 62 P. 1069.

The judgment and the order denying a new trial are affirmed.

We concur: WORKS, J.; CRAIG, J.

74 Cal. App. 615

GLOBE INDEMNITY CO. v. INDUSTRIAL ACC. COMMISSION et al. (Civ. 5389.)

(District Court of Appeal, First District, Division 1, California. Oct. 17, 1925.)

Master and servant ☞417(7)—Industrial Commission's finding on conflicting evidence as to cause of injury held final.

Finding of Industrial Commission on conflicting evidence that an injury received by employee in the course of his employment

proximately caused, through the agency of a fainting spell, an injury several hours later, held final.

Certiorari to Industrial Accident Commission.

Certiorari by the Globe Indemnity Company, to review an award of the Industrial Accident Commission made in favor of Leo W. King. Affirmed.

R. O. Purvis, of San Francisco, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondents.

TYLER, P. J. Certiorari to review the action of the Industrial Accident Commission in awarding to one Leo W. King, the applicant below, workmen's compensation benefits.

Substantially, the facts are as follows: King was a pressman in the employ of the Oakland Tribune, and on February 1, 1925, at about 12 o'clock a. m., and during the course of his employment, he sustained an injury to his head by reason of an iron block weighing some 20 pounds falling from the press a distance of about 10 feet and striking him on the head. The blow caused lacerations of the scalp. He immediately received treatment at the Oakland Emergency Hospital, and was thereafter removed to the Oakland Central Hospital for further treatment. At about 9 o'clock following, his head wounds were dressed, and he was given a hypodermic injection of antitetanic serum to prevent lockjaw. He was then instructed to go home and rest. On reaching his home, King proceeded to the basement thereof where his sons were operating a power saw. While standing near the same, he either fainted or fell upon the machine, suffering the loss of a finger and injuring another. Application for adjustment of a claim for workmen's compensation was subsequently asserted by King. The commission in its findings and award determined that the injury occurring at respondent's residence was a direct result of the first injury, which occurred in the course of his employment, and held petitioner for the entire disability. A rehearing was applied for; the claim being made that the evidence was insufficient to justify the award. This was denied. The present application for writ of review followed.

It is admitted that King was entitled to compensation for the injuries sustained by him in the course of his employment, but not for the subsequent injuries suffered at his home, which it is claimed were caused by King attempting to operate the saw. The evidence upon the subject as to whether the applicant was operating the saw or whether while standing near it he fainted by reason of his original injury was conflicting.

King testified positively that he was mere-

ly standing by the saw, and the next thing he knew he was on the floor with a doctor caring for him. There is also medical evidence to show that the antitetanic serum might cause fainting, or that such a condition might be brought about by the injury applicant received to his head, which latter injury, it appears, did cause him subsequent trouble.

The award of the commission for injuries to the applicant's finger was based upon the theory that such injuries were proximately caused by the injury received the night previous. While conflicting, there is evidence to support the findings of the commission both as to the manner in which the injury occurred and as to its cause. The findings of the commission upon the subject, therefore, must stand.

The award is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

74 Cal. App. 636

PEOPLE v. RODARTE. (Cr. 1264.)

(District Court of Appeal, Second District, Division 2, California. Oct. 20, 1925.)

Criminal law ⚡409—Uncorroborated extrajudicial admissions of birth in foreign country held insufficient to prove corpus delicti of crime of possessing concealed weapon.

Uncorroborated extrajudicial admission, made by defendant to officers at time of arrest, that he was born in Mexico, is insufficient to prove corpus delicti of offense of possession of concealed weapon by unnaturalized foreign-born person, in violation of Firearms Act, since birth in foreign country is an essential part of the corpus delicti.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

Jose Rodarte was convicted of violating Firearms Act, and he appeals. Reversed.

Albert D. Trujillo, of San Bernardino (William G. Randall, of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., Erwin W. Widney, Deputy Atty. Gen., and John L. Flynn, of Los Angeles, for the People.

FINLAYSON, P. J. Defendant was charged with a violation of the Firearms Act (Stats. 1923, p. 695 et seq.). It is made a crime by that act for an unnaturalized foreign-born person to have in his possession a concealed weapon of the type described in the statute. Defendant was found guilty as charged and now appeals from the judgment and from an order denying his motion for a new trial.

Possession of the weapon was not disputed, but the only evidence that defendant is of the proscribed class consisted of certain extrajudicial

admissions that he was born in Mexico, made by him to the officers at the time of his arrest.

It is insisted by appellant that birth in a foreign country is an essential part of the corpus delicti, and that, since there was no corroboration of his extrajudicial admissions of foreign birth, the evidence is insufficient to prove that element of the crime. The point is well taken. The Supreme Court, in the recent case of *People v. Quarez*, 238 P. 363, decided since the trial of this case in the court below, held conformably with appellant's contention.

The judgment and the order denying a new trial are reversed.

We concur: WORKS, J.; CRAIG, J.

74 Cal. App. 617

AVERY v. PEIRSON. (Civ. 5263.)

(District Court of Appeal, First District, Division 2, California. Oct. 19, 1925.)

1. Partnership ⚡20—Plaintiff's purchase of one-half interest in agency contract held to create partnership relation.

Plaintiff's purchase from defendant of one-half interest in latter's contract of agency for sale of land, under which plaintiff's duties, rights, and liabilities attached at once, held to create partnership relation with defendant, under Civ. Code, § 2395.

2. Partnership ⚡263—Partnership may be dissolved by expressed will of one partner, in absence of agreement to contrary.

Partnership may be dissolved by expressed will of one partner, in absence of agreement to contrary, in view of Civ. Code, § 2450, subd. 2.

3. Partnership ⚡298—Dissolution of partnership entitled each partner to accounting of sum to be accounted for.

The dissolution of a partnership entitled each partner to an accounting, if there was any sum whatever to be accounted for.

4. Partnership ⚡108—Partner has no cause of action against copartner as such for recovery of share of assets until accounting is had between them.

Partner has no cause of action against copartner as such for recovery of share of assets until accounting is had between them.

5. Partnership ⚡330—Failure to direct accounting held error.

Where findings showed plaintiff was a partner with defendant in agency for sale of land, and answer admitted some funds were on hand by virtue of such contract, failure to direct an accounting in suit therefor held error.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Suit for accounting by Roy S. Avery against C. W. Peirson. Judgment for de-

fendant, and plaintiff appeals. Reversed and remanded for further proceedings.

William Ellis Lady, of Los Angeles, for appellant.

Sebald L. Cheroske, of Los Angeles, for respondent.

STURTEVANT, J. This is an action brought by the plaintiff to obtain an accounting. The defendant answered, and a trial was had by the trial court sitting without a jury. After the parties had introduced their evidence tending to prove that there was or was not a fiduciary relation existing between the parties, the trial court declined to order an accounting, and directed that findings be drawn by the defendant. The findings were so drawn, and judgment thereon was entered in favor of the defendant. The plaintiff has appealed from the judgment under section 953a of the Code of Civil Procedure.

Prior to the 20th day of February, 1919, C. A. Canfield Estate and Harbor View Land Company were the owners of lands near the city of San Pedro, Los Angeles county, and were engaged in selling off said lands in small parcels. At that time the defendant held an exclusive sales contract by virtue of which he was entitled to make the sales and receive certain sums of money as compensation. On that date he entered into a contract with the plaintiff in which he agreed to sell the plaintiff a one-half interest in his contracts for the sum of \$1,500. It was further agreed that the plaintiff was to pay down \$1,000, and thereafter, on April 5, 1919, he was to make a further payment of \$500. At the time of making the contract the defendant was devoting his entire time in negotiating sales, and it was further agreed between the defendant and the plaintiff that the plaintiff should at once take up the work and devote his entire time in negotiating sales. In accordance with the contract both parties proceeded to act thereunder, and continued to do so for a period of approximately four weeks. On the date that the contract was made, and continuously thereafter, the defendant was maintaining an office, and was incurring some expenses, but the precise nature thereof or the amount thereof is not disclosed by the record. In his complaint the plaintiff alleged that the defendant "has received large sums of money as and by way of compensation under and by virtue of the terms of" the sales contract held from C. A. Canfield Estate and the Harbor View Land Company. In his answer the defendant did not deny that allegation, but, on the other hand, inserted "admits that by virtue of said contracts defendant has received some com-

pensation." At the end of four weeks the plaintiff severed his connection with the business, and returned to the employment of an oil company. Thereafter from time to time he made demands on the defendant for an accounting, those demands were refused, and the plaintiff commenced this action.

[1-4] The trial court found the facts as stated above. The question presented to this court is whether or not the conclusion of law that the plaintiff was not entitled to an accounting is supported by the findings of fact. Looking back over the foregoing facts, it is quite clear that the plaintiff obtained a present title to the one-half interest which he attempted to buy; that his duties and liabilities attached at once; and that his rights attached at the same time. Every element of a partnership was present, and our attention has not been called to the absence of any factor necessary to constitute the relation of copartners between the plaintiff and defendant after the execution of the contract on February 20, 1919. Civ. Code, § 2395; Chapman v. Hughes, 104 Cal. 302, 37 P. 1048, 38 P. 109. As there was no covenant in the agreement made by the parties to the contrary, the partnership could be and was dissolved by the expressed will of the plaintiff. Civ. Code, § 2450, subd. 2. On the dissolution of the partnership each partner was entitled to an accounting, if there was any sum whatever to be accounted for. Under the admissions of the pleadings, there was in the instant case at least some funds to which the plaintiff was entitled to an accounting. Until that accounting shall have been had neither the plaintiff nor the defendant has a cause of action one against the other. 30 Cyc. 462 et seq.

[5] The record discloses that during the four weeks that the plaintiff was actively participating in the business of selling lots that business was very poor, and that few sales were made. The record discloses that at least certain expenses were continuing during that period of time. Under these circumstances it is clear that an accounting may show very little, if anything, as payable to this plaintiff. Be that as it may, it is his affair. Under the admissions contained in the pleadings and the findings as made by the trial court, the trial court should have entered an order directing that an accounting be had. 1 C. J. p. 613, § 56.

The judgment is reversed, and the cause is remanded to the trial court for further proceedings in accordance with the views herein expressed.

We concur: LANGDON, P. J.;
NOURSE, J.

74 Cal. App. 564

ALEGRETTI v. GARDNER. (Civ. 2985.)

(District Court of Appeal, Third District, California. Oct. 14, 1925. Hearing Denied by Supreme Court Dec. 10, 1925.)

1. Vendor and purchaser ⇨3(4)—Instrument held simply option to purchase real estate which giver could withdraw at any time before acceptance.

Instrument whereby plaintiff granted to defendant exclusive right to buy or sell described property for period of 30 days held not a grant within Civ. Code, § 1215, but a plain, simple option to purchase real estate, unilateral in character, which might be withdrawn by giver at any time prior to its acceptance.

2. Appeal and error ⇨1010(1)—Finding of trial court on sufficient testimony binding on appellate court.

Finding of trial court on sufficient testimony that offer to sell real estate was withdrawn prior to its acceptance is binding on appellate court.

3. Specific performance ⇨105(3) — Cross-complaint, seeking specific performance, held demurrable on ground of laches.

In action to quiet title, begun in August, 1922, defendant's cross-complaint, seeking specific performance, based on written instrument executed in August, 1918, held demurrable on ground of laches, especially where no reasons were assigned why specific performance was not sought prior to lapse of so many years.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action to quiet title by Mary A. Alegretti against John Gardner, wherein defendant filed cross-complaint, seeking specific performance. Judgment for plaintiff, and defendant appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant.

Nutter & Hancock, of Stockton, for respondent.

PLUMMER, J. Action by plaintiff to quiet title. Cross-complaint by defendant and appellant, seeking specific performance, based upon the following written instrument:

"Stockton, California, Aug. 8, 1918.

"I, the undersigned, hereby give and grant unto John Gardner or his assigns the exclusive right to buy or sell that certain piece of property 50x100, together with the two story brick building thereon, known as No. 24-26-28 East Main street, in the city of Stockton, county of San Joaquin, state of California, and this exclusive right is granted for a period of thirty (30) days from date hereof. In case of sale I agree to furnish an abstract of title brought down to date, guaranteeing the title to be free and clear of all incumbrances, and I agree to furnish a grant, bargain, and sale deed of conveyance to the said John Gardner or his assigns on the receipt by me of the sum of \$20,000.00 payable

in United States gold coin, or whatever equivalent I may desire to accept.

"Mary A. Alegretti."

Judgment for plaintiff. Defendant appeals.

The court found the execution of the above instrument as set forth on the date therein mentioned and the delivery of the same to the defendant. The court also found upon conflicting evidence that before the defendant had taken any action under and by virtue of the delivery to him of said writing the plaintiff, on the 15th day of August, 1918, withdrew the privilege or option given to the said Gardner to purchase the real estate therein mentioned by executing and delivering to the defendant the following notice:

"To John Gardner, Esq.:

"You will please take notice that the option given you to buy that certain piece of property 50x100 feet, together with the two story brick building thereon, known as Nos. 24-26-28 East Main street, in the city of Stockton, county of San Joaquin, state of California, is hereby withdrawn.

"Dated August 15, 1918.

"Mary A. Alegretti."

The writing first above mentioned was recorded on or about the 16th day of August, 1918, in the office of the county recorder of the county of San Joaquin in the official records of said county. That thereafter no action was taken by the defendant in relation to the exercise of the privilege granted to purchase the premises described in said first-mentioned writing, and the plaintiff, on or about the 23d day of August, 1922, began her action to quiet title to the premises involved, and remove from the title to said premises whatever effect there might be from the recording of the writing hereinbefore mentioned. The plaintiff demurred to the defendant's cross-complaint, and, among other things, raised the question of laches. The court overruled the plaintiff's demurrer to the defendant's cross-complaint, and the plaintiff answered the cross-complaint of the defendant, setting up in her answer the laches of the defendant in seeking specific performance after the lapse of more than four years.

[1-3] Upon this appeal the defendant argues that the writing giving him the exclusive right to buy the real estate referred to within 30 days was and is, in legal effect, a grant, and cites in support of such contention section 1215, Civil Code; Kent v. Williams, 146 Cal. 8, 79 P. 527; and Hibernia, etc., v. Farnham, 153 Cal. 581, 96 P. 9, 126 Am. St. Rep. 129. We do not need to review the authorities cited by the appellant. It is sufficient to say that they do not support his contention. A reading of the instrument dated August 8, 1918, is all that is necessary to answer the appellant's contention. It is

a plain, simple option to purchase real estate, unilateral in character, such as might be withdrawn by the giver at any time prior to its acceptance. The trial court found upon sufficient testimony that the offer was withdrawn prior to its acceptance, and that is binding upon this court. We may further state that the demurrer to the cross-complaint on the ground of laches should have been sustained. The answer of the plaintiff to the cross-complaint sets up that ground as a defense to specific performance, and constitutes a good defense under the pleadings in this case. No reasons whatever are assigned why specific performance was not sought prior to the lapse of so many years. This court, in the case of *Superior Cal. Fruit Land Co. v. Grossman*, 32 Cal. App. 357, 162 P. 1046, had occasion to consider this question quite fully, and it is only necessary here to refer to the collation of authorities contained in the opinion deciding that case. There being nothing of merit in appellant's appeal, it is hereby ordered that the judgment of the trial court be and the same is hereby affirmed.

We concur: FINCH, P. J.; HART, J.

74 Cal. App. 473

CITY OF LOS ANGELES v. MORRIS et al.
(Civ. 4989.)

(District Court of Appeal, Second District, Division 1, California. Sept. 30, 1925. Hearing Denied by Supreme Court Nov. 24, 1925.)

1. Eminent domain $\hookrightarrow$ 124—Damages under Street-Opening Act deemed to accrue at time of order setting case for trial, which date cannot be shifted along by continuances or granting new trial.

In proceeding under Street-Opening Act 1903 and subsequent amendments thereto (Deering's Gen. Laws 1923, Act 8198), under section 10 of that act as amended in 1909 (St. 1909, p. 1038, § 5), the right of property owner for damages is deemed to have accrued on date of order setting cause for trial, and this date could not be shifted along from time to time by granting continuances or by order granting new trial, for "new trial" under Code Civ. Proc. § 656, is mere re-examination of same issue of fact tried at first trial.

2. Eminent domain $\hookrightarrow$ 124—Rule of Street-Opening Act as to date of assessment of damages to be construed so far as possible with general rule as to date of assessment thereof in condemnation proceedings.

Under the Street-Opening Act 1903, and subsequent amendments thereto (Deering's Gen. Laws 1923, Act 8198), rule as to date of assessment of damages is to be construed so far as possible in harmony with general rule in condemnation proceedings as to date of assessment as provided in Code Civ. Proc. § 1249.

3. Statutes $\hookrightarrow$ 47—Statute relative to date of determination of damages not void for uncertainty.

Street-Opening Act, 1903, and amendments thereto (Deering's Gen. Laws, Act 8198) section 10 as amended by St. 1909, p. 1038, § 5, providing that for purposes an assessment assessing compensation damages should be deemed to have accrued at date of order appointing referee or of order setting case for trial, *held* not to be void for uncertainty or to fail to furnish rule as to date on which damages accrued in a proceeding thereunder, where one defendant asked jury trial and others left determination of damages to court assisted by referee, but in such case, construing section 10 with section 8 as amended by St. 1909, p. 1037, § 3, and other provisions, phrase in section 10 "the date of order appointing referee" is subordinate to "the order setting the cause for trial," and under this construction court must determine value at date of order setting case for trial.

4. Eminent domain $\hookrightarrow$ 262(5)—Trial $\hookrightarrow$ 6(3)—Order of continuance held not to violate court rules requiring five days' notice of setting case for trial originally, but, if irregular, not prejudicial.

Where a condemnation proceeding under Street-Opening Act 1903, was set for trial on April 23d, but at that time after jury was impaneled and sworn it was found that judge was disqualified to try case and jury was discharged, judge who then took bench, in assigning case to another department and continuing it until next day, did not violate court rule 17 of superior court of Los Angeles county, providing that civil cases may be set for trial upon motion of party on five days' written notice, for under circumstances order was one of continuance and not an original order, but if such procedure was irregular it was not prejudicial.

5. Eminent domain $\hookrightarrow$ 255—Defendant who made no objection below to form of order allowing jury to view premises or method of carrying into effect, could not raise objection on appeal.

In a proceeding under Street-Opening Act 1903, where judge made order allowing jury to view premises, defendant who did not object to form of order or method of carrying it into effect at trial could not object on appeal that required forms of law were not complied with, in that no person was appointed by court charged with a duty of showing premises to jury under Code Civ. Proc. § 610.

6. Evidence $\hookrightarrow$ 502—Court did not abuse discretion in confining cross-examination of witnesses as to value to period reasonably near date in issue.

In proceeding under Street-Opening Act 1903, where issue of fact was value of property on date of order setting case for new trial on which value was to be determined under section 10 of said act, *held*, it was no abuse of discretion not to permit cross-examination of plaintiff's witnesses as to value of property at certain times after such date, and court was justified in confining cross-examination to period reasonably near time in question.

7. Evidence ⇨568(4)—Jury could rest verdict on testimony of same witnesses as to value of land prior to severance and other witnesses' testimony as to percentage of damage.

In a proceeding under the Street-Opening Act 1903, where lowest figure of damages given by witnesses caused by severance was \$1,658, *held* jury's award of \$1,500 could not be said to be unsupported by evidence, for jury under facts could have rested its verdict on testimony of some witnesses as to value of property prior to its severance and on testimony of others as to percentage of damage as compared with original value.

8. Eminent domain ⇨241—Separate interlocutory judgment entered against defendant and her mortgagee in proceeding under Street-Opening Act not void because it contained no determination as to rights of other defendants.

In a proceeding under Street-Opening Act 1903, wherein one defendant demanded jury trial and others rested determination of compensation with court assisted by referee, *held*, that interlocutory judgment rendered after trial by jury was not void because it merely determined rights of defendant who requested jury trial and of her mortgagee and contained no determination as to rights of other defendants; there being nothing under section 12 of said act as amended by St. 1909, p. 1040, § 7, preventing entry of separate judgments, but on the contrary, under Code of Civil Procedure expressly adopted as part of Street-Opening Act by section 6, section 579 provides expressly for entry of several judgments.

9. Eminent domain ⇨262(5)—Entry of separate interlocutory judgments determining rights of defendant and mortgagee, without determining rights of other defendants, if erroneous, not prejudicial error.

In proceeding under Street-Opening Act where defendant requested jury trial, but others rested decision as to damages with referee appointed by court, court's entry of separate interlocutory judgment as to rights of defendant who requested jury trial and her mortgagee, without determining rights of those who rested case with referee, if irregular, was not prejudicial, and will not be reversed in view of Const. art. 6, § 4½, such separate entries being simply matters of procedure, and for all purposes such judgment, together with judgment rendered in case of other defendants, will be considered as constituting one interlocutory judgment on entry of which Street-Opening Act, § 15 et seq., providing assessments, should be made.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Condemnation proceedings by the City of Los Angeles, a municipal corporation, against Dan Morris, Annie F. Young, and others. From an interlocutory judgment by the Superior Court of Los Angeles, defendant Annie F. Young appeals. Affirmed.

W. W. Hyams and Meserve & Meserve, all of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for appellant.

Jess E. Stephens, City Atty., and Donald M. Keith, Deputy City Atty., both of Los Angeles (John A. Rush, of Los Angeles, of counsel), for respondent.

CONREY, P. J. This action was brought by the plaintiff to condemn land and take the same for public use for the opening, widening, and extending of Fifth street in the city of Los Angeles. The defendant Annie F. Young is the owner of land through which the extended street will run. Under the condemnation proceedings she is entitled to compensation for that part of her land taken for street purposes, and separately to compensation for damages to her adjoining land not taken for the public use. She appeals from the interlocutory judgment, entered pursuant to the verdict of a jury which assessed said compensation and damages, and appeals "from the order denying the motion of said defendant for a new trial made, given and entered on or about the 9th day of July, 1923." Street-Opening Act of 1903, § 13.

First we shall deal with the contention made by appellant that the court erred in determining that the compensation and damages to be awarded to her should be fixed and assessed as of the 5th day of December, 1921. The action was brought under the Street-Opening Act of 1903 (Stats. 1903, p. 376, and subsequent amendments thereto; Deering's Gen. Laws [1923 Ed.] Act 8198). Section 10 of that act, as amended in the year 1909 (Stats. 1909, p. 1038, § 5), reads in part as follows:

"For the purpose of assessing the compensation and damages, the right thereto shall be deemed to have accrued at the date of the order appointing referees or of the order setting the cause for trial, as the case may be, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed by the provisions of this act."

The Code of Civil Procedure, in the title on eminent domain, at section 1249 of that Code, establishes a general rule for condemnation proceedings in this state, with respect to the date from which compensation shall be assessed, as follows:

"For the purpose of assessing compensation and damages the right thereof shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected, in all cases where such damages are allowed as provided in section 1248; provided, that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation

and damages shall be deemed to have accrued at the date of the trial."

The complaint in this action was filed on June 29, 1921. A summons was issued at some time not shown by the record. This appears from a default entry indorsed on the complaint under date December 14, 1921, which shows that prior thereto certain defendants were "regularly served with process." It follows, by necessary inference, that the summons issued prior to December 5, 1921.

Appellant contends that the date as of which she was entitled to have the value of her property fixed for the purpose of assessing her compensation and damages was a time much later than December 5, 1921. Here it becomes necessary to set out some further history of the action.

September 29, 1921, answer of Annie F. Young and Pacific Mutual Life Insurance Company of California (mortgagee of Mrs. Young) was filed. November 28, 1921, notice served on appellant and the other defendants and filed that on December 5, 1921, plaintiff would move to have case set down for trial. December 5, 1921, said motion came on for hearing. Defendant Young and said mortgagee demanded a jury trial. No other defendants demanded a trial by court or jury. The court ordered that the action as to Young and said mortgagee be set for trial with a jury on March 31, 1922, in department 15 of said court, and that the action as to the other defendants should be heard and tried by referees. December 19, 1921, order signed and filed appointing referees.

April 11, 1922, referees' report returned to the court. March 31, 1922, trial as to appellant and mortgagee continued to May 8, 1922; and after further continuances was actually tried by jury on July 6, 1922, and the jury's verdict duly filed and entered.

October 6, 1922, motions for new trial presented on behalf of the city and on behalf of Young and said mortgagee. New trial granted. Case transferred to department 10, which is the department of the presiding judge of said court.

October 9, 1922, under stipulation of the parties, case was regularly set down for trial for December 11, 1922, and assigned to department 14 for trial with a jury. In that department several continuances were regularly made until April 23, 1923. On that day, Judge Charles Monroe presiding, a jury was regularly impaneled and sworn to try the case. At that point it was suggested and admitted that the judge then presiding was, by reason of some property interest, disqualified to try the case. Thereupon Judge Monroe discharged the jury. Immediately when that had been done Judge Charles Crail, then presiding judge of the superior court (department 10 thereof), "took the bench in said Department 14" and, over the objection

of defendant Young and said mortgagee, continued the action for trial to the next day, April 24th, and assigned the case to department 11 of said court, then presided over by Judge J. P. Wood. Said defendants thereupon objected to the trial being thus continued and demanded that the action, under the rules of the superior court, be transferred to the department of the presiding judge and be regularly reset for trial. Said objections were overruled and the case transferred to department 11 as aforesaid.

April 24, 1923, cause called for trial in department 11 before Judge Wood, who ordered that a new jury be impaneled. This order was made over the objection of appellant and said mortgagee. Thereupon a jury was impaneled and sworn to try the case, and the trial proceeded. Evidence was taken and such other proceedings were had that the jury returned the verdict pursuant to which the interlocutory judgment has been entered, from which judgment Mrs. Young now prosecutes this appeal.

[1] It is the contention of appellant that the court erred in holding that the phrase, "the date of the order * * * setting the cause for trial," in section 10 of the Street-Opening Act of 1903, applied only to the first order (that is, the order of December 5, 1921), setting the cause for trial; and in holding that it so applied, not only for the purposes of the first trial, but also for the purposes of the second trial. The first trial (the trial of July 6, 1922) was had pursuant to the order of December 5, 1921, made by the presiding judge, setting the case down to be tried on March 31, 1922; said order being supplemented by continuances in department 15 until the actual date of said first trial. It is admitted by counsel that at that first trial the issue as to value was tried and determined as of December 5, 1921. There seems to be no doubt that, as applied to the trial then occurring, the date was so selected according to the statute. As above noted, there were some continuances from and after the date fixed by the original order, but it does not appear to have been contended that those orders of continuance entirely superseded the original "order setting the cause for trial"; they assumed its validity, and on that basis directed a postponement of the trial. The purpose of the legislation contained in section 10 of the statute was that prior to trial of the action a time be fixed, with relation to which the compensation to be awarded should be established according to the actual value of the property at the date so appointed. The issue of fact was thus made and settled for determination upon the evidence thereafter to be taken. We find in the statute nothing to indicate that the date, with relation to which compensation shall be measured and damages assessed in such cases, shall be shifted along from time to time by means of continuances of the trial, or even

by means of an order granting a new trial of the action. "A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee." Code Civ. Proc., § 656. By the very terms of the definition the re-examination thus had by means of a new trial calls for a determination of the same issue of fact which had been tried before. There is, of course, an exception when the court allows some change in the pleadings, whereby some alteration is made in the issues of fact presented for determination at the second trial. In substance, however, the several trials must be of the same case. In the instant case we are of opinion that the issue remained unchanged, notwithstanding that the effect of the order granting the new trial was to vacate and set aside the verdict which theretofore had been rendered.

[2] The conclusion indicated in the preceding paragraph is strengthened by a consideration of the general rule, which has long been established in condemnation proceedings in California, providing for the assessment of compensation and damages as of the date of issuance of summons in the action. While a different rule has been set up in section 10 of the Street-Opening Act of 1903, this rule should be construed, as nearly as may be, in harmony with the general rule. The Supreme Court followed this principle of decision in *Marin Municipal Water District v. Marin Water & Power Co.*, 178 Cal. 308, at pages 314, 315, 173 P. 469.

[3] Appellant makes the further suggestion that said section 10 of the Street-Opening Act of 1903 is void by reason of uncertainty; that therefore the compensation should have been awarded under section 1249, Code of Civil Procedure; and that because the case was not tried within one year after the commencement of the action, and because the delay was not caused by the defendant, her right to compensation and damages must be deemed to have accrued at the date of the second trial. It will be remembered that according to said section 10 the right to compensation and damages "shall be deemed to have accrued at the date of the order appointing referees or of the order setting the cause for trial, as the case may be." The statute (section 8 as amended by St. 1909, p. 1037, § 3) provides that if, upon the hearing of the motion to set the case for trial, a trial by jury or by the court without a jury is not demanded by the defendants or any of them (or by the plaintiff), the court must appoint referees to ascertain the compensation to be paid to such defendants so waiving trial by jury or by the court without a jury. In a case (and this is such a case) where one defendant has demanded a trial by jury and the other defendants have left the court free to ascertain their compensation with the aid of referees, there may be some difference in time between the date

of appointment of the referees and the date of the order setting the cause down to be tried by jury. Appellant contends that under such circumstances section 10 fails to furnish any rule for ascertaining which date shall be the date as of which the right to damages must be ascertained or be deemed to have accrued. But we think that the language of section 10 is capable of a construction which will harmonize its terms. In a case where the order appointing referees applies to all of the defendants, or in a case where all of the defendants have demanded a trial by the court, or all have demanded a trial by jury, there would of course be no doubt at all concerning the meaning of section 10 as applied to that situation. The only possible doubt will arise when there are two orders, one appointing referees and another setting the cause for trial, and when those two orders are not made on the same day. The statute (section 8) contemplates, however, that the two orders shall be made at the same time or very closely thereto; for it says that "if upon the hearing of such motion" any of the defendants waive a trial, the court must appoint the referees. The motion itself, however, is the motion to set the action for trial. The notice of motion to be made on a certain day to set the action for trial establishes a time at which it is proposed that the case shall be set for trial by the court without a jury—or with a jury, where that method is demanded—and shall also appoint referees to ascertain and report the compensation proper to be paid to such of the parties as have waived a trial by jury or by the court. The statute provides that those referees shall at once proceed to view the lands, etc. Reading together these several provisions of the statute, we think it a fair and reasonable construction of section 10 to hold that the phrase "the date of the order appointing referees" is subordinate to the phrase "the order setting the cause for trial," in those instances where the situation requires both methods of procedure in the same action. Under this construction, it may be that the referees would be required, in ascertaining the values that are to be fixed by them, to determine those values as of the date of "the order setting the cause for trial." On the record before us it appears that on December 5, 1921, when the case against defendant Young and her mortgagee was set for trial by jury, the court at the same time did order that the action as to the other defendants should be heard and tried by referees. The order of December 19, 1921, was merely an order selecting and appointing those referees—thereby carrying into effect the previous order. Under such circumstances, December 5, 1921, would be the appropriate date, as of which the referees should determine the right to compensation and damages of the parties whose claims

were submitted to the referees. We assume that it was so done. The record herein shows nothing to the contrary.

We conclude, therefore, that the court did not err in ruling that the values and damages should be fixed and assessed as of the 5th day of December, 1921, and did not err in limiting the evidence to the issue thus established for determination by the jury.

[4] Appellant contends that the orders of April 23, 1923, pursuant to which the action was continued to April 24th and assigned for trial in department 11, were irregular and erroneous, in this, that the orders thus made by the presiding judge were made contrary to the provisions of rule XVII of the superior court of Los Angeles county. Rule III defines the duties of the presiding judge and, among other things, provides that he shall supervise the condition of the trial calendars of the court and shall readjust the assignment of causes at issue at or before the time of trial thereof in such manner as best to dispose of the business. Rule XVII reads as follows:

"Civil actions at issue may be set for trial in the department of the presiding judge upon motion of a party, on 5 days' written notice of such motion to the adverse party, or on motion based on stipulation of the parties. Such motion must be noticed for, and will be heard at 10 o'clock a. m., of any legal day except Saturday, and will not be granted unless it first appear that the calendar fee has been paid, and that the required notice has been given; provided that the order may be made by consent expressed as required by rule XVIII."

We are of the opinion that the action of the presiding judge in making the transfer and order of continuance was substantially in compliance with these rules. No reason appears why, with the parties all before him in the department where the case had been called for trial, it should have been deemed necessary to pursue the far more inconvenient method of transferring the case to department 10 to be reset for trial. Under the circumstances, the order was one of continuance, and not in the nature of an original order setting the case for trial. Moreover, in view of our decision herein that the compensation and damages were properly measured according to valuations of the property ascertained as of December 5, 1921, the irregularity of the procedure now under consideration (if it was irregular or in any way erroneous) does not appear to have resulted in any material disadvantage to appellant.

[5] After the jury had been impaneled and sworn to try the case, the plaintiff requested that the jury be allowed to "view the premises" involved in this action. The defendant Young objected to this request and proposed order, on various grounds then and there stated by counsel. The court overruled the objections, "and the court thereupon ordered that the jury, before the taking of any evi-

dence, should be allowed to and should view the premises involved herein; that the court did not at said or any time make any order as to who should accompany said jury, did not place said jury in the custody of the bailiff of the court, or any other party, and did not designate any person whatsoever as the party to show the jury the premises to be viewed by them, particularly the property of Annie F. Young, herein sought to be condemned, and her property to be severed by virtue of such condemnation." The transcript describes in much detail the proceedings relating to this transaction. In brief, it appears that the jury were taken to view the premises by the court, "together with the officials of the court, that all of the property which the jury were taken to see, they were taken to see at the direction and under the supervision of, and in the presence of the court. The property lines were pointed out there in the presence of the court and the officials and of both counsel, by Mr. Meserve and Mr. Eberhard, but by no one else."

In relation to the view of the premises taken as above stated, appellant contends that the court erred, and that the required forms of law were not observed, in this, that no person was appointed by the court, charged with the duty of showing the premises to the jury, in conformity with the provisions of section 610, Code of Civil Procedure. It should be noted first that, while appellant made sundry objections to the granting of any order for a view of the premises by the jury, she did not then, or during the viewing of the premises, or even when the trial was resumed in the courtroom, make any objection to the form of the order or the method of carrying that order into effect. We therefore agree with counsel for respondent that an objection of this nature, not made at a time when there was opportunity to correct the alleged error, should not be considered as a ground for reversal on appeal. *People v. Nakis*, 184 Cal. 105, 113, 193 P. 92; *People v. Pompa*, 192 Cal. 412, 422, 221 P. 198.

[6] Appellant contends that the court erred in sustaining objections to certain questions propounded by her counsel on cross-examination of two of plaintiff's witnesses. Each of these witnesses had stated his opinion of the values of the property involved herein on the 5th day of December, 1921. On cross-examination the witness Culver was not permitted to state what, in his opinion, was the value of the entire property of appellant on July 1, 1922, or what was its value on October 10, 1922. He did state, without objection, that the value increased after December 5, 1921, down to and including the time when his testimony was given. He further testified, without objection, that the market value of that property as a whole on April 1, 1922, had not increased more than five per cent. over its value on December 5, 1921. The rulings on cross-examination of the witness Canfield

present in substance the same question of law that is presented by those relating to the testimony of Culver, and need not be separately considered.

Appellant claims that she had a right to cross-examine each witness as to his opinion of values down to the date of the trial; and that the alleged error was especially prejudicial for the reason that any value the jury might have ascertained from a view of the premises would be the value of the premises on the 24th day of April, 1923, the date of the view.

Assuming that the view of the premises by the jury was in its nature a taking of evidence, the issue of fact nevertheless remained unchanged. It related to the value of the property on December 5, 1921, and not at any later time. Since the witnesses for respondent on their direct examination had not testified to any valuations of later date, the court was justified in confining the cross-examination to a period of time reasonably near to the date in question. We think that there was no abuse of discretion in the rulings which enforced that limitation. The stated purpose of counsel for appellant, as declared by him to the court, was to show, not only the values at different dates running back to a time before December 5, 1921, but down to the date of the trial. The court was not bound to follow a course which would be likely to confuse the issue and unnecessarily extend the trial.

[7] There is some argument in which apparently appellant contends that the evidence does not sustain the verdict—although that assignment of error is not definitely stated in the brief. Our examination of the record has not led us into any doubt that the evidence is sufficient, except in one particular—and that doubt has been removed. The jury awarded \$1,500 as damages caused by the severance of one parcel of appellant's land from the condemned portion. The lowest amount given by any witness in actual figures relating to the damage to that parcel was \$1,658. In view of this fact, appellant contends that the evidence does not sustain this element of the verdict, and that the view of the premises by the jury, although in the nature of evidence, is not sufficient to create a conflict in the evidence so as to justify such a verdict. But even without any knowledge obtained by the jury in its view of the premises, the testimony of the witnesses as a whole justifies the jury in fixing said severance damage at \$1,500. We quote from respondent's brief, which we understand is in accord with the record:

"McGarry testified that the full value of this parcel, as a part of the whole, was \$400 per front foot, which would be \$1,808 for the 4.52 feet. Crippen testified that the damage to this parcel was 50 per cent. of its value. This would be \$904, based upon the McGarry valuation."

A number of other comparisons are made which are to similar effect. We are satis-

fied that the jury had a right, if so convinced, to rest its verdict upon the testimony of some of the witnesses as to the value of the parcel prior to said severance, and the testimony of other witnesses concerning the percentage of damage as compared with the original value. Further, the aggregate amount of compensation and damages awarded exceeds, by a large amount, the entire value of the property as valued by some of the witnesses.

[8] Finally, appellant contends that the interlocutory judgment is void on its face because it is limited to a determination of the rights of appellant and her mortgagee, and does not contain any determination based upon confirmation of the report of the referees before whom the action was ordered to be tried for the purpose of assessing the compensation and damages of the other defendants. The argument on this point rests upon section 12 of the Street-Opening Act of 1903 as amended by St. 1909, p. 1040, § 7, which reads as follows:

"Upon the confirmation of the report of the referees, or receipt of the verdict of the jury, or the filing of the findings of the court, the court shall make and enter an interlocutory judgment in accordance with such report, verdict or findings, adjudging that upon payment to the respective parties, or into court for their benefit, of the several amounts found due them as compensation, and of the costs allowed to them, the property involved in the action shall be condemned to the use of the plaintiff, and dedicated to the use specified in the complaint. The court shall allow to the referees, as costs to be paid by the plaintiff, a reasonable compensation for their services, the amount of which compensation shall be fixed by the court upon the hearing of the report, and their necessary expenses."

We think that the rendering and entry of judgment as the same was entered was within the power of the court and was not void. Section 6 of said Street-Opening Act provides that the action to condemn the property necessary to be taken for the stated purposes "shall in all respects be subject to and governed by such provisions of the Code of Civil Procedure now existing or that may be hereafter adopted, as may be applicable thereto, except in the particulars otherwise provided for in this act." We find nothing in section 12 or elsewhere in the statute which prevents the Code provisions from applying to the matter of entry of separate judgments under circumstances like those appearing in this record. Section 579 of the Code of Civil Procedure reads as follows:

"In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper."

[9] Assuming, as we must, that before an assessment can be made against the property within the assessment district for the purpose

of assessing thereon and collecting the sums necessary to pay for the improvement, an interlocutory judgment or judgments must first be entered covering all of the property that is to be taken, it may be further assumed that in due course a separate interlocutory judgment has been entered against the defendants whose compensation and damages were to be awarded under the report of the referees. For all necessary purposes of the proceeding, these judgments together will constitute the interlocutory judgment, upon entry of which the statute provides that the assessment shall be made (Street-Opening Act of 1903, § 15 et seq.). Appellant can suffer no loss or damage by reason of the fact that the court completes the condemnation proceedings by means of two entries of judgments instead of one. And this is so, notwithstanding that the common practice is to enter only one interlocutory judgment. This is solely a matter of procedure, and in this instance results from the fact that some of the defendants were content to have their damages determined by referees, while other defendants exercised their right to have a trial by jury. Assuming that the method of procedure was irregular, there was not any serious error therein. The case is thus brought directly within the terms of section 4½ of article 6 of the Constitution of California, wherein it is declared, among other things, that no judgment shall be set aside for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. It results that, even if it should be held that the entry of judgment against appellant and her mortgagee alone, without including therein a judgment based upon the report of the referees with respect to the rights of other defendants, constituted an irregularity or error, nevertheless that condition of the record would furnish no ground for a reversal.

The judgment and order are affirmed.

We concur: HAHN, Justice pro tem.; CURTIS, J.

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YOUNG v. CITY COUNCIL OF CITY OF LOS ANGELES et al. (Civ. 4990.)

(District Court of Appeal, Second District, Division 1, California. Sept. 30, 1925. Hearing Denied by Supreme Court Nov. 24, 1925.)

1. Appeal and error ⚡460(1)—Taking of appeal without bond is sufficient to stay execution of judgment, except where special bond required by statute.

Since amendments of 1921 (St. 1921, p. 95) made Code Civ. Proc. §§ 940-949, relative

to matter of taking appeal, section 949 has been construed to mean that perfecting of an appeal without a bond is sufficient to stay execution of a judgment except when special bond is required by sections 942-945.

2. Eminent domain ⚡258—Interlocutory judgment in proceedings under Street-Opening Act not a judgment under act requiring bond on appeal to stay judgment.

An interlocutory judgment awarding damages for compensation in a proceeding under Street-Opening Act 1903, is not a judgment to which Code Civ. Proc. § 945, which requires bond to stay judgment which directs sale and delivery of possession of real property, applies.

3. Eminent domain ⚡258—Assessments may be made under Street-Opening Act immediately after entry of interlocutory judgment in condemnation action, notwithstanding appeal.

Under Street-Opening Act 1903, held, in view of sections 13, 15, 37 thereof, that it was intended that assessment proceedings may be begun immediately after entry of interlocutory judgment in condemnation action, even though appeal therefrom was pending, for in view of sections 25, 32, appellant would not be deprived of fruits of appeal on contingency of judgment being set aside and increased award made; right to prosecute appeal so far as increased compensation is concerned being preserved by Code Civ. Proc. § 1254, which is made applicable to Street-Opening Act by section 6 thereof.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Proceeding by Annie F. Young against the City Council of the City of Los Angeles and Robert M. Allen and others, members of said City Council, to review an assessment made for purpose of widening a street. From judgment affirming order of the City Council confirming such assessment, plaintiff appeals. Affirmed.

Meserve & Meserve, of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for appellant.

Jess E. Stephens, City Atty., and Donald M. Keith, Deputy City Atty., both of Los Angeles (John A. Rush, of Los Angeles, of counsel), for respondents.

CONREY, P. J. This is a proceeding on writ of review, and comes before this court on appeal by petitioner from a judgment affirming an order of the city council which confirmed an assessment made for the opening, widening, and extending of Fifth street in the city of Los Angeles.

The street-opening proceedings were prosecuted under the Street-Opening Act of 1903 (St. 1903, p. 376). In connection therewith an action was brought against Dan Morris, Annie F. Young, and others to condemn certain real property required for said street purposes. An "interlocutory judgment" was

entered against Mrs. Young in that action. She appealed from that judgment. A decision has been rendered this day by this court, affirming said interlocutory judgment. *City of Los Angeles v. Morris et al.*, 241 P. 409. That decision contains a history of the progress of the condemnation suit to and including the entry of said interlocutory judgment.

From the petition for writ of review, taken together with the return thereon, it appears that in the condemnation suit the compensation and damages of Mrs. Young and her mortgagee were awarded pursuant to the verdict of a jury, whereas the compensation and damages of all the other defendants were determined in accordance with a report of referees appointed under the provisions of the statute. The interlocutory judgment against Mrs. Young and her mortgagee, which was entered on the 1st day of May, 1923, did not include any adjudication of the rights established by confirmation of the report of the referees. A separate interlocutory judgment as to the defendants included in the report of the referees was entered on June 6, 1923. Thereafter, on July 31, 1923, the city council directed the city engineer to prepare a diagram or map of the assessment district, as provided for by the Street-Opening Act of 1903. This diagram and map having been made and delivered to the board of public works, the board of public works proceeded to make its assessment against the real property included in the assessment district. The assessment having been completed and certified in due form and delivered to the clerk of the city council, and notice having been given by the clerk in due form as provided by the statute, various objections and protests in writing were made by property owners in the assessment district, including Mrs. Young. The objections of Mrs. Young, as stated in her protest, need not be repeated here. It is sufficient to say that the several grounds of objection to the authority of the city council to proceed in the matter of said assessment included all of the grounds of objection which are relied upon by her in the proceeding for a writ of review and on this appeal. The appeal of Mrs. Young from the interlocutory judgment entered against her had been taken by her within 30 days from such entry, and has so remained, pending and undecided, until the present time.

Appellant relies upon two propositions: First, that there was no power in the superior court to render two "interlocutory judgments" in an action brought under the Street-Opening Act of 1903; second, that the city council does not have the power or right "to levy assessments" under said act, when there is an appeal pending from the interlocutory judgment entered in a condemnation action brought pursuant to the provisions of that act.

The first of these contentions has been decided adversely to appellant, in the decision

rendered on the appeal in the other case. *City of Los Angeles v. Morris et al.*, supra.

[1, 2] The sections of the Code of Civil Procedure which deal with the manner of taking an appeal, and with the stay of proceedings (sections 940 to 949, Code Civ. Proc.), remain unchanged since the year 1921. Since the amendments made during that year (St. 1921, p. 95), section 949 has been construed to mean (so far as the general rules of practice are concerned) that the perfecting of an appeal, without a bond, is sufficient to stay execution of a judgment except when a special bond is required under sections 942, 943, 944, or 945. *People v. Jackson*, 190 Cal. 257, 262, 212 P. 4. Respondent claims that appellant gave no stay bond on appeal in *City v. Morris*, supra, and that the case is one where, to stay enforcement of the judgment, a bond was required under the provisions of section 945, Code of Civil Procedure, which applies to a judgment which directs "the sale or delivery of possession of real property." The record here, while it does not state that a bond was given, does not state the contrary. Let it be assumed that there was none. Nevertheless, we are of the opinion that the interlocutory judgment in question was not a judgment to which the provisions of said section 945 apply. In *City of Los Angeles v. Pomeroy*, 132 Cal. 340, 64 P. 477, it was so held, with respect to the final judgment following the interlocutory judgment. It follows that the appeal stayed all proceedings on the judgment, unless the provisions of the Street-Opening Act of 1903 are such that they create an exception to the rule, or unless in the absence of such provision there is a like exception contained in the title on Eminent Domain (section 1237 et seq.) in the Code of Civil Procedure.

Here it must be noted that the orders of the city council, against which appellant's petition is directed, are not orders made under any execution or command of the court requiring the council to do anything under and by virtue of the interlocutory judgment. The entry of that judgment, even if there had been no appeal, had no effect upon the council, except that such entry created the condition which authorized the council to proceed. "Upon the entry of the interlocutory judgment, the city council shall," etc. But the act also provides (section 14) that the council may abandon the proceedings at any time prior to payment of the compensation awarded the defendants.

For the purpose of further testing the merits of the case, we shall assume, however, that the orders of the council, including its hearing of protests against the assessments, and decision thereon, and confirmation of the assessments, are proceedings in the nature of a proceeding to enforce the interlocutory judgment. And since they include determinations of fact, upon evidence received, we further assume that the matters to be deter-

mined are of a judicial nature, and so are subject to attack in a certiorari proceeding.

[3] The terms of the Street-Opening Act of 1903, § 15, on their face indicate a legislative intention that the assessment proceedings shall begin immediately upon the entry of the interlocutory judgment in the condemnation action. And yet it appears, by the terms of section 13 of the same act, that 30 days are allowed, from the entry of that judgment, for taking an appeal therefrom. It is, we think, an appropriate inference from these provisions, reading them together, that the taking of the appeal is not intended to have the force of a stay of the assessment proceedings. Section 37 of the act declares that the provisions of this act shall be liberally construed to promote the objects thereof.

But appellant contends that this interpretation of the statute is unreasonable because, if the assessment against the property subject to assessment be completed and enforced, she will be deprived of the fruits of her appeal if the interlocutory judgment be reversed and if she shall afterwards recover judgment awarding increased compensation and damages. Section 32 of the act provides as follows:

"In case of a deficiency in the fund for such improvement, the city council, in its discretion, may provide for such deficiency by an appropriation out of the general fund of the treasury, or by ordering a supplementary assessment to be made by the street superintendent upon the property in said assessment district in the same manner and form, and subject to the same procedure as the original assessment, and in the last named case, in order to avoid delay, the city council may advance such deficiency out of the city treasury and reimburse the treasury from the collections under such supplementary assessment. In case of a surplus in the fund for such improvement, the city council may order such surplus refunded pro rata to the parties who paid the assessments."

The provisions of the act are such that a deficiency in the fund cannot be created through failure of the assessment collections to provide the full amount awarded to the defendants in the interlocutory judgment. The contingency of such failure is provided against by section 25 of said act. It is there provided that in case of a delinquent sale for nonpayment of the assessment against any property assessed, each parcel separately assessed must be offered for sale separately and sold to the person who will take the least quantity of land and then and there pay the amount of the assessment, etc. In the absence of such purchaser, it is provided that the property shall be struck off to the municipality as purchaser, and the city council shall appropriate out of the general fund of the treasury the amount required for such purchase, and shall order the city treasurer to place the same in the special fund for such improvement. Since there is apparently no other way by which a deficiency in the fund

could be created, we infer that section 32 was intended to provide for this very contingency of an increased award, in a case where the interlocutory judgment has been set aside and on second trial of the action a larger award has been obtained.

But appellant further contends that this interpretation of the statute is unreasonable because, if by enforcement of the assessment while the appeal is pending she shall be forced to pay the assessment, and particularly if she shall find it necessary to claim the right given her by the statute to offset the amount allowed to her in the present interlocutory judgment as a credit on the assessment, by so doing she will lose her right to further prosecute her appeal. This contention is based upon those decisions which hold that one may not accept the benefit of a judgment and at the same time maintain an appeal therefrom. But we think that there is an important limitation to the enforcement of this rule against a defendant whose property is being condemned for a public use. Section 1254, Code of Civil Procedure, provides that in such an action, at any time after entry of judgment or pending an appeal therefrom, where the amount awarded has been paid into court for the defendant, he may receive said money, upon filing a receipt therefor, "and an abandonment of all defenses to the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial shall be granted." By this saving clause, the right to prosecute the appeal, so far as increased compensation is concerned, is fully preserved. *Mt. Shasta Power Corporation v. Dennis*, 66 Cal. App. 186, 191, 225 P. 877. We are not aware of anything which prevents the same clause from applying, with like effect, to an action brought under said Street-Opening Act of 1903. Section 6 of said act provides directly that such an action shall be governed by the Code of Civil Procedure, where applicable thereto, "except in the particulars otherwise provided in this act."

In the case at bar, it does not appear that Mrs. Young's defense to the condemnation, action, or her appeal from the judgment therein, related to any other issues than those pertinent to her claim for compensation. Her protest to the council and her petition for the writ of review indicate that her appeal is solely grounded upon claims of error which prevented her from obtaining adequate compensation and damages. It has not been contended herein that said appeal extends beyond that subject. We therefore conclude that the completion of the assessments as ordered by the council, and even their enforcement in due course while the appeal is pending, would not deprive appellant of the full beneficial results of a successful appeal, supposing that eventually, in the condemnation action, she shall obtain an increased award of compensation for her property, or

increased damages. We therefore think that there is no valid objection to our conclusion that by said Street-Opening Act it is definitely intended that the council shall have power to cause the assessments to be made immediately when the interlocutory judgment has been entered, notwithstanding that there may be an appeal from such judgment.

The judgment of the superior court is affirmed.

We concur: CURTIS, J.; HAHN, Justice pro tem

74 Cal. App. 528

SEUFERT v. COOK et al. (Civ. 2968.)

(District Court of Appeal, Third District, California, Oct. 13, 1925. Hearing Denied by Supreme Court Dec. 10, 1925.)

1. Waters and water courses — 115—“Surface waters” and “flood waters” distinguished.

“Surface waters,” comprising rainwater moving across the country and not coming from any definite source, are clearly distinguished from “flood waters,” or waters spreading out from overflowing streams having definite channels, and the changing of the waters ordinarily flowing within the banks of well-defined channels.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Surface Water; Second Series, Flood Water.]

2. Levees and flood control — 9—Pleading — 18—Levees may be built against flood waters though waters thrown on other lands; complaint not stating whether waters were flood or surface waters ambiguous and uncertain.

Reclamation district established by St. 1913, p. 130, to carry out part of plan adopted by St. Ex. Sess. 1911, p. 117, had right to build levee to protect lands within district from flood waters, though they were thereby thrown on lands outside district, and hence complaint not stating whether waters were flood or surface waters was ambiguous and uncertain.

3. Levees and flood control — 19—Complaint for injuries from flooding held not to state cause of action.

In action against reclamation district, established by St. 1913, p. 130, pursuant to Act December 24, 1911 (St. Ex. Sess. 1911, p. 117), and state reclamation board, for damages from construction of levee blocking ordinary course of waters gathering in certain basin, complaint held not to state cause of action.

Appeal from Superior Court, Sutter County; George H. Thompson, Judge.

Action by John Seufert against Peter Cook and others, as members of Reclamation Board of State of California, Reclamation District No. 1500, and F. W. Kiesel and others, Trustees of Reclamation District No. 1500. Judg-

ment for defendants on their demurrer to complaint, and plaintiff appeals. Affirmed.

W. H. Carlin, of Marysville, and A. H. Hewitt, of Yuba City, for appellant.

Devlin & Devlin, of Sacramento, A. C. Huston and H. L. Huston, both of Woodland, and Stephen W. Downey, of Sacramento, for respondents.

PLUMMER, J. By this action plaintiff seeks to recover from the defendants damages in the sum of \$171,850 alleged to have been caused to his lands and the lands of 32 other persons, assignors of the plaintiff, by the negligent acts of the defendants. The trial court sustained the demurrer of the defendants to the plaintiff's amended complaint, and from the judgment thereafter entered upon the sustaining of such demurrer the plaintiff appeals.

The complaint sets forth 33 separate causes of action, but the gravamen of each cause is set forth in identical words, save and except as to the amount of damages alleged in the different causes of action. The questions presented for determination necessitate a consideration only of the allegations set forth in the following language:

“From time immemorial and up to and on or about the 12th day of February, 1919, in the winter or rainy season of every year large bodies of water accumulated along and near the westerly portion of Sutter county far and westerly from the said lands of plaintiff in what was generally known as the Sutter Basin and the Sutter Tules, whereby and through which said water ultimately flowed off into the Sacramento river without injuring, damaging or in any way affecting plaintiff's lands or any crop growing thereon; however, between the 10th day of August, 1913, and the 12th day of February, 1919, defendants and every of them, acting jointly and in unison, began and proceeded to carry out a plan of reclamation and flood control wherein and whereby it was proposed to reclaim the lands in said Sutter Basin over and upon which said water had from time immemorial in the winter season of every year flowed as aforesaid by the construction and maintenance of a by-pass to the east of said Sutter Basin and to the west of plaintiff's said lands and through said by-pass to carry off the said waters which had theretofore flowed down through said Sutter Basin as aforesaid.

“The said plan for reclamation and flood control provided that said by-pass should be of sufficient width and also that there should be constructed and maintained, on both the easterly and westerly sides thereof, a levee of sufficient height, dimensions, continuity and structure so as to permit all said waters to be by and through said by-pass carried on down the same in a general southerly direction without flowing upon or flooding any of the lands of plaintiff or any lands similarly situated with respect to said by-pass.

“On or about the 12th day of February, 1919, and after the construction of said westerly

levee of said by-pass but before the construction and completion of said easterly levee of said by-pass in accordance with the plan therefor or at all, said defendants, acting jointly and in unison as aforesaid, willfully, negligently and wrongfully caused and permitted said waters to be turned away from said Sutter Basin or Sutter Tules and into said by-pass and because of the then unfinished, incomplete, defective and in some places, practical absence, of said east levee of said by-pass, the waters thus caused and permitted to flow into said by-pass flowed and poured over and through said unfinished, incomplete and defective east levee aforesaid and therefrom down, over and upon plaintiff's said lands, and said waters did then and there inundate and submerge plaintiff's said lands and did destroy valuable crops of grain and alfalfa, also valuable trees and vines belonging to plaintiff and then growing thereon to plaintiff's damage in the sum of \$5,300; and thereby, in addition to said damage done to said crops, trees and vines, said waters did injure and damage plaintiff's said lands in the further sum of \$500."

For convenience we have quoted the language in which the first cause of action is alleged, which is identical with the allegations contained in the remaining 32 causes of action.

The demurrers to the complaint are both general and special and raise all the questions which we will consider herein.

The legal history of this case really begins with the act of the Legislature approved December 24, 1911 (Stats. Ex. Sess. 1911, p. 117), adopting the report of the California Débris Commission theretofore transmitted to the Speaker of the House of Representatives of the United States by the Secretary of War. By that act of the Legislature a reclamation board consisting of three members was created having power to approve plans of reclamation for the construction of levees, embankments, canals, etc., along the Sacramento river, for the reclamation of overflow lands, and the control of flood waters. In furtherance of the execution of the plans contemplated by the report above referred to, the Legislature of this state in 1913 (Stats. 1913, p. 130) created the defendant reclamation district No. 1500. The history and purpose of this district are concisely set forth in *Reclamation District v. Riley*, 192 Cal. 147, 218 P. 762, from which we take the following:

"Reclamation district No. 1500 was created pursuant to the provisions of an act entitled 'An act creating a reclamation district to be called and known as "Reclamation District No. 1500"' (Stats. 1913, p. 130). This statute declares that 'It shall be the duty of said reclamation district No. 1500 to construct a levee, forming the south side of Tisdale by-pass, and a portion of the westerly side of the Sutter Basin by-pass. * * *'. These by-passes were a part of a comprehensive plan known as the report of the California Débris Commission, adopted by legislative enactment for the flood control of the Sacramento river in its

entirety and the reclamation of lands which had been formerly inundated by the flood waters of the river. (Stats. 1911, Ex. Sess., p. 117.) As a governmental agency to carry out the plan of flood control and reclamation there was created the Sacramento-San Joaquin drainage district, which embodied within its confines reclamation district No. 1500 and other reclamation districts not necessary to be enumerated here. (Stats. 1913, p. 252.) The management and control of the drainage district was vested in the state reclamation board. (Stats. 1913, p. 252, § 5, p. 266.) The statutory plan as adopted contemplated that the flood waters of the Sacramento river would be led through certain weirs and by-passes into one main by-pass, which would ultimately, through the medium of other and intermediate by-passes, empty into San Francisco Bay. In order to facilitate the expedient carrying out of the plan it was provided that the entire work should be divided into separate projects by the state reclamation board, which should then be constructed as separate units. (Stats. 1913, p. 252, § 13, p. 269.) Each project was to be designated by a number and a name, and the project of which the levees in controversy are a part is known as the 'Sutter-Butte By-pass Project No. 6.'"

The act of 1913 also provided that the defendant district No. 1500 should erect certain described portions of what is therein designated as the east levee of the Sutter by-pass, it being contemplated that when the work was all finished, the flood waters of the Sacramento river and its tributaries, which, as alleged in the complaint, had from time immemorial spread out over the Sutter basin comprising most of the lands included within district No. 1500, would be conveyed on down to what is known as the Yolo by-pass, and thence to the Suisun Bay, within certain defined limits. It appears that the lands of the plaintiffs and his assignors lie above the elevation of what is known as contour 40, and that the area comprised within the limits of reclamation district No. 1500 is of a sufficiently lower elevation to accommodate the flow of the flood waters finding their way over the same without damage or injury to the lands of the plaintiff and his assignors.

The Legislature of this state, by an act approved May 26, 1913 (St. 1913, p. 252), also created what is known as the Sacramento-San Joaquin drainage district, placing the control thereof in the reclamation board of the state of California. The lands belonging to the plaintiff, and also all the lands lying within the boundaries of reclamation district No. 1500, are included within the exterior boundaries as set forth in the act creating the Sacramento-San Joaquin drainage district. This latter act empowers the state reclamation board to approve all plans of reclamation before the same are executed and also authorizes said board to prevent the erection of any levees, embankments, etc., until the plan for the erection of the same

should have been approved by the reclamation board.

Pursuant to these acts of the Legislature, the defendant district No. 1500 has proceeded to erect a levee along the Tisdale by-pass, and also along the easterly boundary line of reclamation district No. 1500, which constitutes the westerly boundary of the Sutter by-pass. The easterly levee of the by-pass authorized to be constructed by the act creating defendant district No. 1500 had not, at the time of the injury complained of, been constructed, or, at least, not sufficiently so to prevent the flood waters of the Sacramento river and its tributaries from spreading out over adjacent lands.

According to the allegations of the complaint, in February, 1919, the waters which theretofore had found their way over the Sutter basin and across the lands included within the limits of reclamation district No. 1500, were deflected and thrown back and over and upon the lands belonging to the plaintiff and his assignors, by reason of the erection of the levee referred to, as being constructed along the easterly boundary of district No. 1500, that levee having been constructed prior to the construction of the levee along the easterly boundary of the Sutter by-pass contemplated by the act referred to, and being a part of the work necessary for the conveying of the flood waters of the Sacramento river and its tributaries within definite boundaries.

As set forth in the various cases decided by the Supreme Court of this state having to do with litigation arising out of the adoption and execution of plans for the control of the flood waters of the Sacramento river and its tributaries, three objects are sought to be obtained: (1) The improvement of navigation of the Sacramento river; (2) the reclamation of the lands lying along said rivers; and (3) the confining of the flood waters within definite boundaries by the construction of weirs, levees, and such other works as might, from time to time, be found expedient or necessary. The history of the reclamation work to which we are referring, as set forth in the various cases having to do therewith, also shows that the execution of the work has been hampered and delayed by the lack of funds and also the obstacles thrown in the way of the execution and use of the funds provided, or attempted to be provided, for defraying the expenses of the contemplated improvements. Just how long the completion of the plans approved by the Legislature and provided by the act of the Legislature to be put into execution have been delayed does not appear, but the several cases relating thereto indicate that the period comprises a number of years. It would seem that these obstacles and the litigation concerning the district caused a delay of a sufficient period of time which otherwise would have sufficed for the building of the

easterly levee of the Sutter by-pass, as contemplated by the act of the Legislature of 1913. We speak of these because the records show the causes of the delay, and therefore that such delay cannot be held as chargeable to the officers of the district having to do with the execution of the contemplated plans.

This brings us down to a consideration of the allegations contained in the plaintiff's complaint. Among other things set forth therein, we find the following:

"On or about the 12th day of February, 1919, and after the construction of said westerly levee of said by-pass but before the construction and completion of said easterly levee of said by-pass in accordance with the plan therefor or at all, said defendants, acting jointly and in unison as aforesaid, willfully, negligently and wrongfully caused and permitted said waters to be turned away from said Sutter Basin or Sutter Tules and into said by-pass and because of the then unfinished, incomplete, defective and in some places, practical absence, of said east levee of said by-pass, flowed and poured over and through said unfinished, incomplete and defective east levee aforesaid and therefrom down, over and upon plaintiff's said lands," etc.

[1] It is sought by the allegations of the complaint of which the foregoing is a portion to charge the officers of said reclamation board and of reclamation district No. 1500 with the damages caused by the overflowing of plaintiff's lands on account of the erection of the levee along the westerly boundary of the proposed by-pass before the completion of the levee along the easterly boundary thereof. The gist of the allegation is really that the flood waters of the Sacramento river and its tributaries should have been allowed to follow its immemorial trend over the lands comprised within reclamation district No. 1500 until the levee along the easterly line of the proposed by-pass had been fully completed, or, to put it in other words, that protection should not have been afforded to the lands of the district before protection was also afforded to lands lying without the district. In support of this contention our attention is called to page 19, second edition, of Cooley on Torts, setting forth three definitions of negligence or acts for which one may become liable:

"(1) By actually doing to the prejudice of another something he has no legal right to do; (2) by doing something he may rightfully do, but wrongfully or negligently doing it by such means, or at such time, or in such manner, that another is injured; (3) by neglecting to do something which he ought to do, whereby another suffers injury."

This definition was adopted and approved by the Supreme Court in *Perkins v. Blauth*, 163 Cal. 782, 127 P. 50. In that case the trustees of reclamation district No. 785 were held liable for having negligently cut down a certain levee for the purpose of affording

passageway for a dredger into said district, that necessary precautions were not taken and certain lands belonging to the plaintiff were inundated and crops destroyed. The allegations of the complaint in that case were to the effect that the defendants cut a canal through the natural banks of the Sacramento river and failed to take proper precautions to prevent the waters therefrom from flooding the plaintiff's lands. A number of cases are cited in the opinion having to do with the negligence of officers in the execution of work which they may legally perform, and in the doing of which they will not be liable if properly performed, but for which they will be liable if negligently performed. With that case and the numerous other cases cited by counsel supporting the same rules, we take no exception, but from the dissimilarity of the facts involved we think inapplicable to the questions tendered for determination in this case. The cases also touching upon these questions draw a clear distinction between what are called surface waters, i. e., rain-water moving across the country, and not coming from any definite source, flood waters, or waters spreading out from overflowing streams having definite channels, and the changing of the waters ordinarily flowing within the banks of well-defined channels. Thus, in *Proper v. Sutter Drainage Dist.*, 53 Cal. App. 576, 200 P. 664, the syllabus reads:

"The trustees of a drainage district are personally liable for the failure to use ordinary care to prevent the flooding of private property by the canals of the district."

This case is cited to us as an authority establishing the sufficiency of the plaintiff's complaint. An examination of the facts set forth in the *Proper Case* shows a striking dissimilarity from those set forth in the complaint under consideration. The acts charged in the *Proper Case* are alleged as follows:

"Said defendants and all of them, in their management, control and operation of said main and lateral drainage canals, collected therein large bodies of water for the purpose of draining the territory traversed by said main canal * * * and said defendants in their said conduct and management of said canals did collect and convey down through said main canal where the same crosses the said lands of plaintiff and into said lateral canal, a large volume of water far in excess of the carrying capacity of said canals, and did overflow the banks of both thereof and did thereby, by the conveyance of such water down such canals, overflow the banks of said canals and did precipitate water upon and flood the said lands of plaintiff," etc.

The facts set forth in the opinion also show that the waters collected by the defendants were largely composed of surface waters collected by the canal of the defendant as aforesaid. Under these circumstances, the trustees of the district were held liable. The *Proper Case* follows the rule laid down

in the case of *Sanguinetti v. Pock*, 136 Cal. 466, 69 P. 98, 89 Am. St. Rep. 169, where the distinction is drawn between the right to protect against surface waters and flood waters. In the case of *Pac. Seaside Home v. Newbert P. Dist.*, 190 Cal. 544, 213 P. 967, relied upon by the appellant, the facts show that the defendant attempted to construct a channel for the Santa Ana river, and so defectively and negligently constructed the same that the channel was insufficient to carry the waters of said stream, etc. There is nothing in that case touching upon the question of the right of any one to protect his lands from overflow by flood waters. The Santa Ana river, it would appear, had its definite channels and the attempt was made to provide a new one, which was alleged to be improperly constructed, etc. This case and others cited by appellant are all unquestionably good law when applied to the facts under consideration, and as controlled by what has become the leading case in this state on the subject of the police powers of the state acting through its agencies to control the flood waters thereof. We refer to *Gray v. Reclamation District No. 1500*, 174 Cal. 622, 163 P. 1024.

[2, 3] Beginning with the case of *Green v. Swift*, 47 Cal. 536, followed up by *Lamb v. Reclamation Dist. 108*, 73 Cal. 125, 14 P. 625, 2 Am. St. Rep. 775, and *Sanguinetti v. Pock*, supra, the right to levee against flood waters has become firmly established in this state.

The legal right to build levees to ward off the common enemy, known as flood waters, was fully established by the cases decided prior to the rendition of the opinion of the Supreme Court in the case of *Gray v. Reclamation Dist. 1500*, supra, but they are all set forth in this latter case, which has become the leading treatise upon the subject of surface and flood waters in the state of California, and what may be legally done in relation to the control thereof, the protection of land subject to overflow by flood waters by the building of levees, and when liability does, or does not, ensue from the erection of such works. We might multiply words, but upon the subject of the flood waters escaping from the Sacramento river and its tributaries, we think that nothing of substance can be added to, or taken away from, what is said in the opinion of the Supreme Court, when deciding the *Gray Case*. We therefore simply refer to that case as unquestionable authority for the right of trustees of reclamation district No. 1500 to erect the levees protecting the lands lying within reclamation district No. 1500 from the overflow waters of the Sacramento river and its tributaries, and also the police powers of the state to provide for the erection of all the levees contemplated by the act of the Legislature creating reclamation district No. 1500.

With the foregoing matters kept in view,

we will begin consideration of the alleged cause of action set forth by the plaintiff. There is first a want of any statement as to the character of the waters that from time immemorial accumulated along and near the westerly boundary of Sutter county. Whether these waters were surface waters or flood waters is not stated. Against this lack of definite statement the defendants interposed a demurrer for ambiguity and uncertainty, which demurrer, we think, is well taken. The complaint then sets forth that the defendants "between the 10th day of August, 1913, and the 12th day of February, 1919, * * * began and proceeded to carry out a plan of reclamation and flood control wherein and whereby it was proposed to reclaim the lands in said Sutter basin over and upon which said water had from time immemorial in the winter season of every year flowed as aforesaid." If the waters so flowing over the Sutter basin were flood waters, what the plaintiff has alleged that the defendants proposed and were proposing to do is exactly what the Legislature authorized them to do, and which the law declares that they may do. District No. 1500, as shown by the authorities which we have cited, had a perfect right to build a levee along the northerly and easterly boundary of the district to protect the lands lying within the district from flood waters coming across the country, even though these flood waters were by such action caused to flow upon the lands lying without the district. To further allege that the trustees of the district were negligently doing what they had a lawful right to do, without showing facts that they were performing a lawful act in a negligent manner, likewise fails to state a cause of action; nor can the members of the state reclamation board be held liable for having approved a plan provided for by the Legislature and authorizing the trustees of reclamation district No. 1500 to execute a plan and build a levee to protect said reclamation district from the flood waters of the Sacramento river and its tributaries without showing that said defendants participated in and authorized these acts to be performed in a negligent manner. That the erection of the levees on both sides of the contemplated by-pass is a work much to be desired and which will prove highly beneficial to all parties and landowners in the Sutter basin, and will afford protection to the lands of the plaintiff and his assignors from the flood waters of the Sacramento river and its tributaries, has no bearing whatever upon the right of reclamation district No. 1500 to protect itself from the same flood waters. Whatever may be the law in other states, the right to protect one's property against the common enemy is firmly established in this state.

Defendants have urged a number of other

special grounds of demurrer, but, as what we have said is decisive of the case, we think is unnecessary to set them forth in this opinion.

We think the plaintiff's complaint does not state a cause of action, and the judgment of the trial court is therefore affirmed.

We concur: FINCH, P. J.; HART, J.

74 Cal. App. 598

BECKLEY v. ARCHER et al. (Civ. 2965.)

(District Court of Appeal, Third District, California. Oct. 16, 1925.)

1. Fraud —20—Reliance on representations necessary to fraud.

In order to make a cause under Civ. Code, § 1572, subds. 1 and 2, for fraud and deceit by seller of cows in making alleged misrepresentations, it is not only necessary to prove that representations were made and were false, but that buyer solely relied thereon and was led to make purchase solely by reason thereof.

2. Fraud —22(1)—Seller's statements, as to condition of udders of cows held not actionable.

Where seller of dairy cows misrepresented that udders of all cows were in normal condition, *held* that, it being matter of common knowledge that veterinarian is not required to discover defects in udders of milk cows, and, buyers having convenient opportunity for inspecting cows before purchasing, it was their duty to do so rather than rely on seller's statements, and fraud could not be predicated thereon.

3. Fraud —11(1)—Seller's statement cows were with calves held expression of opinion not actionable.

Where seller represented that all dairy cows sold were with calves and would calve within six weeks, evidence *held* to show that such statement was an expression of opinion honestly made, with no intent or purpose to deceive buyers, and hence was not actionable.

4. Fraud —20—Seller's statement cows would calve within six weeks not actionable, where buyers made inspection.

Statement by seller of dairy cows that cows were with calves and would calve within six weeks *held* not actionable, where buyers, who had long experience in handling dairy cows, could by exercise of their own judgment upon inspecting cows have satisfied themselves whether cows would calve within six weeks, thus disproving any reliance by them on seller's statement.

5. Fraud —64(3)—Representations by sellers of cows held for jury.

Conflict in evidence as to whether or not seller of dairy cows represented to buyers that cows were not afflicted with disease of abortion *held* to make it question for jury to resolve.

6. Fraud ⚡11(1)—Seller's statement cows were free from disease of abortion held mere expression of opinion.

Where fraud on part of seller of dairy cows in representing that they were free from disease of abortion was alleged, held that, in view of fact that disease can be discovered only by microscopical examination or examination involving scientific test, buyers who had read about such disease must have known that seller, who was not a veterinarian, and did not pretend that examination of cows had been made, was merely expressing his opinion in making such statement.

7. Fraud ⚡20—False representations must actually have deceived one parting with something of value.

To constitute fraud, false representations must actually have had effect of deceiving and thus led party to whom they were made into entering in an agreement, by terms of which he parts with something of value.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fraud.]

8. Fraud ⚡20—Seller's representations not actionable, where buyer relied on own judgment.

Where buyer in contract of sale of property disregards representations of seller as to character, condition, or quality of such property, and prosecutes independent investigation and relies thereon in making purchase, he cannot predicate rescission of contract or maintain action for damages on representations made by seller, even though false.

9. Fraud ⚡20—Buyer purchasing in reliance on own investigation cannot claim damages for false statements by seller.

If buyer by his own investigation learns real facts concerning property, and makes purchase, relying solely on what he has thus learned, he cannot claim damages based on false statements by seller regarding quality of property which did not induce buyer to make purchase.

10. Fraud ⚡20—Buyer disregarding seller's representations cannot allege fraud, though independent investigation ineffectual.

The essential elements of action under Civ. Code, § 1571, for fraud and deceit, being deceit practiced by defendant on plaintiff producing damage complained of, if buyer wholly disbelieves representations made by seller, and does not act or rely on them, he cannot claim to have been defrauded in making such purchase, even though he ineffectually prosecuted an independent investigation as to condition of property involved.

11. Fraud ⚡9—Seller's statement as to adaptability of property for certain uses not fraud.

Mere statement by seller of property as to its adaptability to certain uses does not constitute fraud, unless false and made with intent to defraud party of his property.

12. Trial ⚡296(1)—No prejudice held to have resulted from objectionable instruction, in view of other instructions giving correct rule of law.

Even though instruction in question is subject to criticism, and other instructions containing correct statement of law were inconsistent, no prejudicial error resulted where repugnancy between such instructions was so slight that jury could not have been misled as to true rule.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by J. L. Beckley against J. B. Archer and others, wherein defendants filed a cross-complaint. Judgment for plaintiff, and defendants appeal. Affirmed.

Hudson Grant, A. G. Bailey, and A. C. Huston, all of Woodland, for appellants.

Forrest A. Plant, of Davis, for respondent.

HART, J. The plaintiff brought this action to recover on a promissory note in the sum of \$3,000 executed by the defendants in favor of one H. H. Schmitt as in part payment of the purchase price of a certain number of head of cattle. Said note was by said Schmitt, before the filing of the complaint herein, assigned to the plaintiff. It was stipulated at the trial "that the note was duly made and executed by appellants and delivered to said Schmitt; that no part of the principal or interest had been paid, but that a credit of \$175 should be allowed upon the note principal as of the date of its execution; that in the transaction from which said note arose said Schmitt was the agent of the respondent herein, and the note was delivered to him (Schmitt) as the agent of the respondent."

The defendants, by their answer, admit the due execution of the note sued on, but set up as in avoidance of the obligations thereof a special defense founded upon fraud, alleging that they were induced to purchase the cattle, which consisted of 49 head of "dairy cows," upon the false representation by the said Schmitt that the said cows were in a perfectly healthy condition and in every way adapted to the purposes of dairy cows. Defendants also filed a cross-complaint for damages in the sum of \$10,390 alleged to have been by them suffered by reason of said alleged fraud. To the cross-complaint the plaintiff interposed an answer, denying the allegations charging fraudulent representations by Schmitt as to the character and condition of the cows.

Upon the issues made by the cross-complaint and the answer thereto the cause was tried by a jury, with verdict for the plaintiff. Judgment was entered accordingly. A motion by defendants for a new trial having been disallowed, the defendants have brought the case here upon an appeal from the judg-

ment. The points pressed upon us for a reversal are that the verdict is without enough support, and that certain instructions embraced within the trial court's charge to the jury involve misstatements of the law, and, consequently, seriously militated against the rights of the defendants in the trial of the action.

The defendants, at the time of the transaction eventuating in the purchase by them of the dairy cows above referred to, were, on or about January 8, 1922, and for a long period of time prior thereto, engaged in conducting a dairy business in Yolo county. On the date just mentioned, they entered into an agreement with one H. H. Schmitt, whereby they purchased and said Schmitt sold to them the said 49 head of cows at the agreed price of \$110 per head. These cows, as the cross-complaint alleges, and the undisputed evidence shows, were purchased by the defendants for use as dairy cows.

It appears from the evidence that Schmitt, acting for the plaintiff in the matter, procured the cows from a man named Adams, who had a short time previously shipped the animals with other cows from the state of Texas and placed them on his ranch near Lathrop, San Joaquin county. While the matter of the sale of the cows by Adams to Schmitt was pending and before the trade was completed, the latter had 61 head of the cows segregated from a band of 88 belonging to Adams, and had them driven into a field in which they were kept by themselves to the end that they might the better be inspected and subjected to an examination which would determine their condition as to physical soundness and their suitability for dairy use. Thereafter Schmitt had the cows inspected and examined by a veterinary, Dr. Lichtenwalter, and an experienced dairyman by the name of Bracken. The examination by the veterinarian was confined principally to the tuberculin test, conducted by the method usual in such cases. Upon this examination, and the opinion of the veterinary and Bracken that 50 head of said cows were in a healthy condition, being free from tubercular symptoms or other diseases to which cattle are peculiarly subject, Schmitt took the cows at the rate of \$100 per head, exchanging mules therefor at the rate of \$85 per head. Immediately after the consummation of this bargain, Schmitt drove the cattle to the ranch of Bracken, above spoken of, also situated a short distance from the town of Lathrop. All these transactions took place early or in the middle of the month of December, 1921. About 15 or 18 days after he had procured the cows, Schmitt, having learned that the defendants desired to purchase some dairy cows, entered into negotiations with the latter for the sale to them of said cows. After some discussion of the proposition between the parties, the defendants, accompanied by one Lewis Sheridan,

went to the Bracken ranch to look at or inspect the cattle, with the result that they bought 49 head of the cows at the rate of \$110 a head, they having themselves selected them from the herd procured by Schmitt from Adams.

At the trial, and in support of their defense and the charge set up in their cross-complaint that Schmitt falsely and with intent to defraud them represented the cows to be in a perfectly healthy physical condition and adapted to dairy purposes, the defendants testified that, while they were looking the cattle over before a sale thereof to them was perfected, they asked Schmitt particularly as to whether the cows were afflicted with a disease known as "abortion"—a condition, as we understand it, in female cattle which becomes of a chronic character, and which, when existent in such cattle, arrests gestation and so causes the premature delivery of calves, with the almost invariable result that the calves are either dead when delivered or die within a short time thereafter, thereby deteriorating the milk-producing quality of the cows; that they also asked Schmitt whether the cows were udder deficient, whether they were with calves, and, in short, whether they were in all respects perfectly fit for dairy use; that Schmitt replied in the most positive terms that the cattle were not suffering from the disease known as "abortion," and were wholly free from tuberculosis; that he had had the cows thoroughly examined by Dr. Lichtenwalter, and that the doctor had pronounced them in a perfect condition of health, bearing none of the symptoms of any disease peculiar to cattle; that the cows would produce calves, and that some of them were already with calves. The defendants further testified that the cows proved entirely worthless for use as dairy cows; that only 8 of the number were with calves when taken to their dairy ranch, but the calves came prematurely, and all but 2 of the 8 died within a few hours after their delivery; that some of the cows losing their calves would thereafter give a very small quantity of milk, while others likewise afflicted would give no milk at all; that they treated the cows so that, if capable of doing so at all, they would give milk, but that the treatment was wholly futile or ineffectual. In short, they stated that the entire herd or "bunch" of cows they purchased from Schmitt, save and except 3 or 4, were wholly unfit for dairy purposes, and were not worth, for beef cattle, to exceed \$35 or \$40; that, in fact, there were 34 head which they had been unable to sell at all for beef or any other purpose. The defendants testified that, while on the occasion mentioned they looked the cattle over before the purchase was made, and that (so one of them testified), the cows, from such inspection as they then subjected them to, appeared to be worth the price they paid for them, they nevertheless,

in making the purchase, relied entirely upon and were solely induced by the representations of Schmitt that the animals were in every respect in a sound physical condition and adapted to dairy purposes. One of the defendants further stated that, although he had heard and read of the fact that milch cows were often found to be afflicted with the disease known as "abortion," he was not an expert on cattle diseases, and therefore even a critical investigation by him of the cattle would not have enabled him to determine whether any of the cows were so afflicted.

Schmitt testified that, before completing the trade for the cows, he had the animals examined by Dr. Lichtenwalter particularly for the purpose of determining whether they were free from tuberculosis or tubercular germs. This examination took place on the Bracken ranch; 61 head of the cattle having been selected by Schmitt from a herd of 88 cows and driven to said ranch, where there were barns equipped with stanchions and other facilities for conveniently conducting such an examination. The doctor, proceeded Schmitt, subjected the cows to a tuberculin test—that is, he injected into the cattle a serum commonly used for the purpose of making such a test—that, at the end of about 96 hours after the injection of the serum—the period of time necessary to intervene to determine the result of the test—he, with the doctor and Bracken, again inspected the cows, and found that there were, among the herd of 61, but two "reactors"; that is to say, that 59 of the cows proved to be wholly without symptoms of tuberculosis, while two appeared to carry germs of the disease. Schmitt further testified that those cows—4 or 5—whose udders bore the appearance of not being normal, were examined by the doctor and found to be in good condition. The reason, he said, that the udders of all the cows were not subjected to a physical examination was that it could easily be seen from a general survey of the animals not so examined that their udders were in a perfectly normal condition. Schmitt, who had for many years been engaged in the cattle business, also said that, at the time they were sold to the defendants, the cows, or a majority of them, were with calves; that there was no evidence of the disease of abortion in the cows, and that some "6 or 8" of the cows gave birth to calves before the animals were taken from the Bracken ranch by the defendants, and that all said calves, with the exception of 2, lived and were in a healthy state. Positively Schmitt testified that during the negotiations resulting in the sale of the cows to the defendants not a word was said, either by the latter or himself about the disease of abortion, or as to whether the cows or any of them were or were not afflicted therewith. Dr. Lichtenwalter corroborated Schmitt with respect to the examination he gave the cows,

saying that his examination was conducted with the view of ascertaining whether any of the cows were afflicted with tuberculosis; that he found all but two of the 61 head selected by Schmitt to be entirely free from that disease or the symptoms thereof, that the udders of all the cows were in normal condition, and that he observed in none of the herd any indications of the disease technically termed "abortion." Bracken, an experienced dairyman, who was present when the tuberculin test was made by the veterinarian, and who was also present when the sale of the cows was made to defendants, testified that the animals appeared on both occasions to be in a healthy condition; that the udders of none were in any way deficient; that he did not, at the time the defendants purchased the cows, hear any one speak of the disease of abortion; that, so far as he knew, the disease of abortion was not brought up or referred to either by defendants or Schmitt or himself.

The foregoing embraces a statement in substance of the testimony presented by both sides.

[1] The issues presented to the jury, specifically stated, were these: Whether the representations as to the physical condition of the cows and their fitness for dairy use were made by Schmitt, and, if so, were they false and made with the purpose and intent of deceiving and defrauding defendants, and were defendants, in purchasing the cows, solely influenced or induced to make the purchase by the representations so made. The cause of action set out in the cross-complaint was, therefore, founded on fraud and deceit (section 1572, subs. 1 and 2, Civ Code), and it was not only necessary to support the cause of action so stated for the defendants to prove that the representations alleged were made and were false, but further, that in purchasing the cows they solely relied upon and were likewise induced to do so by the representations so made or some vital one of such representations. And even if it had been shown to be true that the cows after their purchase by defendants were found to be physically unfit for use for dairy cows for any of the reasons alleged in the cross-complaint, a failure to make a case under said pleading would follow unless it were also shown that the representations alleged, or some of them, were made, that they were false, and that defendants were lead to make the purchase solely by reason thereof.

[2] Now, as to the evidentiary phase of the case, it will readily be seen that upon the issue of fraud, as alleged in the complaint, there is a substantial conflict in the evidence. Certainly there exists, or appears to exist, such a conflict upon the question whether Schmitt did or did not represent to the defendants that the cows were free from the disease known as abortion. As to the al-

leged assurance by Schmitt that the udders of all the cows were in a healthy or normal condition and that in that respect the cows were fit for dairy purposes, it is clear that if that defect really existed it is one so patent and obvious that it would readily have been detected upon a visual examination of the cattle. The specific complaint in that particular is based upon the claim that some of the teats attached to the udders of several of the cows were, as we understand the testimony on that subject, so shriveled or atrophied as to render the cows thus afflicted unprofitable as milch cows—that is to say, that those cows were, by reason of their defective udders, incapable of producing the quantity of milk usual with first-class dairy cows. As a matter of common knowledge, it is known that it requires no veterinarian to discover such a defect in the udders of milch cows. An inspection of the cows by any person of common intelligence, and particularly by a person engaged, as have been the defendants, in the dairy business for a long period of years, would readily reveal to him such condition in a milch cow. The udder of a milch cow would, quite naturally, be among the first of the physical characteristics of such an animal which a person intending to purchase it for dairy purposes would give careful attention to, or such an examination as would enable him at once to determine whether the animal was deficient in that particular as a milk producer. The defendants, according to their own testimony, saw several of the cows in a stall, and were “amongst and about” the remainder of the herd as they were grazing in a field, and Schmitt testified that a person could step up to and put his hand on any of the cows while they were grazing, meaning, of course, that they were perfectly gentle, and that a thorough inspection of them at “close range” could be had. Thus it is clear that the defendants had convenient opportunity for inspecting the cows with a view of ascertaining the condition of their udders, and even if Schmitt did make the statement that the udders of all the cows were in a healthy or perfectly normal condition it was regarding a matter upon which the defendants could as well have informed themselves, they having full opportunity to do so. Indeed, under the circumstances, it was their duty, rather than to rely upon what Schmitt stated in regard to the udders, to make an examination for themselves and then exercise their own judgment in the matter. *Lee v. McClelland*, 120 Cal. 147, 52 P. 300. “If, in a contract of sale, * * *” says Professor Pomeroy, in his treatise on Equity Jurisprudence (3d Ed.) § 894, “representations are made by the vendor concerning some incidents, qualities, or attributes of the subject-matter which are open and visible, so that the falsity of the statement is patent to any ordinary observer, and

it is made to appear that the purchaser, at or shortly before concluding the contract, had seen the thing itself which constitutes the subject-matter, then a knowledge of the facts is chargeable upon such party; he is assumed to have made the agreement knowingly, and cannot allege that he was misled by the false representations.” See, also, *Hackleman v. Lyman*, 50 Cal. App. 323, 327, 195 P. 263.

[3, 4] The above rule, it seems to us, plainly fits the facts of this case, in so far as are concerned the alleged defective udders. The alleged representation by Schmitt that all the cows were with calves, “and would calve within six weeks,” is not entirely supported by the testimony of the defendants themselves. The defendant Byron Archer testified that there were several calves among the herd; that, when he asked Schmitt “why there were not more calves with this bunch,” the latter replied that “a good many of them died from drinking rich Jersey milk.” In his testimony, however, said Archer explained that the representation by Schmitt that “all the cows were with calves” was in reply to his (said Archer's) question as to those cows which had not at the time borne calves. Schmitt testified that Dr. Lichtenwalter examined the cows to see whether they were with calves before Schmitt purchased from Adams, and that both the doctor and himself satisfied themselves that they “were picking calvey cows, cows that were going to calve, and ones, of course, that already had calves.” This testimony shows that Schmitt's statement to defendants as to the condition of the cows in that particular amounted to nothing more than a mere opinion. Whether this opinion was based upon his own inspection of the cows or upon the opinion of the veterinarian as the result of the latter's examination of the animals is not clear from the evidence, nor is it important, for there is nothing in his testimony or that of the defendants which shows, or which may reasonably be said to tend to show, that his opinion was expressed with a design to deceive the defendants as to the matter. To the contrary, the fact that a large number of the cows had already delivered calves tends strongly to show that his expression of the opinion that those cows which had not then already been delivered were with calves was honestly made and with no intent or purpose to deceive the defendants. It is elementary that expressions of opinion honestly made are not actionable. *Phelps v. Grady*, 168 Cal. 73, 77, 141 P. 926, and cases therein cited. But it is quite manifest that defendants themselves, by the exercise of their own judgment upon an inspection of the cows, could as well have satisfied themselves with regard to whether the cows, or those which had not already calved, were or were not within six weeks, or approximately six weeks, of parturition. With their long expe-

rience in the handling of milch cows, it is hardly probable that, having themselves inspected the cows, they relied on Schmitt's statement rather than upon their own judgment regarding that matter and the jury, it may be assumed, so viewed that phase of the case.

[5, 6] We have shown that both Schmitt and Bracken testified that no question was asked by any of the defendants as to whether the cows were afflicted with the disease of abortion; that, in fact, that disease was never mentioned or referred to by any person present when defendants were taking a view of the cows; that therefore there was a conflict in the evidence as to the alleged representation by Schmitt with respect to that question which was for the jury to resolve; but it may further be remarked in that connection that the disease of abortion as applied to cows is not in all cases in a contagious form, as a statement in the brief of defendants implies. It is declared by very high authority (Special Report, 1923, on Diseases of Cattle, Bureau of Animal Industry of the U. S. Department of Agriculture, p. 165), that the said disease exists and manifests itself in two different forms, the one contagious and the other noncontagious, and it is important in this case to note that the same authority states that, except where the actual fact of abortion has occurred, the existence of the disease in either form can only be discovered by a microscopical examination of the cow, or by some other means of examination involving such a scientific test as will disclose the existence of such a condition. From this it is clear that Byron Archer, who stated that he had himself "read about" said disease, must have known, or at least it must have occurred to him, that any representation by Schmitt, who was not a veterinarian, and who, as the evidence shows, made no pretense that an examination had been made, either by him or any veterinarian, with a view of ascertaining whether any of the cows were so afflicted, could have amounted to nothing further than the mere opinion of a layman having no more and perhaps less acquaintance with the diseases of cattle than had the defendant Byron Archer, or, for that matter, any other layman. The jury could apparently warrantably have so concluded, and probably did so conclude.

Concluding now on the branch of the case presently in hand, it may be suggested that if it were necessary to prosecute an inquiry to discover the particular considerations which led the jury to accept upon the issue of fraud the testimony presented by the plaintiff as against that presented by the defendants, one of singular significance is to be found in the fact that, although they notified Schmitt of the premature delivery of calves by some of the cows shortly after they took possession thereof, the defendants made

no other movement looking to a rescission of the agreement of sale or the surrender and cancellation of the note in suit on the ground of failure of consideration therefor (Union Invest. Co. v. F. M. Landon Co., 32 Cal. App. 305, 162 P. 903), or for damages for any damage incurred by defendants for a breach of the agreement upon the part of the vendor in that the cattle sold were not what they were represented to be in quality or condition, but, to the contrary, continued (uncomplainingly, so far as the record shows) to retain possession of the cows (even making an effort to sell them), until the institution of this action some 10 months after they had purchased the cows, and 7 or 8 months after they had obtained what they conceived to be concrete evidence that some of them were afflicted with the disease known as abortion.

Having now sufficiently considered the point that the verdict is lacking in sufficient support from the evidence, we will proceed with the consideration of the contention that certain instructions allowed by the court do not correctly state the law of the case as made by the pleadings and proofs. There are two instructions thus assailed and they are the following:

"That false representations, to constitute fraud, must actually deceive. If it is not believed or if the party disregards it and makes inquiries for himself, there is no fraud, and that if you believe from the evidence in this case that the defendants did not believe the representations of plaintiff's agent and purchased the property in question after an independent investigation and inquiry and upon the strength thereof rather than upon the strength of said representations, then your judgment should be for plaintiff.

"*That statements by the vendor of property as to its adaptability to certain uses do not constitute fraud, and you are instructed that if you believe that plaintiff's agent stated to defendants that the cows in question were good dairy cows, and if you find that at such time such statement was made defendants knew that plaintiff's agent had no information as a basis for such statement, then such statement was not a misrepresentation in law.*"

[7-10] The instruction first above presented embraces a correct abstract statement of the law. It is unquestionably true that, to constitute fraud, false representations must actually have had the effect of deceiving and thus leading the party to whom they are made into entering into an agreement by the terms of which he parts with something of value. And no proposition could be less debatable than that where the vendee, in a contract of sale of property, does not believe or disregards the representations of the vendor as to the character, condition, or quality of such property, but as to those matters prosecutes an independent investigation for himself, and, in purchasing the property, relies entirely upon his own inquiries and investigation rather than upon the representa-

tions made by the vendor, the vendee, after discovering that the property is not of the character or quality or in the condition which his own judgment, based upon his own investigation, established it to be, cannot predicate a rescission of the contract or maintain an action for damages upon the representations so made by the vendor, even though they be shown to be false. Counsel for appellants, however, argue that the instruction is vulnerable because, as they contend, it fails to embrace the statement that the inquiry independently prosecuted by the vendee himself has been effective—that is, that thus he actually learned the real facts. It is true, of course, that if by his own investigation he has learned the real facts concerning the property, and then makes the purchase relying solely on what he himself has thus learned, he is bound by his own judgment in the matter, and cannot claim damages based upon deception or false statements by the vendor regarding the quality or condition of the property which in no manner or degree operated to induce him to make the purchase. But the rule even goes further, for if the buyer wholly disbelieved and disregarded the representations made by the vendor as to the character or quality or condition of the property, and did not rely or act upon, or was in no measure induced by said representations to purchase such property, then, in such case, the vendee cannot claim to have been deceived or defrauded in making such purchase, even though it was true that he did ineffectually prosecute an independent investigation as to the condition, quality, or attributes of the property involved. This is so because the essential essence or gravamen of a cause of action based upon section 1571 of the Civil Code is in the deceit practiced by the defendant upon the plaintiff, and which produced the damage complained of. In a case of this character there can be no damage where there has been no deception, or, what in law is the same thing, where the alleged deception is in false representations which had no effect upon the mind of the party sought to be deceived in changing his position regarding the property as to which the false representations were made.

[11, 12] The criticism of the other or second instruction is directed particularly to that part thereof in italics, viz.: "That statements by the vendor of property as to its adaptability to certain uses do not constitute fraud." That part of the instruction, taken alone, while misleading in a case such as we have here, is, as an abstract statement, not far afield in the statement of a correct proposition, since it is manifestly true that the mere statement by the vendor of property as to its adaptability to certain uses would not constitute fraud unless such statement was false and made with the intent and design to defraud a party out of his

property or to induce him, to his detriment, to enter into an improvident contract. What the court probably intended to say was (and this is reasonably to be gathered from the succeeding language of the instruction) that the statement by the vendor of property as to its adaptability to certain uses does not constitute fraud if it appear that defendants knew at the time such statement was made that plaintiff's agent had no information as a basis for such statement. As so viewed, the instruction does not misstate the rule. It is to be conceded, though, that the instruction is not wholly free from criticism, and that, if it stood alone upon the subject to which it relates, it might be troublesome in the consideration and disposition of this appeal; but elsewhere in its charge the court submitted to the jury, in two separate instructions, a correct statement of the rule applicable in this case. The rule so stated was embraced in the two following instructions, given by the court on the request of defendants:

"You are instructed that if you find from the evidence that the cows showed and offered to the defendants were then and there stated by plaintiff or his agent to be good dairy cows and suitable for dairy purposes, when in truth and in fact they were not dairy cows and were unsuitable for dairy purposes, and that this representation was made to induce defendants to purchase said cows, and was believed and relied upon by defendants, that one fact alone will entitle the defendants to damages, and the measure of damages will be as herein defined."

The second given instruction, also proposed by the defendants, in effect repeats the statement of the rule as follows:

"If you find from the evidence that the cows delivered were unsuitable for dairy purposes you will then find the amount of profits, if any, which the defendants have lost between the day of sale to the day of trial, by reason of their conducting their dairy business with the inferior cows so delivered to them by the plaintiff as aforesaid."

We cannot persuade ourselves that the jury could have been misled as to the law of the case, as it is clearly declared in the two foregoing instructions, by the criticized instruction, particularly in view of the fact that the latter instruction is, as we have shown, capable of being so construed as to harmonize with the rule as it was stated in the instructions last above quoted herein. But even if it be granted that the assailed instruction is or appears to be inconsistent with the instructions containing a correct statement of the rule, a careful and reasonable analysis of said instruction will force the conclusion that the repugnancy is so slight that the jury could not have been misled or confused as to the true rule by which it was their duty to be governed in solving the proposition which it was the evident de-

sign of the court thereby to submit to them. In applying the rule that a judgment will be reversed "where two instructions are contradictory in essential particulars," it is also "to be borne in mind," said Justice McLaughlin (when a member of this court), in *Hayden v. Consolidated Min., etc., Co.*, 3 Cal. App. 136, 139, 84 P. 422, 423, "that, although some of the instructions may in slight respects be repugnant to each other, if it appear that the jury could not have been misled thereby, a new trial will not be granted"—citing a number of cases. Again, in that case, the learned justice further said:

"And it must further be remembered that 'the meaning of the court below cannot be fairly arrived at by a partial view of what the jury was told was the law by which they should be governed. All that was said to them in relation to the matter should be considered.' *People v. Kennedy*, 55 Cal. 202; *Ellis v. Tone*, 58 Cal. 297; *Monaghan v. Rolling Mill Co.*, 81 Cal. 193 [22 P. 590]; *Feliz v. Feliz*, 105 Cal. 6 [38 P. 521]. In construing the charge of the court, it must be viewed in the light of common understanding, and the practical administration of justice should not be defeated by a too rigid adherence to close and technical analysis of the whole or any part thereof"—citing many cases.

Our conclusion is, as the foregoing discussion indicates, that the judgment should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

74 Cal. App. 551

STRATFORD CO v. CONTINENTAL MORTGAGE CO. et al. (Civ. 5087.)

(District Court of Appeal, Second District, Division 2, California. Oct. 13, 1925. Rehearing Denied Nov. 13, 1925; Hearing Denied by Supreme Court Dec. 10, 1925.)

1. Landlord and tenant $\Leftrightarrow$ 101½ — Transfers under lease terminating interest of lessee on transfer of interest under execution, receivership, bankruptcy, or other operation of law are those arising by reason of lessee's inability to pay debts.

Under lease providing that interest of lessee shall cease on transfer of lessee's interest under execution, receivership, bankruptcy or other operation of law, or otherwise, the specific transfers by operation of law terminating interest are those arising because of inability of lessee to meet his financial obligations not those in any manner arising under direction of lessee or his personal representative.

2. Landlord and tenant $\Leftrightarrow$ 101½ — Sale of property of deceased lessee under probate proceedings held not to come within provisions of lease terminating lessee's interest on transfer by execution receivership, bankruptcy, or other operation of law.

A sale of property of decedent lessee under probate proceedings is not in view of rule of

ejusdem generis, such a transfer by operation of law as to come within lease providing for termination of lessee's interest on transfer of such interest under execution, receivership, bankruptcy, "or other operation of law, or otherwise," since probate transfer arises through death of lessee, whereas transfers specified in lease arise from inability to pay debts.

3. Contracts $\Leftrightarrow$ 318—Deeds $\Leftrightarrow$ 155—Burden on party claiming forfeiture under written instrument to show that such was intention of instrument; forfeiture not enforced unless terms are plain.

Burden is on party claiming forfeiture of rights under written instrument to show that such was the unmistakable intention of instrument, and forfeiture of estates and restraints upon alienation should not be enforced except when terms of conditions are so plain as to be beyond province of construction.

4. Landlord and tenant $\Leftrightarrow$ 101½—Words "or other operation of law," in lease terminating lessee's interest by reason of receivership, execution, or bankruptcy, held to include mortgage foreclosure sales; "*ejusdem generis*."

Under rule of *ejusdem generis*, when specific words employed in instrument are exhaustive of class to which they belong, some meaning must be found for general words if possible, since effect must be given to all parts of a writing, so that, where lease provided for termination of lessee's interest on transfer of such interest under execution, receivership, bankruptcy, words "or other operation of law" not including transfers under probate proceedings, may be construed to include sales by order of court, or other officers in decrees for foreclosure of mortgages which under the lease and rules of forfeitures are not to be construed as execution sales.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, *Ejusdem Generis*; *Other*.]

Appeal from Superior Court, Los Angeles County; George F. Buck, Judge.

Action by the Stratford Company against the Continental Mortgage Company and others. Judgment for plaintiff, but, on court's refusal to award it full measure of relief, plaintiff appeals. Affirmed.

Hearing denied by Supreme Court; Myers, C. J., dissenting.

Frank C. Hill and George S. Hupp, both of Los Angeles, for appellant.

Newby & Palmer, of Los Angeles, for respondents.

WORKS, J. In its inception this action was one in unlawful detainer for nonpayment of rent. The complexion of the litigation, however, was materially changed by the filing, pursuant to an order of the trial court, of an amendment to the complaint to conform to the proof. We shall lay aside a contention of respondents that the court was

without power to permit the filing of the amendment, and shall proceed to a discussion of the merits of the question which appellant seeks to present. The judgment was in form in favor of plaintiff, but, as the court refused to award it the full measure of relief for which it contended, that party appeals.

Appellant, a landlord, insists that it was entitled to a judgment declaring a forfeiture of a lease out of which the rights and duties of the respective parties spring, and it is that relief which was denied by the trial court. The lease contained a paragraph forbidding assignments of the instrument without the consent of the lessor. A part of the paragraph follows, with our italics:

"It is expressly made a condition of this lease that, in the event that any person, other than the lessee named herein, shall secure possession of the interest of the lessee hereunder, *under execution, or by reason of any receivership or proceeding in bankruptcy, or other operation of law, or otherwise*, * * * all interest of the lessee hereunder, shall, at the option of the lessor, forthwith cease and terminate, and the lessor may forthwith or at any time thereafter, * * * re-enter and take possession of said premises. * * *

The contention of appellant that it was entitled to judgment that the lease had been forfeited is based upon this language of the instrument and particularly upon the italicized portion of it. The claim that there was a forfeiture is founded upon these further facts: During the term created by the lease, the lessee died. Letters of administration in the matter of his estate were taken out by his wife, and she entered upon her duties as administratrix. In the due course of the administration of the estate, and upon due order of the court sitting in probate, the administratrix sold the leasehold interest of the lessee under the lease and made assignment of the instrument to the purchaser. The latter went into possession under the assignment. The sole question presented by appellant for determination, doubly stated, is this: Did the assignment come within the language of the lease which is above set forth? Did the sale and the consequent assignment of the leasehold interest invade the legal meaning of the words "or other operation of law, or otherwise"?

[1, 2] Respondents insist that the question raised must be answered in the negative, for the reason that, in the light of the facts inherent in the nature of the transfer of the leasehold interest, the words last quoted are harmless to their rights as assignees under the rule of construction familiarly associated with the expression *ejusdem generis*. There is no difficulty in ascertaining the general import of this rule. Its meaning is so well understood as to require no exposition here. The real question, as is usually the case, is to determine whether the rule its

the facts now presented—whether a sale and delivery of property of a decedent under a probate proceeding and as a step in the settlement of his estate is a transfer by operation of law "of the same kind" with a transfer "under execution, or by reason of any receivership or proceeding in bankruptcy." It is to be observed, in aid of the contention of respondents, that the specific transfers by operation of law which are mentioned in the lease are those possibly to arise because of the inability of the lessee to meet his financial obligations, those which, under the law, except in the case of a voluntary bankruptcy, are, in addition, harsh, forced, and not in any manner under the direction of himself or of any personal representative. The following reflections appear to justify this classification as one to be employed in determining whether the transfer under the probate proceeding was one "of the same kind" with those specifically mentioned in the lease. Such a transfer is not one which in its essence arises from an inability to pay debts, but through death. It is not forced, in the sense in which that term is applied to the three methods or kinds of transfer in terms named in the instrument. A transfer in probate is initiated, engineered, and controlled, subject to the orders of the court, by a personal representative of the deceased, a representative who is so near to him that, under the law governing cases of intestacy, he must primarily be the spouse, or be selected from among the relatives, of the deceased, and it is therefore in a sense friendly and voluntary. It is particularly worthy of note that, as we have already remarked, a transfer under probate proceedings arises from death and not from an inability of a living person to pay his debts. With this thought in view, the lease is to be construed, if we adopt appellant's contention, exactly as if it provided that the term created by the instrument was to end, at the option of the lessor, upon the death of the lessee. This is a method of forfeiture which, it appears to us, is different from those contemplated by the reference in the lease to sales under execution, in bankruptcy proceedings, or through receiverships. We are convinced, as argued by respondents, that the lease was not so drawn as to prevent the term created by it "from passing into the hands of an administrator and being disposed of by him in the usual course of the administration of the estate, without the consent of the lessor."

[3] In considering the question urged by appellant, we have paid due regard to the rules of law that, where there is a claim made that a forfeiture of rights under a written instrument has occurred, the burden is upon the party making the point "to show that such was the unmistakable intention of the instrument" (*Quatman v. McCray*, 128

Cal. 285, 60 P. 855); and that the courts tenaciously cling "to the rule that forfeitures of estates and restraints upon alienations should not be enforced except when the terms of the conditions are so plain as to be beyond the province of construction" (*Randol v. Scott*, 110 Cal. 590, 42 P. 976). See, also, *Jameson v. Chanslor-Canfield Oil Co.*, 176 Cal. 1, 167 P. 369, citing Civ. Code, § 1442.

[4] Before leaving the question here involved, it is proper to mention a point not presented by counsel, as it seems necessary, or at least convenient, to a final disposition of the appeal. It is settled by many cases, only one of which we shall cite (*Strange v. Board of Commissioners*, 173 Ind. 640, 91 N. E. 242), that, under the rule *ejusdem generis*, when the specific words employed in the instrument sought to be construed are exhaustive of the class to which they belong, some meaning must be found for the general words if possible, because of the well-known rule that effect must be given to all parts of a writing if that result can be accomplished. It is said in the case cited that the rule "that general words following a particular enumeration will not include things of a superior class, has no application where the rule would leave the general words without meaning or effect." We are thus inspired to inquire whether there are sales or transfers by operation of law other than those under execution, under receiverships, or in bankruptcy, which are in the same class with those specifically named, and, if there be any, to state what they are. In that class, it seems to us, as we have above described it, are sales by order of court, by commissioners or other officers, in decrees for the foreclosure of mortgages. It is true that for some purposes a foreclosure sale is to be treated as an execution sale (*Moore v. Ross*, 139 Ind. 200, 38 N. E. 817), but we have no difficulty in determining that, for the purposes of the instrument before us, and under the rules of law concerning forfeitures which we have above stated, it is not so to be considered. See, also, *Norton v. Reardon*, 67 Kan. 302, 72 P. 861, 100 Am. St. Rep. 459. A sale under decree of foreclosure would therefore come within the general language of the lease which we now construe. Perhaps other methods of judicial sale might be named which would fall under the same classification, but it is not necessary further to pursue an inquiry into the subject. As a meaning has been found for the general language of the lease, within the class into which the specifically named modes of transfer naturally fall, it is neither necessary nor proper to include probate sales within the general designation.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

197 Cal. 548

CITY OF OAKLAND v. SCHENCK et al.
(S. F. 11165.)(Supreme Court of California. Nov. 30, 1925.
Rehearing Denied Dec. 28, 1925.)

1. Eminent domain ⇨241—Failure of condemnation judgment to state that railroad land was condemned for street purposes in common with use by railroad held not prejudicial.

In proceedings by city, under Street Opening Act of 1903, to condemn strip of land across railroad right of way, failure to incorporate in condemnation judgment stipulation that land was condemned for street purposes, in common with use thereof for railroad purposes, was not prejudicial to railroads, as judgment carried no greater estate than mere easement in property for purpose of opening and extending street.

2. Eminent domain ⇨69—Railroad right of way private property, which can only be taken under power of eminent domain, for just compensation.

A railroad right of way is so far private property as to be entitled to protection of Const. art. 1, § 14, so that it can only be taken under power of eminent domain, for which just compensation must be paid.

3. Eminent domain ⇨122—Compensation should be awarded in condemnation proceeding, however small it may be.

Though interest appropriated in condemnation proceeding may be small and amount of compensation difficult of proper measurement, some award should be made, however small the amount may be.

4. Eminent domain ⇨120—Rule as to compensation to be allowed railroad for opening street across right of way different than in case of property of individual.

Because nature of interest in land acquired by city in opening street across railroad right of way, and, as one of incidents of public use to which railroad dedicates property used as right of way, is right of public to construct street crossings when reasonably necessary, rule as to amount of compensation is different than in case of taking property of individual for like uses.

5. Eminent domain ⇨120—Railroads' compensation for opening of street across their right of way nominal, where use for railroad purposes not unduly interfered with.

In condemning right of way for street across railroad right of way, extent to which railroads' right to use of land for tracks will be diminished by opening of street should be ascertained, and if use for legitimate railroad purposes is not unduly interfered with, railroads' compensation should be nominal; inquiry being directed solely to question of diminution, if any, in value of railroad right of way.

6. Eminent domain ⇨319—Railroads retain rights in soil of right of way over which city requires easement for opening of street.

In view of Code Civ. Proc. § 1239, subs. 1, 2, and Political Code, § 2631, where city, in

proceeding under Street Opening Act of 1903, sought only easement across railroad right of way to open street, railroads as owners in fee, may retain their rights in soil for all purposes consistent with full enjoyment of easement for street purposes acquired by city.

7. Eminent domain ⇨120—City acquiring merely easement across railroad right of way not required to pay for fee.

Where city, in proceeding under Street Opening Act of 1903, sought only an easement across railroad right of way for purpose of opening a street, city was not bound to acquire and pay for fee; extent of value to which such railroads' right to use such land was unduly diminished being only question to be considered.

8. Eminent domain ⇨200—Burden on railroads over whose right of way city acquired easement to show that value thereof was unduly diminished.

In proceedings under Street Opening Act of 1903, to acquire easement across railroad right of way for opening of street, burden is on railroads to show that value of their right to use of land was unduly diminished thereby.

9. Eminent domain ⇨120—Railroads held not entitled to damages for structural changes necessitated because of opening of street across right of way.

Where city, by condemnation proceedings, acquired easement across railroad right of way for purpose of opening street, held, that railroads were not entitled to damages for structural changes required resulting therefrom, as such expenses must be regarded as incidental to police power of state.

10. Railroads ⇨95(1)—Duty of railroad to construct and maintain in good condition its crossings over highways.

Generally it is duty of every railroad company to construct and maintain in good condition its crossings over highways, so far as can be done without interfering with operation of railway.

11. Railroads ⇨61—May acquire fee in land by direct purchase.

Under Code Civ. Proc. § 1238, railroad may acquire fee in land by direct purchase, though it may obtain only an easement for railroad purposes if it resort to proceedings in eminent domain.

In Bank.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by the City of Oakland against Mary S. Schenck, the Southern Pacific Company, and the Central Pacific Railway Company, under the Street Opening Act of 1903, to condemn certain land. From a portion of a judgment awarding them nominal damages of \$1 as compensation, the two last-named defendants appeal. Affirmed.

D. J. Foulds and H. W. Hobbs, both of San Francisco, for appellants.

Leon E. Gray, City Atty., and Bestor Robinson, Deputy City Atty., both of Oakland, for respondent.

WASTE, J. This is an appeal from a judgment in condemnation. The defendant railroad companies were the owners in fee of a strip of land in the city of Oakland 115.272 feet in width and approximately 757 feet in length. The northeasterly 55.272 feet of this strip is in use as a right of way for appellants' electric suburban railroad, while the southwesterly 60 feet of the strip is not presently devoted to railroad uses. The city brought this action, under the Street Opening Act of 1903 (St. 1903, p. 376), to condemn a strip of land 60 feet wide across the lands of appellants and of defendant Schenck for the purpose of opening and extending Eighty-Ninth avenue. The court, sitting without a jury, found the value of the part of appellants' land not devoted to railroad purposes to be \$300, and that no damages would be suffered by reason of the severance. The appellants take no exception to this finding. With respect to the part of the land in use for a railroad right of way, the court found the value of the interest to be taken was \$1, and that no damages would be suffered by appellants by reason of the taking. It is by this finding, and by the portion of the judgment awarding the nominal sum of \$1 as compensation, that appellants feel aggrieved, and for that reason they prosecute this appeal.

[1] Appellants' contentions are that the trial court erred, first, in awarding only \$1 as the value of the easement taken by the city for street purposes across the strip of land owned in fee by the defendants, and used as a railroad right of way; and, second, in holding that the railroad companies were not entitled to damages for the structural changes required in their tracks and appliances resulting from the opening of the street. A less important contention is that the judgment in condemnation should have provided in terms, in accordance with a stipulation entered into during the trial, that the land was condemned for street purposes in common with the use thereof for railroad purposes. It would have been better practice to have carried such a reservation of use into the judgment; but we do not see how the appellants have been prejudiced by what was done in this case. The plaintiff below, by the complaint in condemnation, sought only an "easement in, on and over said pieces or parcels of land for street purposes." The findings fully cover the purposes of the action and the subject of joint user by the city and the railroad companies. The judgment declares that the use of the property (parcel 2) "as and for a public street, is consistent with the continuance of the use of said property for the present use as and for a railroad right of way and that

both public uses can exist together." When these proceedings were instituted the railroad companies had an exclusive right to use the land in question for tracks upon which to move their cars. The city does not propose to interfere in any degree with the enjoyment of that right otherwise than by the opening of the street across the tracks for a public use. The judgment carries no greater estate than a mere easement in the property for the uses stated. *McCarty v. Southern Pac. Co.*, 148 Cal. 211, 222, 82 P. 615.

[2-5] In support of their contention that the trial court erred in allowing only \$1 for the taking of an easement for street purposes over the railroad right of way, appellants argue, first, that the taking of a right of way for use as another right of way is the taking of land, or an interest in land, which shall not be taken or damaged for public use without just compensation made to the owner or paid into court for him. *Calif. Const. art. I, § 14*. It may not be questioned that a railroad's right of way is so far private property as to be entitled to the protection of the Constitution, so that it can only be taken under the power of eminent domain; and a condition precedent to the exercise of that power is that the statute conferring it make provision for reasonably compensating the owner. *Western Union Tel. Co. v. Penn. R. R. Co.*, 195 U. S. 540, 570, 25 S. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517. The interest appropriated by the party condemning may be small, and the amount of compensation difficult of proper measurement, but some award should be made, however small the amount may be. *Lake Erie & W. R. Co. v. Commissioners*, 63 Ohio St. 23, 57 N. E. 1009. But, because of the nature of the interest in the land which is acquired by a city, where a street is opened across a railroad right of way, the rule as to the amount of compensation to be allowed the railroad company is different from the rule which prevails in the case of the taking of the property of an individual for like uses. The reason for this difference is that one of the incidents of the public use to which a railroad company dedicates its property used as a right of way is the right of the public to construct street crossings wherever and whenever reasonably necessary.

In condemning a right of way for a street across a railroad right of way, the inquiry must be directed to ascertaining the extent to which the value of the company's right to use the land for railroad tracks will be diminished by the opening of the street across it. If the opening of the street across the railroad tracks in this case does not unduly interfere with the companies' use for legitimate railroad purposes, then their compensation should be nominal. Whether there was such an interference, what was its extent, and what was the value of that lost by the appellants as the direct result of such inter-

ference, were questions of fact to be determined in the light of the legal principles by which the court was to be governed in fixing the amount of compensation to the owners of the railroad right of way. *Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U. S. 226, 242, 17 S. Ct. 581, 41 L. Ed. 979. If, prior to the institution of the condemnation proceedings, the railroad companies had constructed upon the land embraced within the crossing buildings to be used in their business, it would have been necessary, in ascertaining the just compensation to be awarded, to take into consideration the value of such improvements. There were no buildings in the present case. The inquiry is directed solely to the question of the diminution, if any, in value of the railroad right of way.

[6-8] The Legislature has declared what estates and rights in land may be taken in this state for public use. Section 1239 of the Code of Civil Procedure, after designating (subd. 1) the cases in which a fee simple may be taken, prescribes (subd. 2) that, with certain exceptions, only an easement may be taken. One of the exceptions is that—

“When the taking is by a municipal corporation, and is for the purpose of constructing, equipping, using, maintaining * * * any * * * road * * * a fee simple may be taken if the legislative body of such municipal corporation shall, by resolution, determine the taking thereof to be necessary.”

In this case only an easement is sought. Section 2631 of the Political Code declares that, by taking land for a highway, the public acquires only the right of way, and the incidents necessary to enjoying and maintaining the same, subject to the regulations in the Codes provided. In the present case it was stipulated that the portion of the right of way of the appellants sought to be condemned was required for street purposes only, for use by the public in common with the use by the railroad companies; that the uses are consistent; and that the railroad operated by the defendants can exist with the street across it. Appellants, as owners of the fee in the right of way over which the street is opened, will retain their rights in the soil for all purposes which are consistent with the full enjoyment of the easement for street purposes acquired by the city. *Wright v. Austin*, 143 Cal. 236, 239, 76 P. 1023, 65 L. R. A. 949, 101 Am. St. Rep. 97; *Gurnsey v. Northern Calif. Power Co.*, 160 Cal. 699, 705, 117 P. 906, 36 L. R. A. (N. S.) 185. As the right to open a street across the railroad tracks was all that the city sought to obtain by the proceedings in condemnation, it was not bound to acquire and pay for the fee in the land over which the street is opened. The extent to which the value of the companies' right to use the land for railroad tracks was unduly diminished by opening the public street across it was the only question to be determined by the jury. *Chicago, Bur-*

lington & Quincy R. R. v. Chicago, 166 U. S. 226, 251, 17 S. Ct. 581, 41 L. Ed. 979. The burden of showing such diminution of value of the right of way was on the appellants. The evidence, on the whole, on that subject is not as satisfactory as it might be. Its weight and the inferences to be drawn therefrom were matters confided to the discretion of the trial judge, and we are not disposed to hold that it fails to support the findings and judgment of the court below.

[9, 10] Appellants' second major contention is that the trial court erred in holding that the railroad companies were not entitled to damages for structural changes required in their tracks and appliances resulting from the opening of the street. The contention presents a question which, like the first discussed, is no longer open to argument. Appellants cannot recover for such costs. The expenses that will be incurred by the railroad companies in making structural changes, such as filling the portion of the tracks between the rails, and two feet outside, with planks, and other crossing changes, in order that the railroad may be safely operated, necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken into account by the railroad companies when they accepted the privileges and franchises granted by the state. Such expenses must be regarded as incidental to the police power of the state.

“What was obtained, and all that was obtained, by the condemnation proceedings for the public was the right to open a street across land within the crossing that was used, and was always likely to be used, for railroad tracks. While the city was bound to make compensation for that which was actually taken, it cannot be required to compensate the defendant for obeying lawful regulations enacted for the safety of the lives and property of the people.” *Chicago, B. & Q. R. R. v. Chicago*, supra, p. 255 (17 S. Ct. 592).

See, also, *Cincinnati, I. & W. Ry. v. Connersville*, 218 U. S. 336, 343, 31 S. Ct. 93, 54 L. Ed. 1060, 20 Ann. Cas. 1206; *Chicago, Milwaukee & St. P. R. Co. v. Minneapolis*, 232 U. S. 430, 438, 34 S. Ct. 400, 58 L. Ed. 671. The acquisition by eminent domain of an easement for street purposes by a municipality is one thing. The power of the public to require, by subsequent proceedings, that its highways be made safe is another. As a general rule it is the duty of every railroad company to construct and maintain in good condition its crossings over highways, so far as the same can be done without interfering with the operation of the railway. The weight of authority is to the effect that the rule applies to crossings laid out after the construction of the railway as well as to those in existence at the time of its construction. *Elliott on Railroads* (3d Ed.) § 1570; (2d Ed.) § 1102. Appellants admit that no change or

relocation of their tracks or any other structural changes will become necessary, nor, so far as can now be seen, will there be any difference whatever with respect to physical conditions at the point where Eighty-Ninth avenue crosses the railroad right of way until the street is actually opened and in use. When that time shall arrive the question of structural changes and the improvement of the highway will become an issue. The duty resting on the railroad companies to make the necessary changes and improvements does not arise because of the opening of the street, but because of the obligation imposed through the exercise by the city of the power to order the crossing improved whenever it becomes necessary for the protection of life and property.

We are aware that there has not been a uniformity of opinion in the decisions of the courts of the other states on the questions presented by this appeal. The conflicts appear, however, to be more shadowy than real, when it becomes apparent that they are mainly due to differences in the statutes of the various states. We are not disposed to be led into a critical analysis of the many decisions cited by opposing counsel, but, as the decision of the Supreme Court of the United States in *Chicago, Burlington & Quincy R. R. v. Chicago*, supra, determines so much of the controversy presented by this appeal, and as the question is one of first impression in this state, we feel it were well to refer to that case somewhat at length. The city of Chicago sought to open and widen a street by condemning certain parcels of land owned by individuals, and also certain parts of the right of way of the Chicago, Burlington & Quincy Railroad Company. In their verdict the jury fixed \$1 as just compensation to the railroad company in respect to those parts of its right of way to be used for the purposes of the proposed street. On appeal the railroad company claimed that it was entitled, by reason of the opening of the street, to recover as compensation a sum equal to the difference between the value of the fee of the land sought to be crossed, without any restrictions on its right to use the land for any lawful purpose, and the value of the land burdened with a perpetual right in the public to use it for the purpose of a street, subject to the right of the railroad company to use it only for railroad tracks or any purpose for which it could be used without interfering with its use by the public. The Supreme Court of Illinois held (149 Ill. 457, 37 N. E. 78), that when the city, under the authority of law, extended the street across the railroad tracks or right of way, it did not prevent their use by the railroad company, and that the measure of compensation should be the amount of decrease in the value for railroad purposes caused by the use for purposes of a street, such use being exercised jointly with the use

by the company. In other words, it held that the company should be compensated merely for the diminution in its right to use its tracks caused by the existence and use of the street. The judgment of the lower court was affirmed. On writ of error to the Supreme Court of the United States the decision of the Illinois Supreme Court was held to be—

"A correct interpretation of the local statute, and as indicating not only the interest acquired by the public through proceedings instituted for the extension of a street across the tracks and right of way of the railroad company, but also the extent to which the company was deprived, by the proceedings for condemnation, of any right in respect of the land. Such being the law of the state, it would necessarily follow that the jury, in ascertaining the amount of compensation, could not properly take as a basis of calculation the market value of the land as land. The land as such was not taken, the railroad company was not prevented from using it, and its use for all the purposes for which it was held by the railroad company was interfered with only so far as its exclusive enjoyment for purposes of railroad tracks was diminished in value by subjecting the land within the crossing to public use as a street."

Another contention advanced by the plaintiff in error in the *Chicago Case* was that, in arriving at the amount of damages, the trial court failed to take into consideration the fact that a railroad easement is not necessarily in perpetuity, and that in the event of the abandonment of its line the company would find itself deprived of its property without any compensation having been paid therefor. The United States Supreme Court held (page 249 [17 S. Ct. 581]), that the jury could not properly have taken into consideration the possibility that at some future time the company would put itself in the situation where, if no street crossed its right of way, it might sell its land for what it was worth as land freed from any public easement, for the reason that "such a possibility was too remote and contingent to have been taken into account." Another contention of the railroad company was that the land sought to be condemned was subject to sale by the railroad company for any lawful use; that, after being condemned for purposes of a public street, it could not be sold, as land held for private use could be sold in the market; consequently, its salable value, treating it as land simply, was practically destroyed by the opening of a public street across it. In answer, the court said (pages 250, 251 [17 S. Ct. 581]), that the railroad company must be deemed to have laid its tracks within the limits of the city subject to the condition, necessarily implied, that new streets might be opened and extended from time to time across its tracks as the public convenience required, and under such restrictions as might be prescribed by statute. The city did not propose to interfere in any degree

with the enjoyment of the right of the company to use the land in question for tracks upon which to move its cars, otherwise than by opening a street across the tracks for public use. Consequently, it was not bound to obtain and pay for the land over which the street was opened, the only question of compensation to be determined being to what extent the use of the land for railroad tracks was unduly diminished by opening a public street across it.

[11] Appellants admit that if the decision of the United States Supreme Court in *Chicago, Burlington & Quincy R. R. v. Chicago*, supra, is applicable under the statutes and Constitution of this state, it sustains the contention of the city of Oakland and supports the judgment of the lower court. They contend, however, that the decision should be restricted in its effect to being merely an affirmation of the interpretation given the laws of Illinois by the Supreme Court of that state. In Illinois, a railroad company can acquire land, whether by voluntary purchase or otherwise, for railroad purposes as defined in its charter. It does not hold land, as does the ordinary power, with the right of using it for any purpose to which it may be adapted. 149 Ill. 457, 461, 37 N. E. 78. In this state there is no such restriction on the right of a railroad company. It may acquire the fee in land by direct purchase, although it may obtain only an easement for railroad purposes, if it resort to proceedings in eminent domain. Code Civ. Proc. § 1238; *Southern Pac. R. Co. v. San Francisco Sav. Union*, 146 Cal. 290, 292, 79 P. 961, 70 L. R. A. 221, 106 Am. St. Rep. 36, 2 Ann. Cas. 962. But, whatever may be the nature of the interest of the railroad company in the land, in this state, the nature of the easement acquired by a municipality, in condemning a right of way for street purposes across the railroad tracks, as in the present case, is the same as in the state of Illinois. An easement only is taken in each case. Consequently, we find no difficulty in applying the reasoning of the *Chicago* Case to the situation presented here. Other courts have gone exhaustively into the subject and have reached the same conclusion. A most interesting discussion of the issues presented by this appeal and the cases bearing on the questions will be found in two notes to *Grafton v. St. Paul*, etc., R. Co., 16 N. D. 313, 113 N. W. 598, in 15 Ann. Cas. 10-13, and in 22 L. R. A. (N. S.) 1-15.

Appellants cite two decisions of the courts of this state which, they argue, lay down a rule of compensation differing from that we have followed in the present case: *City of Los Angeles v. Zeller*, 176 Cal. 194, 167 P. 849; *Los Angeles v. Allen*, 32 Cal. App. 553, 163 P. 697. In each of these cases, however, the court was careful to point out the well-recognized distinction between the absolute

taking of a long, longitudinal strip of land used as a right of way by a railroad, and the situation presented by the opening of new streets, from time to time, across the tracks of the railroad company, as the public convenience requires, and under such restrictions as may be prescribed by statute. "The right to take longitudinally is very different from the mere right to cross, for in the one case the rights of the railway company are materially impaired, while in the other the taking is such that both uses can stand together." *Elliott on Railroads* (3d Ed.) § 1566; (2d Ed.) § 1098.

The judgment of the lower court is affirmed.

We concur: MYERS, C. J.; SHENK, J.; LAWLOR, J.; SEAWELL, J.; RICHARDS, J.

197 Cal. 467

CITY OF LONG BEACH v. PAULI et al.
(L. A. 7975.)

(Supreme Court of California. Nov. 30, 1925.
Rehearing Denied Dec. 28, 1925.)

1. Eminent domain ☞47(5)—Power to open street across railroad held vested in municipality.

Under the Charter of City of Long Beach, art. 4, §§ 2, 12, 13, the power to open street under the provisions of Street Opening Act of 1903, across defendants' railroad, held vested in municipality, and provisions of Public Utilities Act are inapplicable.

2. Eminent domain ☞128(3)—Railroad held not entitled to compensation for structural changes by reason of opening of street across right of way.

Railroad company is not entitled to compensation for structural changes, made necessary by taking of an easement for opening and extension of street across its right of way, in proceeding under Street Opening Act of 1903.

3. Appeal and error ☞110—Order denying new trial not appealable.

In view of Code Civ. Proc. § 963, as amended in 1915, orders denying new trial are not appealable, and an appeal from such an order will be dismissed.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by the City of Long Beach against R. Pauli and others, under the Street Opening Act of 1903, to condemn certain land. From an insufficient judgment in their favor, certain defendants appeal. Affirmed.

Frank Karr, R. C. Gortner, and C. W. Cornell, all of Los Angeles, for appellants.

Bruce Mason, Geo. W. Trammell, Jr., Fred F. White, Chief Deputy City Atty., John K.

Hull, Geo. L. Hoodenpyl, and Burr A. Brown, all of Long Beach, for respondent.

Jess E. Stephens and Robert J. Stahl, both of Los Angeles, amici curiae.

WASTE, J. The city of Long Beach brought an action, under the provisions of the Street Opening Act of 1903 (St. 1903, p. 376), to open and extend Orizaba avenue across several parcels of land, one of them being the private right of way of the Pacific Electric Railway Company, on which there are constructed and in use five main line and spur tracks. The Pacific Electric Railway Company and the trust companies holding its mortgages, after alleging the value of the parcel of land sought to be condemned and the amount of damage caused by the severance, set up in their answer a claim to the cost of structural changes which would be made necessary by the opening and extension of the street across the railway right of way. An agreement was reached at the trial as to the amount of damages to be awarded for the easement for street purposes, but the defendants were not permitted to show the damages the railway company would sustain by reason of the necessary structural changes. The findings and interlocutory judgment of the court were that the defendants were entitled only to the amount agreed upon for land values, and nothing was allowed for structural changes. The railway company and its mortgage holders, after motion for a new trial made and denied, have appealed.

[1] In their amended answer, the appealing defendants interposed a plea to the jurisdiction of the superior court, on the ground that the sole and exclusive jurisdiction of the subject-matter of the action is vested in the State Railroad Commission, under the provisions of the Public Utilities Act (St. 1915, p. 115), and that the action could not be prosecuted until after the permission of the commission to open the street had been obtained. The objection was withdrawn by them at the inception of the trial in the court below; but, at the time of the oral argument, the suggestion was made by some of the mem-

bers of the court that, if the question of jurisdiction were actually involved, the withdrawal of the plea was aside the issue, for the reason that jurisdiction cannot be conferred by consent of the parties. We are satisfied, however, that, under the provisions of the charter of the city of Long Beach, the power to open the street across the defendants' railroad and to acquire such interest in the land as was necessary for that purpose was vested in the municipality, and the provisions of the Public Utilities Act have no application to this case. Charter of the City of Long Beach, art. IV, §§ 2, 12, and 13 (Stats. 1921, p. 2057); *City of Los Angeles v. Central Trust Co.*, 173 Cal. 323, 326, 159 P. 1169; see, also, *Civic Center Association v. Railroad Commission*, 175 Cal. 441, 166 P. 351. The objection to the jurisdiction of the superior court was not well taken.

[2] The real issue of this appeal is presented by the contention of the appellants that the trial court erred in its refusal to allow any damages in the way of compensation for the structural changes which would be made necessary by the opening and extension of the street. This question was considered in connection with the appeal in *City of Oakland, a Municipal Corporation, v. Mary S. Schenck, Defendant, and Southern Pacific Company and Central Pacific Railway Co., Defendants and Appellants* (S. F. No. 11165) 241 P. 545, argued and submitted with the appeal in this case. In the decision in that case, this day handed down, we hold that in this state a railroad company is not entitled to compensation for structural changes made necessary by the taking of an easement for the opening and extension of a street across its tracks and right of way.

[3] By the amendment of 1915 to section 963 of the Code of Civil Procedure, appeals from orders denying a new trial were abolished. 2 Cal. Jur. p. 173, § 34. The appeal from the order in this case is dismissed.

The judgment is affirmed.

We concur: MYERS, C. J.; SHENK, J.; LAWLOR, J.; SEAWELL, J.; RICHARDS, J.

197 Cal. 551

BANCROFT WHITNEY CO. v. PAYNE,
County Auditor. (L. A. 8954.)

(Supreme Court of California. Dec. 1, 1925.)

Courts ⇨ 42(5)—**Ordinance of city council and resolution of board of supervisors held to have established municipal court for city.**

Ordinance of city council of Los Angeles and resolution of the board of supervisors of Los Angeles county, in view of St. 1925, p. 648, Const. art. 11, § 8½, article 6, § 1, as amended in 1924, and Los Angeles City Charter, §§ 35, 429, held to have established municipal court for city of Los Angeles.

In Bank.

Application for writ of mandate by the Bancroft Whitney Company against H. A. Payne, County Auditor of the County of Los Angeles. Writ granted.

Myron Westover, of Los Angeles, for petitioner.

Newby & Palmer, of Los Angeles, for respondent.

Jess E. Stephens and Chas. B. MacCoy, both of Los Angeles, amici curiæ.

J. M. Friedlander, City Prosecutor, of Los Angeles, amicus curiæ.

RICHARDS, J. The petitioner herein applies for a writ of mandate to be directed to the respondent herein in his capacity as county auditor of the county of Los Angeles, commanding him to audit and approve the petitioner's claim and demand for a certain sum of money claimed to be due and payable to said petitioner as the purchase price of certain property sold and delivered to the county of Los Angeles pursuant to an order of the board of supervisors thereof, directing the purchasing agent of said county to procure and furnish certain sets of Deering's Codes of California for the use of the municipal court established by an ordinance of the city council of the city of Los Angeles, approved August 26, 1925, published September 2, 1925, and which became effective on October 2, 1925, and by virtue of which it was provided that said municipal court should begin to function on December 1, 1925. It is for the purchase of said property pursuant to said order for such purpose that the petitioner herein demands payment, and for which it seeks the issuance of the writ prayed for herein. It is stipulated by the parties hereto that the facts set forth in the petitioner's said application are true.

The sole question presented for our consideration in this proceeding is as to whether or not the city of Los Angeles has, by proper and legal procedure, established a municipal court in that city which can begin to function as such court on December 1, 1925. Section 8½ of article 11 of the state Constitution provides in part as follows:

It shall be competent for cities in their charters to provide:

"1. For the * * * establishment, constitution, regulation, government and jurisdiction of municipal courts and judges thereof, with such civil, criminal and magisterial jurisdiction as by law may be conferred upon inferior courts and judges thereof."

Section 1 of article 6 of said Constitution, as amended in 1924, provides in part as follows:

"The judicial power of the state shall be vested in the Senate, sitting as a court of impeachment, in a Supreme Court, District Courts of Appeal, superior courts, such municipal courts as may be established in any city or city and county, and such inferior courts as the Legislature may establish in any incorporated city or town, township, county or city and county. [Amendment adopted November 4, 1924.]"

Section 13 of the same article reads as follows:

"The Legislature shall fix by law the jurisdiction of any inferior courts which may be established in pursuance of section 1 of this article, and shall fix by law the powers, duties, and responsibilities of the judges thereof."

The act of the Legislature of 1925 (Stats. 1925, p. 648), provides in part as follows:

"Section 1. A municipal court is hereby authorized to be established for each chartered city or city and county of the state having a population of more than forty thousand inhabitants as ascertained by the census taken under the authority of the Congress of the United States last preceding the establishment of such court, whenever such city or city and county by its charter provides for the establishment of such court, or whenever a majority of the qualified electors of any such city or city and county voting upon the question of the establishment of such municipal court, vote in favor thereof.

"Section 2. Whenever the charter of a city or city and county, either as originally adopted or by amendment thereto, provides for the establishment of a municipal court, such court shall begin to function at the time fixed in the charter, or if no time is therein fixed then at such time as shall be fixed by an ordinance of the legislative body of such city or city and county."

Section 429 of the charter of the city of Los Angeles (Stats. 1925, p. 1151) contains a provision reading as follows:

"The city of Los Angeles may establish a municipal court when, and in such manner as may be, authorized by the Constitution or laws of the state of California."

On the 24th day of July, 1925, the board of supervisors of the county of Los Angeles duly adopted an ordinance, by the terms of which the boundaries of Los Angeles township were so changed that said township was, upon the taking effect of said ordinance, to be wholly within the boundaries of the city

of Los Angeles. On the 26th day of August, 1925, the city council of the city of Los Angeles duly adopted an ordinance creating, constituting, and establishing a municipal court in the city of Los Angeles, which ordinance reads in part as follows:

"Section 1. That a municipal court in and for the city of Los Angeles is hereby created, constituted and established, under authority of, and in conformity with, the Constitution and laws of the state of California and the charter of said city.

"Sec. 2. That said municipal court shall begin to function on the 1st day of December, 1925, and shall have and exercise such jurisdiction and powers as are now, or hereafter may be, provided by law.

"Sec. 3. That until otherwise provided by law, the number of judges of said municipal court shall be twenty-four; and the qualifications of such judges, and the manner in which, the time at which, and the term for which, they shall be elected or appointed shall be as is now or hereafter may be, provided by law."

"Sec. 5. That the justices of the peace of the city of Los Angeles, and the justices of the peace of the townships of Los Angeles, and the clerks and other attachés of the courts of such justices of the peace shall become and act as the judges, clerks and attachés respectively of said municipal court from and after the time said municipal court shall begin to function in accordance with the provision of section 11 of article 6 of the Constitution of the state of California, as amended November 4, 1924."

By the terms of section 35 of article 3 of the Charter of the city of Los Angeles (Stats. 1925, p. 1044), the city council of the city of Los Angeles possess the following powers, viz.:

"Except as otherwise in this charter specifically provided, the council shall have full power to pass ordinances upon any subject of municipal control, or to carry into effect any of the powers of the city."

The foregoing provisions of the Constitution, and of the act of the Legislature giving effect to the same, and of the Los Angeles charter, and of the ordinance of the city council of said city, and of the board of supervisors of Los Angeles county, providing the successive steps in the creation and establishment of municipal courts, have, in our opinion, the combined effect of creating, providing for, and establishing a municipal court in and for the city of Los Angeles which should begin to function as such upon December 1, 1925, with such officers as were duly qualified on that date to be and act as the judge and other officers thereof. This being so, we are further of the opinion that the board of supervisors of the county of Los Angeles had power under the charter of said county and under the provisions of general law to purchase and provide the proper appliances and equipment for the functioning of said court, among which might be includ-

ed the requisite number of the published Codes of this state for the use of the judges and officers thereof. This latter proposition has not been questioned in this proceeding.

It is therefore ordered that a writ of mandate issue as prayed for herein.

We concur: LENNON, J.; SHENK, J.; WASTE, J.; SEAWELL, J.; LAWLOR, J.

197 Cal. 482

**RECLAMATION DIST. NO. 1500 v. RECLAMATION BOARD OF CALIFORNIA
et al. (Sac. 3738.)**

(Supreme Court of California. Nov. 30, 1925.
Rehearing Denied Dec. 28, 1925.)

1. Levees and flood control ☞16—Reclamation board not entitled to set up amendment of plan after expenditures made by reclamation district as ground of refusing to pay for such expenditures.

Where reclamation district in constructing levees incurred expenditures for "bank protection" in conformity to existing plan approved by the reclamation board, *held* that such board could not, in purchasing levees as governing body of drainage district, deny compensation for such expenditures because subsequent amendments of plan eliminated such work.

2. Levees and flood control ☞16—Resolution of reclamation board held not limitation on its power in later contracting to purchase levees for drainage district.

Provision in resolution of reclamation board, approving plans of reclamation district in constructing levees, that expenses were to be borne by such district, *held* not to prevent board when contracting to purchase levees for drainage district, from including in purchase price expenditures for particular work, if it constituted "actual reasonable cost of construction."

3. Levees and flood control ☞16—Conclusion of reclamation board, expressed in contract purchasing levees for drainage district, as to actual reasonable cost of construction, *held* final, in absence of bad faith or abuse of discretion.

Reclamation board as governing body of drainage district in purchasing levees constructed by a reclamation district under St. 1913, p. 130, has a large measure of discretion in determining what expenditures come within meaning of phrase "actual reasonable cost of construction," and board's conclusion in agreeing to take over levees and pay stipulated sum as actual reasonable cost cannot be disturbed by the courts, in absence of want of good faith or abuse of discretion.

4. Levees and flood control ☞16—Whether interest incurred by reclamation district was part of actual reasonable cost of construction *held* question of fact for reclamation board purchasing levees for drainage district.

In view of Pol. Code, § 3395 et seq. *held* that question whether sums expended by reclamation district as interest on warrants is-

sued by it in constructing levees were properly a part of actual reasonable cost of construction was question of fact for determination of reclamation board, contracting, as governing body of drainage district, to purchase such levees.

5. Interest ☞13—Provisions as to payment of interest for forbearance in payment of debts inapplicable to state agencies regulated by statutes.

Civ. Code, § 1915 et seq. relating to payments of interest for detention or forbearance in payment of liquidated sums of money has no application to state agencies or political subdivisions, liabilities of which are regulated by statutes.

6. Drains ☞19—Reclamation board without authority to authorize payment of interest on obligations of drainage districts unless warrants bearing interest have been issued.

The reclamation board, purchasing levees constructed by reclamation district as governing body of drainage district, has no authority to provide for or permit payment of interest on obligations of drainage district until such time as warrants bearing interest as provided therein have been actually issued in payment of such obligations.

In Bank.

Application for writ of mandate by Reclamation District No. 1500, to be directed to the Reclamation Board of the State of California and another, to compel respondents to allow and pay certain moneys due petitioner, for construction of certain levees. Writ granted.

Devlin & Devlin, of Sacramento, for petitioner.

Stephen W. Downey, of Sacramento, for respondents.

RICHARDS, J. This application is for a writ of mandate, whereby the petitioner seeks to have the respondents commanded to allow and provide for the payment of certain sums of money alleged to be due from the respondent Sacramento and San Joaquin drainage district to the petitioner, arising out of the construction of certain levees constituting a portion of the Sutter-Butte by-pass system of the Sacramento and San Joaquin Drainage District, and the purchase by the latter thereof from said petitioner. The original application contained four counts. By the first of these the applicant sought to have the respondents directed to allow and order paid the sum of \$1,876,556.66, being a balance alleged to remain due and payable upon a certain contract made and entered into between the said applicant and the Sacramento and San Joaquin drainage district upon the purchase price of said levees as provided for therein; said contract being known and designated as contract A. By the second count the applicant sought a like writ requiring the respondent to allow and order paid the sum

of \$858,665.42, alleged to be due and payable upon a certain contract made and entered into between said applicant and said drainage district, known and designated as contract B. By the third count the applicant sought to have the respondents directed to allow and order paid the sum of \$312,962.19; the same being the amount of interest alleged to be due as of the date of October 10, 1924, upon the said balance of the purchase price of said levees as set forth in the first count of said application. By the fourth count the applicant sought to have the respondents directed to allow and order paid the sum of \$95,470.40, alleged to be due and payable as interest upon the principal sum of \$1,000,000, which was paid to said applicant according to the averments of the first count. These several counts in the applicant's original and amended petition, with the responses made thereto, will be treated in the order of their presentation.

The facts out of which these several claims are alleged to have arisen are quite fully set forth in the decision of this court in the case of Reclamation District No. 1500 v. Riley, etc., 192 Cal. 147, 218 P. 762, and hence will require but brief reference and review in this opinion. By its said decision in Reclamation District No. 1500 v. Riley, etc., supra, this court held that the contract made and entered into between reclamation district No. 1500 and Sacramento and San Joaquin drainage district for the purchase of the levees of the former, which contract is known and designated in the first count of the original application herein as contract A, was a valid and existing agreement between the parties thereto, and accordingly ordered a writ of mandate to issue commanding the immediate payment of the sum of \$1,000,000 then due and payable by the terms of said contract by the issuance of warrants against assessment No. 6 of the Sacramento and San Joaquin drainage district for said sum. According to the averments of the application herein, the mandate of this court in the above proceeding was obeyed, and the warrants called for therein were issued on October 3, 1923. By the terms of said contract A it was provided that the purchase price of said levees should be the principal sum of \$2,876,556.66, "which the reclamation board fixed and determined as the actual reasonable cost of said levees * * * without computing interest thereon, the amount of interest to be hereafter considered and fixed by the said drainage district." By the terms of the first count of the original application herein the balance remaining due upon the principal sum of said purchase price was averred to be the sum of \$1,876,556.66.

In their response to the said first count of their original application, the respondents, while admitting the making of said contract A, averred that by a mutual mistake of the parties thereto the principal sum of the pur-

chase price of said levees was stated to be the sum of \$2,876,556.66, whereas it should have been stated to be \$2,844,315.57, a difference of \$18,725.34. The respondents further averred that, in arriving at the total principal sum which should represent the "actual reasonable cost" of the construction of said levees, the reclamation board, acting for said drainage district, included therein certain items which formed no proper part of the cost of construction thereof, and that as to these items the said reclamation board exceeded its statutory power in the inclusion of the same in the total principal sum agreed to be paid as the purchase price of said levees. The respondents made certain other averments which, in addition to those above referred to, presented disputed issues of fact, in consequence whereof this court upon the first hearing upon said application had on November 24, 1924, referred the proceeding to Hon. Peter J. Shields, judge of the superior court of the state of California, in and for the county of Sacramento, to take testimony and report the same and his findings thereon to this court. By said order, which was made and entered by consent, it was further provided that, since the answer of the respondents admitted that there was at least an additional \$1,000,000 due and owing to the petitioner upon said contract A, it was therefore ordered that said sum be applied thereon by warrant to be issued therefor, and, when issued, to be credited upon the demand set forth in the first count of said application. It was further provided in said order that a supplemental petition should be filed by the petitioner setting forth the substance of said order, and that said order was made and was to be complied with without prejudice to the rights and claims of either of the parties to this proceeding as set forth in their respective pleadings, or to the right of the court to fully hear and determine all of the matters and issues presented therein. In compliance with said order, the said sum of \$1,000,000 was duly applied upon the purchase price of said levees as provided for in said contract A; and also in pursuance thereof a hearing was duly had before said referee. Pending said hearing and prior to the conclusion thereof and filing of the report and findings of said referee, the parties hereto, on March 3, 1925, appeared in open court, and the petitioner therein conceding that, owing to a mutual mistake the purchase price of said levees as named in said contract A should be the sum of \$2,844,315.57 instead of the sum of \$2,876,556.66 as stated therein, and that there should be a reduction from said latter amount to the extent of \$32,241.09; and, it further appearing from the evidence already taken before said referee "that the total amount of the items contested by respondent upon contract A do not exceed the sum of \$441,957.65, being \$383,408.77 for bank protection, and \$58,548.88 for financing the Ajax Dredging Com-

pany contract, a total of \$441,957.65, and that, in addition to the allowance of \$1,000,000, allowed by this court by its order dated November 24, 1924, and paid by warrant, it was suggested on the part of the petitioner there might be allowed an additional sum of \$402,357.92, being the amount named in contract A, less \$32,241.09 deducted on account of mutual mistake, less \$2,000,000 heretofore paid by warrants and less \$441,957.65, being contested by respondent upon said contract A," and that an order in accordance with the foregoing conceded facts might be made; and, there being no objection on the part of the respondents to said order, it was thereupon made in conformity therewith, and the said respondents were thereby ordered to allow and issue warrants for the payment of the sums thus conceded to be due and payable upon said contract A without prejudice to the rights and claims of either of the parties hereto as to any balance remaining due or payable upon said contract A or of the court to hear and determine the same.

Thereafter and on May 6, 1925, the petitioner herein, pursuant to the order of this court directing the filing of a supplemental petition herein, filed its amended and supplemental petition wherein it set forth the substance of the two orders of this court above referred to and the fact that the same had been complied with, and further alleging that, as a result of the making of said orders and of the compliance therewith, there remained but two contested items under the first count in its said petition to be disposed of by this court, to wit, the sum of \$380,408.77 alleged by said petition to be properly embraced within the terms and amount provided in said contract A as part of the purchase price of said levees, expended by the petitioner for "bank protection," and the further sum of \$58,548.88, also recoverable under said contract A as expended by petitioner "for financing the Ajax Dredging Company contract," and for the allowance and payment of which two said sums the petitioner still contended a writ of mandate should issue. To this amended and supplemental petition the respondent presented and filed an answer admitting those portions thereof which purported to set forth the substance of the prior orders of this court and the compliance therewith, but denying liability upon the remaining two items alleged to be covered by said contract A. The report and findings of the referee upon the hearing had before him were presented and filed on April 28, 1925.

As to the two remaining items above referred to as embraced within the terms and amounts due and allowable under said contract A, the report and findings of the referee were, in substance, as follows: The terms "bank protection" embraced such work done in the course of construction of the sloping banks of the levees within reclamation district No. 1500 as consisted in the planting of

such willows and other vegetation along the bases and sides of said levees as would conduce by their rootage and growth to solidify and thus protect the same from the disintegrating action of the waves and currents of the passing or impinging waters, and also of the building of pile and timber bulkheads to break the effect of wave action and of cobble revetment of the levee slopes at places for the same purpose. As to the cost and details of such work, the report of the referee shows that it was provided in the amended plans and estimates of Sutter-Butte by-pass project assessment No. 6 that such protection against the waves and currents of the stream should be provided along that portion of the levees contemplated by such plans and estimates and lying within reclamation district No. 1500, and that the estimated cost thereof for the east levee of said reclamation district which constituted the west levee of Sutter by-pass was the sum of \$198,900, and of such work upon the easterly end of the north levee of said district, which constituted the south levee of Tisdale by-pass, was the sum of \$8,670, making a total estimated cost of such work of bank protection upon the east and north levees of said reclamation district No. 1500 the sum of \$207,570. When reclamation district No. 1500 came to plan, estimate, and perform this work of bank protection upon its said levees in course of construction, its estimate of the cost of such work upon its said east levee was \$223,775 and its said plans therefor were duly reported to and approved by the state reclamation board. No amount was at that time estimated or approved for bank protection upon said north levee. By a subsequent amendment of the plans of Sutter-Butte by-pass project No. 6, made after the foregoing work of bank protection had been completed by reclamation district No. 1500, but before the purchase of its said levees by virtue of contract A, the foregoing items referring to bank protection were omitted from said plans and estimates. The referee, however, finds that the bank protection work which was actually done by reclamation district No. 1500 was desirable for the protection of said levees in order to prevent their destruction by the beating of water against them, and was done in accordance with the highest engineering skill and advice, and that the total amount expended by said reclamation district therefor was the sum of \$383,408.77, which gross sum embraced an item of cost for bank protection of a portion of the south levee of Tisdale by-pass, amounting to \$129,448 in excess of the amount originally provided for this particular work in the original plans and estimates of Sutter-Butte by-pass project No. 6. The gross sum above given also included the sum of \$115,457.30 expended by reclamation district No. 1500 for work done in Tisdale by-pass channel which was never included in either the original or amended plans and estimates of

Sutter-Butte by-pass project No. 6, but which was also done to protect the Tisdale by-pass levee from destruction and was done with the highest engineering skill and advice.

All of the foregoing work of bank protection was reported to and was under consideration by the reclamation board when in the year 1919 it was considering the purchase from reclamation district No. 1500 of its levee system, which purchase was in the course of consummation through the execution of contract A; and, as a result of such consideration by the auditors and engineers of said reclamation board, a resolution was duly adopted by said board approving the plans and work of reclamation district No. 1500 with regard to bank protection, and the sum allowed therefor was then fixed at a total of \$383,408.77, and was included within the terms of said contract A as a part of the reasonable cost of the construction of said levees, and as the principal sum actually expended by said reclamation district No. 1500 for such work in warrants issued therefor without calculating interest upon such warrants. The respondents challenge the right of the petitioner to have these items for bank protection allowed and ordered paid upon grounds hereinafter to be stated and commented upon.

As to the amount claimed by the petitioner upon the item embraced in contract A, designated as Ajax Dredging Company Contract, the referee's report explains said item, in substance, as follows: In the year 1918 reclamation district No. 1500 entered into a contract with Ajax Dredging Company for the construction of a certain portion of its levees in accordance with the plans or reclamation approved by the reclamation board. By the terms of said contract the district was to pay the contractor the cost of the agreed work plus 12½ per cent. and was to make such payments monthly as the work proceeded; and the contract further provided that, if such payments were made in warrants issued to the contractor, the district was to make some arrangement by which said contractor should receive cash on account of these monthly payments. The district had at said time no cash with which to pay warrants, and it therefore seemed to be necessary to the progress of said work that the district should, as it did, make arrangements for the discounting of its said warrants at the rate of 11.11 per cent. This resulted in an expenditure on account of the said percentage of profit to the contractor above cost of \$58,679.60, and of a further expenditure on account of said discounts of the sum of \$58,548.88, both of which said amounts were actually expended by said reclamation district No. 1500 during the course of the fulfillment of its said contract with the Ajax Dredging Company for the construction of said levees. Both of these foregoing amounts were included within the terms of contract A, after the bases therefor had been fully ex-

amined into by the officers and agents of the reclamation board. The respondents challenge the validity of the allowance only of the discounts in said contract A, and that only upon the ground that discounts of this character constituted no part of the cost of construction of the levees, and hence that the reclamation board had no power to allow or contract to pay the same.

[1, 2] Dealing first with the objections which the respondents urge against the validity of the claims of the petitioner for the items embraced within the total sum provided in contract A to be allowed for bank protection, we find that said objections differ as to each of the said items included within said total sum. As to the item of \$138,509.47, which represents work done by reclamation district No. 1500 upon its levees at a time when the doing of such work was included within the details of the original plan of the reclamation board upon the basis of which the assessment of Sutter-Butte by-pass project No. 6 was to be predicated, it is urged by respondents that the subsequent amendment of said plan by the reclamation board must be given the effect of eliminating this class of work from inclusion in the cost of construction of levees to be paid for out of the funds to be raised by said assessment. We are not disposed to look with favor upon this contention as to this particular item, for the reason that it is conceded that at the time said reclamation district No. 1500 actually made this expenditure in the course of the construction of its said levees it was conforming to the then existing plan approved by said reclamation board, and hence that the latter board ought not to be allowed by any changes in its original plan to work an injury to the petitioner which had proceeded in good faith to do a particular and necessary kind of constructive work upon its levees in conformity with the then existing plan and purpose of said reclamation board. The objection which the respondents urge to the validity of the item of \$129,448, part of the sum total allowed for bank protection, is that the work for which said sum was agreed to be paid in contract A was never wholly included within the original plan of the reclamation board for the work to be done upon the south levee of the Tisdale by-pass, but only a small portion thereof, and hence as to such excess it cannot be legally allowed. As to the item of \$115,451.30 constituting the balance of said total sum allocated in said contract A to bank protection, the objection of the respondents is that the particular work upon the Tisdale by-pass channel for which said charge is made was done under the express stipulation embodied in the order of the reclamation board dated September 16, 1919, approving the plans of said reclamation district No. 1500 for the doing of said work, wherein it was provided that "all of the expenses of said work were to be borne by the district." It

is to be noted, however, in respect to this particular objection to this item, that the resolution of said reclamation board above referred to antedated contract A nearly three years, and that the same was therefore passed and adopted at a time when no contract existed for the purchase of said levees by the drainage district from reclamation district No. 1500, and when the latter was proceeding to do its construction work as an independent entity, operating in co-ordination with the general plans and purposes of the drainage district, and its governing body, the reclamation board, but bearing for the time being the whole expense and burden of levee and channel construction. Viewed in this light, the provision in the resolution of the reclamation board in the year 1919 cannot be held to be a limitation upon its power by later contract with the petitioner to agree to include in the purchase price of said levees the amount thus early expended by the latter for channel construction and covered by the aforesaid item of expense, provided always that said particular work comes fairly within the meaning of the phrase "actual reasonable cost of construction."

[3] We are thus brought to a consideration of the controlling question underlying the allowance or disallowance of these several items embraced within the sum total agreed to be allowed and paid for bank protection, and also agreed to be allowed on account of the Ajax Dredging Company contract, by the terms and agreements embraced in contract A. It is the question of the power of the reclamation board as the governing body of Sacramento and San Joaquin drainage district to enter into contract A and to bind said drainage district to each and all of the terms of said contract. In its decision of the case of Reclamation District No. 1500 v. Riley, etc., 192 Cal. 147, 218 P. 762, this court had occasion to deal with the powers of said reclamation board with respect to the work of reclamation, flood control, and levee construction within Sutter-Butte by-pass project No. 6 in general, and also with reference to contract A in particular. It was our conclusion, expressed therein, after a careful review of the history and legislation affecting the vast problem of reclamation and flood control in that region, that the reclamation board, which was and is the governing body of Sacramento and San Joaquin drainage district, was empowered by the Legislature to employ three methods for carrying the twofold purpose for which said drainage district has been constituted into effect. The first of these was by direct action of the reclamation board in making contracts for the doing of the work of building levees, creating by-pass channels, and generally subserving the objects of reclamation and flood control; second, by providing for the organization and functioning of subsidiary reclamation districts within particular areas of the general

district, with power to operate in the construction of portions of the work to be done within such areas under the general plan and supervision of the reclamation board, and receive compensation therefor by the presentation and allowance of claims for the cost of such construction by the reclamation board; third, by permitting such reclamation districts operating in specific areas to proceed with such work as though they were measurably independent entities, subject, however, to the general regulations of the statutes governing the methods of doing such work, and, when such work was so done or in the course of being done, the result thereof in the form of levees, channels, rights of way, etc., might, by said reclamation district so undertaking the same, be transferred to the general drainage district under contracts which should provide for taking over such construction work and all rights and values acquired in the course of prosecuting the same upon payment by the general drainage district of the "actual reasonable cost of construction." In that connection this court said:

"It was evidently not the intention of the Legislature to vest in the reclamation board the sole power of carrying out the plan in detail, for it provided that any reclamation district, levee district, drainage district, or municipal corporation should have the right to acquire rights of way, or other easements, and to construct levees, cuts, canals, or gates, subject, of course, to the approval of the plans by the reclamation board, which works might be conveyed to the drainage district upon compensation being made of the actual reasonable cost. In other words, it was contemplated that the different owners and agencies interested in flood control and reclamation of the lands should work in conjunction with the drainage district; the drainage district supplementing the work of the other agencies whenever necessary or desirable for the carrying out of the general plan. Stats. 1913, § 18, p. 275." In re Sutter-Butte By-Pass Assessment No. 6, etc., 191 Cal. 650, 658, 218 P. 27, 30.

It was under the third of these methods that reclamation district No. 1500 proceeded to function by virtue of an act of the Legislature creating such reclamation district and defining its powers. Stats. 1913, p. 130. Having done so, and having by so doing reached the point in the course of completion of its construction work when it could enter into a contract with the Sacramento and San Joaquin drainage district through its governing body, the reclamation board, for the taking over of the results of its operation, it became the duty of the reclamation board to investigate and determine as to what had been the actual reasonable cost of such construction work in order to arrive at the basis of compensation which should form the purchase price of the values thus to be taken over. Conceding, as is done in this case, that the work thus far done by the reclamation district had in all respects been legally, properly,

and skillfully performed, the duty of determining the "actual reasonable cost" thereof involved of necessity many details in the course of such construction, and which would enter more or less intimately or necessarily into the outlay for such construction work; and, this being so, the performance of its duty by the reclamation board in the foregoing respect would necessarily involve a large measure of discretion in order to determine just what items of expenditure in the long and involved course of such constructive work were or were not within the range of meaning to be given to the clause in the statute, "actual reasonable cost of construction." The exigencies of each particular case and class of constructive work would have to be considered; as, for example, whether "bank protection" was required to be done in this or that reclamation district in order to protect and preserve the levees from the action of the stream; or, to take another example which might well arise out of the fact that reclamation districts undertaking to do construction work within their area and under the statute have at the outset no funds on hand for the prosecution of work which insistently must be begun and completed and which must in one form or another be paid for as the work proceeds in order that it may proceed at all, the expedients to which the particular district undertaking such work in advance of the collection of the moneys by assessment or otherwise, which was ultimately to provide the means of payment therefor, might be driven, such as the discount of its warrants, are matters which from the peculiar nature of the case the reclamation board must consider in applying to the situation the provision as to "actual reasonable cost of construction."

It was surely not the intent of the lawmakers, in attempting to deal with the complicated problem of reclamation and flood control within the region affected by the overflow of our great central rivers, and in committing to specially formed reclamation districts within such region the work of construction of levees, by-passes, channels, etc., to so limit their powers in performing such work, and also the powers of the reclamation board in taking over the work which such districts had struggled to skillfully and properly perform, to hamper these respective public agencies as to either the performance of the work or as to the reasonable and adequate payment of the cost thereof when so far performed as to be ready to be turned over to the general drainage district under such agreements as are to be found embodied in contract A. In order to prevent such consequences, we are of the opinion that it was the intent of the Legislature to repose in the reclamation board the power and discretion of determining what particular items of expenditure in the course of construction came fairly within the meaning of the phrase "ac-

tual reasonable cost of construction," and that the determination of said board upon that subject is final, in the absence of any showing of want of good faith or of abuse of such discretion; and hence that The conclusion of said board thereon when expressed in their agreement to take over said work and to pay a stipulated sum as the actual reasonable cost thereof is not to be disturbed by us herein. *Carmichael v. Riley*, 56 Cal. App. 409, 413, 205 P. 478, and cases cited. In respect to the suggestion made by respondents that certain portions of the work of "bank protection" were not within the terms or scope of the original or amended plan of the drainage district upon the basis of which its assessment of the lands within the entire district for the provision of funds for the ultimate payment of all construction work was predicated, we do not regard this fact as having any particular significance, since whatever the original plans of the drainage district may have been, they were in the nature of things tentative and in a large degree formative, and hence subject to change as the work of reclamation and flood control developed, and were not intended to present any hard and fast rule which should operate to hamper the powers of the reclamation board in either changing from time to time its original plans for flood control or in finally determining to take over work which individual districts had undertaken to do, and in so doing to determine what particular items of expenditure in the course of doing such work should be included in the "actual reasonable cost of construction." We therefore arrive at the conclusion that, as to the remaining items included within the terms of contract A and going to make up the total sum provided therein to be allowed and paid by warrants duly issued by the reclamation board, the petitioner is entitled to its writ.

[4] The second count in the petitioner's application for a writ of mandate herein involves the question as to the effect to be given to another contract between the parties to this proceeding, known and designated as contract B. Under the express terms of contract A, above considered, after providing for the allowance and payment of the sum named therein as the principal sum due and payable as the actual reasonable cost of the said levees and rights of way transferred thereby, it was further provided "that the above-mentioned amounts or payments do not include in any way interest charges that may have accrued upon any payment or expenditures made for the cost of construction of these levees and rights of way by said reclamation district at any time and that said drainage district reserves unto itself the right to consider and act upon any claim which may in the future be presented by said reclamation district for such interest and other charges, and said reclamation district reserves unto itself all its claim and demand for such in-

terest and other charges, and enters into this contract without prejudice to said claim and demand for such interest and other charges to be hereafter presented." Thereafter, and on November 9, 1922, that certain agreement known and designated as contract B was entered into between the parties hereto, wherein, after referring to the foregoing resolution in contract A, and after reciting that the reclamation board had computed the amount of interest referred to in said former agreement, and had found the same to amount to \$858,665.42, it was agreed that the drainage district should pay said sum as interest upon the principal amount expended for said levees and rights of way as of the date of May 22, 1922. It is for the enforcement of this agreement that the petitioner has included the second count in its said application, and it therein alleges that the petitioner, in seeking the issuance of said writ, does not claim interest as such on any investment or by way of profit, but seeks reimbursement only for such payments and outlays as were actually and compulsorily made by it under the law requiring it to pay interest on its warrants issued for and during the construction of its said levees, and that the sum set forth and agreed to be paid in said contract B is wholly made up of such necessary outlay. The answer of the respondents to the second count of said application put in issue the allegations of the petitioner in the foregoing regard, and hence upon the first hearing before this court this disputed matter was also referred to the referee for his report and findings thereon. According to the report and findings of said referee, "the amount stipulated to be paid in contract B, to wit, \$858,665.42 is the interest paid out by reclamation district No. 1500 upon its warrants issued in payment of the items and each of the items included in contract A from the date of the issuance of said warrants to and including May 22, 1922."

It thus appears that the recitals of contract B as to the correctness of the amount agreed to be paid thereby and as to what said amount represents, and the report and findings of the referee, are in accord and must therefore be taken to be true. It is, however, the contention of the respondents that the question as to whether interest upon warrants issued by the reclamation district in the course of its construction work can be allowed as a part of the "actual reasonable cost of construction" is not a question of fact which the reclamation board had jurisdiction to determine and allow, but is a question of law for this court to determine, and that as a matter of law interest is not allowable as a part of cost of construction, and hence that contract B, in so far as it undertook to allow and provide for the payment of the same, is void. The respondents cite certain cases from other jurisdictions holding that in ordinary cases of contracts for construction of various

structures interest has not been allowed as part of the cost of such construction. We have no quarrel with the conclusion arrived at in these cases, but we are of the opinion that these cases have no application to the unique situation presented in the instant proceeding. Under the several acts of the Legislature providing for the formation of a number of reclamation districts for the furtherance of the work of levee construction under the general plan of reclamation and flood control in accordance with which the reclamation board and the Sacramento and San Joaquin drainage district came into being, these several reclamation districts were organized for the purpose of promoting intensively the much needed work of flood control in that region. Under these statutes governing their organization and activities they were empowered to proceed at once with this construction work, but were provided with no immediate funds with which to so proceed; their only resource being that of levying assessments upon the lands within their respective districts pursuant to the provisions of chapter 1 of article 1 of title 8 of part 3 of the Political Code. Confronted with the actual and present necessity of engaging in the work of levee construction and of pushing said work to completion as rapidly as the exigencies of the situation would permit, and confronted also with the practical compulsion of financing said work as the same proceeded, there was no other recourse open to these districts than that of either using such credit as they might have in the way of borrowing money to pay for such work as it went on or of issuing interest-bearing warrants therefor against the fund to be secured at some future time through the levy and collection of assessments within their respective districts to be benefited by the prosecution and completion of the work of levee construction and of flood control. In such a situation we are of the opinion that the question as to whether the sums actually expended by these reclamation districts in dealing with an urgent situation through the issuance and eventual liquidation of interest-bearing warrants in payment for the work of levee construction were to be properly classed as costs of such construction was a question of fact for the determination of the reclamation board in concluding to take over such levees and other properties acquired in the course of such construction work. Having so determined and having fixed the amount of such expenditures in the way of interest at the sum named in contract B, and there being in view of the report and findings of the referee, no further question as to the correctness of said amount, it is our conclusion that a writ should issue requiring the respondents to allow and to issue a proper warrant for the payment of the same.

[5, 6] This brings us to a consideration of

the three remaining counts in petitioner's application, and as to these a different situation arises. By the third count therein the petitioner seeks to have a writ of mandate issued to compel the allowance and payment of the sum of \$312,982.19, being the amount of interest which the petitioner claims to be due and payable upon the balance of the purchase price of said levees as set forth in said contract A, and which accrued thereon between May 22, 1922, the date of said contract A, and the 10th day of October, 1924, and also for such further sum as has accrued thereon since said last-named date. By the fourth count in its said application the petitioner seeks to have a like writ issued to compel the allowance and payment of the sum of \$95,470.40, claimed to have accrued as interest upon the sum of the \$1,000,000 which was paid to the petitioner by warrants issued and registered on October 3, 1923, in accordance with the terms and agreements of said contract A which was made and entered into on May 22, 1922, and by which it was provided that said sum of \$1,000,000 should be immediately allowed and paid by the issuance of such warrants therefor. By the fifth count to its said application, added by its amended and supplemental application, the petitioner seeks to have a like writ issued to compel the allowance and payment of the sum of \$180,319.73, claimed to be due and payable as interest upon the sum of \$858,665.42 agreed to be allowed and paid by the terms and agreements of contract B, said interest being computed thereon from May 22, 1922, to May 22, 1925, together with such further sum as may be found to be due and payable thereon after said last-named date and up to the time of the issuance of said writ. It is to be observed that these three last counts in the petitioner's original and amended applications relate to several sums of money which are claimed as accrued interest upon certain principal sums of money which the respondents agreed to allow and issue warrants for the payment of, by, and in contracts A and B, but for portions of which the issuance of interest-bearing warrants was for some time delayed, and for other portions of which no warrants have as yet been issued. The petitioner urges, at considerable length, and with much apparent show of fairness, that the petitioner is entitled to receive these several allowances of interest upon said principal sums heretofore in said two contracts agreed upon, for the reason that the principal sums upon which it is claimed such interest is due are ultimately to be payable out of the assessment (or the bonds issued in lieu thereof) which has been levied upon the property owners of the entire drainage district of which the land lying within petitioner's reclamation district is a part, and that, since such assessment, or bonds, is presently drawing interest which the landowners within petitioner's district will eventually have to pay.

they should presently be allowed interest upon the several principal sums which the said drainage district has already agreed to pay petitioner on their account, otherwise the interest which these landowners will eventually have to pay upon their assessment or upon the bonds issued or to be issued in lieu thereof will have eaten up the principal sums now and for some time past due and payable to the petitioner on their account. To these equitable considerations the respondents make an equally long and learned reply in the endeavor to show that these matters will eventually work out the equities which the petitioner now invokes. It seems to our minds, however, that these arguments pro and con are largely speculative, and that the proposition thus presented is one which it is not our province at this time to attempt to solve, and that there is a more direct answer to the petitioner's present contention. It is this, the petitioner insists upon the application of the rule laid down in sections 1915 et seq. of the Civil Code, relating to the payment of interest for the detention or forbearance in the payment of liquidated sums of money. This rule, while doubtless applicable to ordinary debtors, has no application to state agencies or political subdivisions, the liabilities of which are entirely regulated by the statutes providings for their creation and the limitations of their powers. This question is practically set at rest by the decision of this court in the case of *Engebretson v. City of San Diego*, 185 Cal. 475, 197 P. 651, wherein the doctrine as laid down in *Ruling Case Law* (15 R. C. L. § 14, p. 17) in the following language was approved:

"It is well settled, both on principle and authority, that a state cannot be held to the payment of interest on its debts unless bound by an act of the Legislature or by a lawful contract of its executive officers made within the scope of their duly constituted authority. This principle applies to bonds, claims, judgments, and warrants. The theory upon which the rule is based is that, whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes. The apparently favored position of the government in this respect has been declared to be demanded by public policy."

The court further pointed out that in the case of *Savings, etc., Soc. v. San Francisco*, 131 Cal. 356, 363, 63 P. 665, it was held that sections 1915 et seq. of the Civil Code do not apply to the state or any of its subdivisions, citing abundant additional authority in support of such conclusion. In the more recent case of *McNutt v. Los Angeles*, 187 Cal. 245, 259, 201 P. 592, the same principle is recognized by the court in stating that:

"As against the state or a municipality thereof, interest cannot be recovered except under special statutory authorization."

We have examined the various statutes and the amendments thereto which have been adopted since the original act of 1911 providing for the creation, powers, and functions of the reclamation board, and we nowhere find any provision therein providing for or permitting the payment of interest upon the obligations of the drainage district of which it is the governing body until such time as warrants bearing interest as provided therein have been actually issued in payment of such obligations. In so far as such warrants have already been issued for the payment of the obligations of said drainage district, recognized and agreed to be paid by virtue of contracts A and B above referred to, the petitioner is receiving or is entitled to receive interest thereon, but, in so far as warrants have not as yet been issued by the respondents for the payment of such sums as are referred to in its application herein, and which form the basis of the third, fourth, and fifth counts in its original and amended applications herein, it is entitled to no present relief in the instant proceeding.

Let a writ issue in accordance with the conclusions arrived at in the foregoing decision.

We concur: MYERS, C. J.; LAWLOR, J.; SEAWELL, J.; WASTE, J.; SHENK, J.; LENNON, J.

197 Cal. 470

STATE LAND SETTLEMENT BOARD v. HENDERSON et al. (S. F. 11579.)

(Supreme Court of California, Nov. 30, 1925.)

1. Taxation ⚡213—Land acquired under State Land Settlement Act held land belonging to the state and exempt from taxation; "belong to"; "owned by."

All lands opened for settlement on terms prescribed by the State Land Settlement Act, amended by St. 1923, p. 930, and St. 1925, p. 358, and lands purchased by state land settlement board for purpose of carrying out objects of act belong to the state within Const. art. 13, § 1, and Pol. Code § 3607, and are exempt from taxation; "belong to" being equivalent to "owned by."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, *Belong—Belonging*.]

2. Taxation ⚡213—Rule as to strict construction of provisions exempting property from taxation held inapplicable in determining whether state land taxable.

Rule that provisions exempting property from taxation are to be strictly construed has no application to question whether property acquired under State Land Settlement Act amend-

ed by St. 1923, p. 930, and St. 1925, p. 358, are exempt from taxation under Const. art. 13, § 1, as belonging to state.

3. Taxation — 213—Reversionary interest of state in public lands not taxable, because interest of private person therein taxable.

Though a private interest in or use of public lands is not exempt from taxation because interest of state is nontaxable, it does not follow that, because interest of private person in public lands is taxable, reversionary interest of state thereto is also taxable.

In Bank.

Petition for writ of mandate by the State Land Settlement Board, to be directed to F. R. Henderson and others, as members of and constituting the Board of Supervisors of the County of Merced, and another, commanding cancellation of certain assessment of taxes. Writ granted.

U. S. Webb, Atty. Gen., and Frank English, Deputy Atty. Gen., for petitioner.

C. H. McCray and F. W. Henderson, both of Merced, for respondents.

SEAWELL, J. This action arises on a petition for a writ of mandate by the state land settlement board against the board of supervisors and the district attorney of the county of Merced, asking for a writ of mandate commanding said board of supervisors to have entered upon the minutes of its board an order directing the auditor of the county of Merced to cancel certain assessments of taxes levied against the state land settlement board for the fiscal year of 1924-1925, and likewise directing said respondents as members of and constituting said board of supervisors to direct the auditor of said county of Merced to cancel any other assessments which may have been levied by the assessor of said county upon any other property situate in said county of Merced and belonging to the state of California and held for and on its behalf by said state land settlement board as particularly described in said petition and to likewise command said board of supervisors to direct the auditor and recorder of said county of Merced to cancel any and all assessments of any of the property which may have been sold to the state because of the nonpayment by said state land settlement board of any taxes erroneously or illegally levied against said property and said state land settlement board; further that said writ of mandate do also command the district attorney of said county of Merced to give his written consent to the cancellation and correction (Pol. Code, § 3881) herein prayed for and for appropriate relief and costs of suit.

But one question is presented by this proceeding to wit whether the lands and property acquired and held by the state land settlement board on behalf of the state and

which are needful or necessary to effect the purposes of said act (Stats. 1917, c. 755, p. 1566, amended Stats. 1923, c. 411, p. 930; Stats. 1925, c. 206, p. 358), are subject to taxation (Const. art. 13, § 1; Pol. Code, § 3607).

The first section of the act is declaratory of the legislative belief in the wholesomeness of the legislation it was undertaking. It is thus stated:

"The Legislature believes that land settlement is a problem of great importance to the welfare of all the people of the state of California and for that reason through this particular act endeavors to improve the general economic and social conditions of agricultural settlers within the state and of the people of the state in general."

By section 2, as amended in 1923 (St. 1923, p. 930, § 1), the object and scope of the act is thus stated:

"The object of this act is to provide employment and rural homes for soldiers, sailors, marines and others who have served with the armed forces of the United States in the European war, or other wars of the United States, including former American citizens who served in allied armies against the Central Powers and have been repatriated, and who have been honorably discharged, to promote closer agricultural settlement, to assist deserving and qualified persons to acquire small improved farms, to demonstrate the value of adequate capital and organized direction in subdividing and preparing agricultural land for settlement, and to provide homes for farm laborers. To carry out the objects herein stated there is hereby created a state land settlement board to consist of five members appointed by the governor to hold office for a term of four years and until their successors have been appointed and shall have qualified. * * *

By section 3, as amended in 1925 (St. 1925, p. 358, § 1), it is provided that the board shall constitute a body corporate, with the right on behalf of the state to hold property, receive and request donations, to sue and be sued, and all other rights provided by the Constitution and laws of the state of California, as belonging to bodies corporate, together with all rights and authority necessary for the proper carrying out of the provisions of the act.

Section 4, as amended in 1923 (St. 1923, p. 932, § 2), provides that the board may acquire on behalf of the state, by purchase, gift, or the exercise of the power of eminent domain, all land, water rights, and other property needed for the purposes of the act, and may take title in trust, and shall, without delay, improve, subdivide, and sell such land, water rights, and other property, with appurtenances and rights, to approved bona fide settlers. The powers with which the board is invested by the act are very broad and are too numerous to restate at large. We will therefore make reference to but a

few of them. The board is given authority to set aside for town-site purposes suitable areas purchased under the provisions of the act and to subdivide and sell or lease said lands acquired by it for cash, or on terms, in lots of such size and with such restrictions as to resale as it shall deem best. It may dedicate to public use such areas as it may deem desirable for roads, schoolhouses, churches, or other public purposes. It is given authority to contract with owners of tracts of land large enough, in the opinion of the board, to provide homes for at least 100 settlers, such tracts to have a water supply sufficient to irrigate the same. Under such contracts the board may provide that it shall prepare plans for subdivision, improvement, and sale of the tract contracted for, and, in cases where the board is able to make arrangements satisfactory to it, it may undertake for the owners of the land the settlement and sale of the same under such terms and conditions as it may deem fit, provided said terms and conditions are, in a general way, similar to those as in said act provided. The board is given authority to call upon the University of California for assistance in making soil surveys and other investigations necessary to determine the feasibility of the soil for settlement and in fixing the sale price of land according to productiveness.

Said board is empowered to establish within California or outside the state "offices for meeting settlers and selling the land"; also to "arrange for land seekers' excursions within or without the state." In addition to the many enumerated powers conferred, or attempted to be conferred, upon the board, it is given:

"All additional power and authority the board may deem necessary to enable the board to co-ordinate existing colonizing activities so far as they relate to irrigable areas and to bring to new farming communities the benefit of an organized life. The board shall make such charges in connection with its work under such contracts as will be sufficient to meet all expenses, such charges to be paid out of the funds obtained from the sale of the land."

Section 5 provides for the procedure to be taken when, in the judgment of the board, private land should be purchased for settlement in furtherance of the purposes of the act. Before the purchase of any private land may be made, an inspector, approved by the board, must be appointed to inspect the land proposed to be purchased and report to the board as to the productiveness and the value of the same and its adaptability to intensive, closer settlement, including an appraisalment of the value of water rights and improvements thereon, and, if the board is satisfied as to the reasonableness of the seller's price, it shall submit its report and recommendations to the Governor, and, upon his approval, the board shall be authorized to make the

purchase, provided that before the purchase is made the Attorney General shall approve the title of such land and any water right appurtenant thereto and the state water commission shall certify in writing as to the sufficiency of any water rights to be conveyed.

By section 10 it is provided:

That all sales and allotments of land made by the board to settlers under said act "shall be made under such terms and conditions as shall give to the board full control of any subdivisions thereof until all moneys advanced by the state for the purchase, improvement, or equipment of such subdivisions are fully repaid, together with interest thereon as herein provided."

Immediately upon taking possession of any land purchased by the board, and after deducting any areas to be set aside for town-sites or public purposes, the board shall subdivide said lands into areas suitable for farms and farm laborers' allotments, lay out, where necessary, roads, ditches, and drains for giving access to and insuring the proper cultivation of the several farms and allotments. Prior to disposing of any of said land to settlers, or at any time after such land has been disposed of, but not after the end of the fifth year from the commencement of the term of the settler's purchase contract, the board may prepare all or any part of such land for irrigation and cultivation; seed, plant, or fence such land, and cause dwelling houses and out buildings to be erected on any farm allotment, or make any other improvement necessary to render the allotment habitable and productive in advance of or after settlement, the cost to the board of such dwellings, buildings, and improvements not to exceed \$1,500 on any one farm allotment; cause cottages to be erected on any farm laborer's allotment and provide a domestic water supply, the combined cost to the board of the cottage and water supply not to exceed \$800 on any one farm laborer's allotment; make loans to approved settlers on the security of permanent improvements, stock and farm implements, and the total amount of any such loan, together with moneys spent by the board on improvements as above specified, not to exceed \$3,000 on any one farm allotment, or \$2,000 on any one farm laborer's allotment. Authority is granted to the board to operate and maintain any irrigation works constructed to conserve any lands purchased and sold under the provisions of the act. All moneys received in tolls and charges for the operation and maintenance of any works or for any water supplied therefrom shall be deposited in the land settlement fund created by the act and shall become available for the payment of any costs, expenses, or other charges authorized to be paid from said land settlement fund. After the purchase of land by the board, and before its disposal to ap-

proved bona fide applicants, the board shall have authority to lease such land or a part thereof on bonded or secured leases on such terms as it shall deem fit.

The act provides in detail for public notice to be given before any part of an area is thrown open for settlement, and the mode and amount of payment and such other particulars as the board may deem proper, and it shall have the power in its discretion to reject any and all applicants. The board may also sell at public auction, under such conditions of sale and notice thereof as the board may prescribe, any areas which it may determine are not suitable for farm or farm laborer's allotments. Any citizen of the United States, or any person who has declared his intention of becoming a citizen of the United States, and who is not the holder of agricultural lands or of possessory rights thereto to the value of \$15,000, and who, by his purchase, would not become the holder of agricultural land or of possessory rights thereto exceeding such value, and who is prepared to enter within 6 months upon active occupation of the land acquired, may apply for and become the purchaser of either a farm allotment or a farm laborer's allotment; not more than one allotment shall be sold to any one person.

The board may, in offering for sale farm or farm laborer's allotments, co-operate or contract with the duly authorized representatives of the United States government and other public corporations or agencies generally. It is authorized to perform all acts necessary to co-operate fully with the agencies of the United States engaged in work of similar character, and with similar boards and agencies of other states. In its co-operation with such representatives or agencies of the United States government, preference must be given to soldiers, sailors, marines, and others who have served with the armed forces of the United States, including former American citizens who served in allied armies against the Central Powers, and have been repatriated, and who have been honorably discharged. The board may give such preference to any of such citizens of California, who, as soldiers, sailors, marines, and others, have served with the armed forces of the United States as above described.

The selling prices of the several allotments into which the purchased land may be subdivided shall be fixed by the board in such amounts as are calculated to return to the state the original costs of the land, together with a sufficient sum added thereto to cover all expenses and costs of surveying, improving, subdividing and selling such lands, including the payment of interest, and all costs of engineering, superintendence, and administration, including the cost of operating any work built, directly chargeable to such land, and also the price of so much land as shall

on subdivisions be used for roads and other purposes, and also such sum as shall be deemed necessary to meet unforeseen contingencies. The board may revise such prices in such a manner as to best protect the interest of the state, and may reoffer such allotments for sale at the revised prices so stated.

Every approved applicant shall enter into a contract of purchase with the board, which contract shall, among other things, provide that the purchaser shall pay as a cash deposit a sum equal to 5 per cent. of the sale price of the allotment and in addition not less than 10 per cent. of the cost of any improvement made thereon. The balance due on the land shall be paid in amortizing payments extending over a period to be fixed by the board, not exceeding 40 years, together with interest thereon at the rate of 5 per cent. per annum, except as otherwise provided by the act. The amount due on improvements shall be paid in amortized payments extending over a period to fixed by the board, not exceeding 20 years, together with interest at the rate of 5 per cent. per annum. Provision for the repayment of loans made on live stock or implements is also made. If, after the expiration of 6 years from the opening date of any colonization project, it shall appear to the board that the contracts made with settlers shall work an undue hardship upon them, and the success of the project, and investment of state funds is thereby jeopardized, the board shall have authority with the consent of the settler to revise such existing land purchase contract by a reduction of not exceeding 30 per cent. in the sale price of the land and by a reduction in the rate of interest to be thereafter charged on the land purchased.

Every contract entered into between the board and an approved purchaser shall contain provisions that the purchaser shall cultivate the land in a manner to be approved by the board and shall keep in good order and repair all buildings, fences, and other permanent improvements situated on his allotment, reasonable wear and tear and damage by fire excepted. Each settler shall, if required, insure and keep insured against fire all buildings on his allotment, the policies therefor to be made out in favor of the board and to be in such amount or amounts and in such insurance companies as may be prescribed by the board.

In the event of the failure of a settler to comply with any of the terms of his contract of purchase and agreement with the board, the state and the board shall have the right at its option to cancel the said contract of purchase and agreement, and thereupon shall be released from all obligation in law or equity to convey the property, and the buyer shall forfeit all right thereto and all payments theretofore made shall be deemed to be rental paid for occupancy. The board may

require the settler, as security and for its protection, to execute a mortgage or a deed of trust on the property purchased upon such terms as may appear just.

Actual residence on any allotment sold under the act shall commence within 6 months from the date of the approval of the application and shall continue for at least 8 months in each calendar year for at least 10 years from the date of approval of said application, unless prevented by illness or some other cause satisfactory to the board. By the amendment of 1919 (St. 1919, p. 83S), for the purpose of carrying out the provisions of the act, the sum of \$1,000,000 was appropriated out of any money in the state treasury not otherwise appropriated, which sum of \$1,000,000, it is calculated, shall be returned to the state within a period of 50 years from the date of said appropriation.

Other provisions of the act not essential to a consideration of the questions presented are omitted.

[1] We have quoted freely from the act, substantially adopting its language, for the reason that it aptly illustrates the completeness of the official control under which the colonization plan has been placed and shows that said lands are treated as state property. The purchase of all lands by the board is made subject to the approval of the Governor of the state and the title thereto must be approved by the Attorney General. The state water commission must also certify to the sufficiency of the water supply. Several public commissions and boards are given advisory powers in the promotion of the general plan. The control and operation of the plan is strictly under the direction of the state's legally constituted agencies. In this respect it does not differ from the many other public institutions or entities of the state which are controlled indirectly by the state through trustees or boards or commissions.

It will be also noted by an examination of the plan and scheme of the act that nothing is said nor is any provision made for the payment of taxes on land owned by the state and not under contracts of purchase. It is not likely that such an important item as the payment of taxes on lands owned by the state would have escaped the attention of the framers of the act in view of the very careful and thoughtful provisions made for the payment by the purchasers of all costs and expenses incidental to sales and for the repayment of all outlay or advancement of moneys made by the state in carrying out the provisions of the act, together with interest, which costs, expenses, and outlays of money are included in the purchase price, to the end that the state may be made whole in the transaction. The fact that taxes are not regarded as an element in computing the price to the purchasers gives support to the theory that it was not the intention of the framers of the act that land acquired and

held by the state for the purposes of the act should be subject to taxation. We think that all lands held by the state and open for settlement upon the terms prescribed by the state land settlement act are lands which belong to the state and are exempt from taxation under the provisions of article 13, § 1, which provides:

"All property in the state except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. * * * Property * * * such as may belong to the United States, this state, or to any county, city and county, or municipal corporation within this state shall be exempt from taxation. * * *

We are unable to perceive why, and no argument of sufficient strength has been made to convince us to the contrary, lands purchased by the board in compliance with the act should be in a different class, so far as ownership is concerned, than state school lands or other public lands which belong to the state and are open to settlement. The fact that the public lands in question were once held in private ownership cannot affect the public character that such lands take on after purchase by the state for public purposes. If this argument should obtain, none of the lands belonging to the state and devoted to public uses would be exempt from taxation. We have no doubt but that property acquired by the board for the purpose of carrying out the objects of the act belongs to the state within the intent and meaning of the constitutional provision which exempts property from taxation, and that such property is property of the state of California.

"The word 'belong' is applied alike and with the same force and meaning to the United States, this state, and to counties and municipalities, and it seems to us was employed to denote an unqualified ownership of the property, not an ownership subject to the condition that it was to be used exclusively for governmental purposes. Certainly it was not intended to attach any such condition to property belonging to the United States or this state, and how can we give it a different meaning as applied to counties and municipalities? 'The Constitution of a state derives its force and authority from the vote of the people adopting it. For that reason it is a general rule that in construing the provisions of a Constitution the words employed therein shall be given the meaning which they bear in ordinary use among the people. The natural and ordinary meaning of the words is to be accepted, except where a word is used the meaning whereof is established by statute or by judicial construction.' *Burke v. Snively*, 208 Ill. 328 [70 N. E. 327, 329]. All the dictionaries give to the word 'belong,' among other meanings, the

definition: "To be the property of" (Webster, Century); "To be possessed by" (Worcester)." *San Francisco v. McGovern*, 28 Cal. App. 491, 152 P. 980. Other examples and illustrations of the meaning of the words "belonging to" are given to show that the words used in a Constitution are equivalent to "the property of." The words "belong to" are equivalent to the words "owned by." The primary meaning of the term is "to be the property of." It implies ownership. 7 C. J. 1039, and note. There is ample authority in this and other jurisdictions to sustain this construction. Many of the revenue acts of this state would have an uncertain meaning if we were to depart from the evident meaning of the word as used in the state Constitution. The Constitution places no limitation upon the use that the state shall make of its land. It is not, for the purposes of taxation, restricted to an exclusive use.

[2, 3] The rule that provisions exempting property from taxation are to be strictly construed has no application to this case. In *Pasadena v. County of Los Angeles*, 182 Cal. 171, 187 P. 418, speaking of the strict construction rule, it is said:

"That rule applies to exemptions of property held in private ownership. But, where the question is whether or not public property shall be taxed, the rule is that it is not to be taxed unless there is express authority therefor. An example of this is found in the decisions to the effect that property belonging to a city was not taxable under the Constitution of 1849, although there was no express exemption thereof in that Constitution. *People v. Doe*, 36 Cal. 220."

The parcels of land upon which the assessments are sought to be canceled are situate within the Delhi state land settlement and are numbered 256 and 433, respectively. Allotment No. 256 has been sold by the board and is subject to a contract of purchase made by it with one N. J. Garrison. "When an interest in land, whether freehold or for years, is severed from the public domain and put into private hands, the natural implication is that it goes there with the ordinary incidents of private property and therefore is subject to being taxed. * * * The principle that a possessory right in public land is private property, and that it may be assessed for purposes of taxation to the person in possession, although in point of law he may have no right as against the state or government owning the land, has long been settled in this state." *San Pedro, etc., R. R. Co. v. Los Angeles*, 180 Cal. 18, 179 P. 393. A private interest in or use of public lands is not exempt from taxation because the interest of the state is nontaxable. It does not follow, however, that, because the interest of a private person in public lands is taxable, the reversionary interest of the

state thereto is also taxable. *San Pedro, etc., R. R. Co. v. Los Angeles*, supra.

The prayer of the petition is much broader in its requests for relief than the allegations of the petition would warrant us in granting, in that no assessments are specifically alleged to have been made against any property belonging to the state other than the two allotments described therein. Neither are any sales shown to have been made under void assessments. Our order cannot be made effective against illegal assessments or sales not alleged by petitioner to have been made. If such assessments have been made, they would fall within the rule herein announced.

Let a peremptory writ of mandamus issue directing the cancellation of the assessments of the two allotments of land described in the petition.

We concur: MYERS, C. J.; LAWLOR, J.; WASTE, J.; SHENK, J.; RICHARDS, J.

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KENDALL v. BUNNELL. (Civ. 5257.)

(District Court of Appeal, First District, Division 2, California. Oct. 23, 1925.)

1. Pleading $\S$ 251—Offered amendment to complaint pleading evidence and apparently irrelevant and disconnected matters held properly refused.

In suit to have patentee of public lands, under Act Cong. March 3, 1877, amended by Act Cong. March 3, 1891, and Act Cong. March 28, 1908, being U. S. Comp. St. § 4674 et seq., declared a trustee, offered amendment to complaint held properly refused, as pleading petitioner's evidence and apparently irrelevant and disconnected matters instead of ultimate facts.

2. Appeal and error $\S$ 1097(1)—Decision on first appeal becomes law of case when second trial develops no evidence substantially different from facts on former hearing.

Decision of appellate court on first appeal becomes law of case on second appeal, when second trial developed no evidence substantially different from facts on former hearing.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Suit by Ramer O. Kendall against Schuyler U. Bunnell. Judgment for defendant, and plaintiff appeals. Affirmed.

Phil. D. Swing and J. S. Larew, both of El Centro, for appellant.

Haines & Haines, of San Diego, for respondent.

STURTEVANT, J. On March 3, 1877, an act was approved entitled, "An act to provide for the sale of desert lands in certain states and territories." 19 Stat. 377 (U. S. Comp. St. § 4674 et seq.). On March 3, 1891, that act was amended. 26 Stat. 1096 (U. S. Comp. St.

§ 4677 et seq.). On March 28, 1908, the statute was further amended. 35 U. S. Stats. at Large, 52 (U. S. Comp. St. §§ 4681-4683). Under the latter statute (section 1 [U. S. Comp. St. § 4681]), it was provided that from March 28, 1908, the right to make entry under the provisions of the acts of 1877 and 1891 should be restricted to surveyed public lands of the character contemplated by said acts, and no such entries of unsurveyed lands should be allowed or made of record provided:

"That any individual qualified to make entry of desert lands under said acts who has, prior to survey, taken possession of a tract of unsurveyed desert land not exceeding in area 320 acres in compact form, and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry of such tract under said acts, in conformity with the public land surveys, within ninety days after the filing of the approved plat of survey in the district land office."

Of the lands in controversy a survey was made in 1856. That survey was so defective that a resurvey was authorized by an act approved July 1, 1902. The resurvey was made, and a copy was filed in the land office at Los Angeles on February 23, 1909. Such proceedings were had that an application was made by Bunnell for a tract consisting of 320 acres. His application was accepted; it was approved by the Commissioner of the General Land Office; from that approval an appeal was taken to the Secretary of the Interior, and that officer, through one of his assistants, rendered an opinion favorable to Bunnell, and in accordance with that opinion a patent was issued to the applicant. Kendall, claiming to be possessed of a better title, commenced this action to obtain a judgment that Bunnell holds the legal title in trust for him. A trial was had in the superior court, and a judgment was ordered in behalf of Kendall. Bunnell took an appeal, and the judgment was reversed. *Kendall v. Bunnell*, 56 Cal. App. 112, 205 P. 78. An application was made to the Supreme Court to have the cause heard in that court after judgment in the District Court of Appeal, but the application was denied. After the remittitur went down a second trial was had. During those proceedings Kendall offered an amendment to his complaint; the offer was refused, and an exception was duly noted. A little testimony was offered, and thereupon counsel stipulated that the bill of exceptions prepared on the first appeal should be adopted as a part of the record. Thereafter judgment was rendered in favor of the defendant, and from that judgment the plaintiff has appealed under section 953a of the Code of Civil Procedure.

[1] In pleading his statutory right, among other things, the plaintiff alleged:

"That on March 4, 1908, plaintiff set 4x4 redwood posts at each of the corners of that part

of said land above described which is claimed by the said defendant as hereinafter set forth, upon which posts were plain and conspicuous notices that he, the plaintiff, intended to reclaim said land; and said notices remained so posted for more than one year thereafter; that in the month of April or May, 1908, plaintiff commenced the work of reclamation of the said land now claimed by the defendant herein, and did thereon reclamation work of the value of \$85; which work consisted of clearing and rough leveling, and the construction of borders in the east side of said tract of land; that between the 1st day of March, 1909, and the 21st day of said month, plaintiff caused 21 days' work with a two-horse team and Fresno scraper to be done on said land in clearing and rough leveling the same, which said work was of the value of \$105."

The offered amendment was to insert immediately following \$105:

"That in the month of August, 1908, plaintiff assisted in organizing and incorporating a company known as the High Land Construction Company for the purpose of bringing water to said land and other land, and expended for such purpose the sum of \$25 in cash; the plaintiff was secretary of said company and devoted, as nearly as he can estimate, one month of his time to the work of said company for the purpose aforesaid."

Comparing the amendment with the statute it will be noted at once that the plaintiff was but offering to plead his evidence and apparently irrelevant and disconnected matters instead of ultimate facts. The trial court did not err in refusing to allow the amendment.

[2] The plaintiff took the stand and gave testimony. Among other things he testified regarding the incorporation of the High Land Construction Company, and of and concerning his activities in aiding in the incorporation of that company; that he paid out \$25 in that behalf; that he devoted 30 days of work in that connection; but he did not testify that the High Land Construction Company or any other company as the lawful successor thereof ever put a drop of water on the lands in question, or ever constructed any ditches or water works. On cross-examination the witness stated that he gave testimony before the register and receiver of the United States Land Office on the hearing of Bunnell's application to make his desert-land entry. He further testified that on that hearing he gave certain testimony which was in substance the same as the testimony which we have quoted as having been given on the second trial. The defendant gave testimony to the effect that no company other than Imperial Water Company No. 2 ever constructed ditches to the land for the irrigation thereof or applied any water to the land. There is not a particle of evidence in the record that the plaintiff and his associates ever organized any other water company than the High Land Company, or that the Imperial Company is in any sense the successor in law of

the High Land Company. Under the record before us the judgment in *Kendall v. Bunell*, supra, constitutes the law of the case. Nothing that developed on the second trial in legal effect tends to modify that judgment.

The judgment appealed from is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

A. Ruggles, all of San Francisco, for respondents.

HART, J. This is an action for damages for the alleged seizure and conversion by defendants of a certain quantity of tomatoes and a certain quantity of Egyptian corn.

The action is in conversion, and the complaint, among other facts therein stated, alleges:

"That at the time of the commencement of this action and for a long time prior thereto the plaintiff was the owner of and entitled to the possession of all the following described personal property, namely: 196,605 pounds of tomatoes and 102,040 pounds of Egyptian corn which were raised on plaintiff's ranch in said San Joaquin county in the year 1918.

"That on or about the — day of October, 1918, while plaintiff was so the owner of and entitled to the possession of all the aforesaid tomatoes and Egyptian corn, the defendants entered upon plaintiff's said premises and, without plaintiff's consent or knowledge, wrongfully and unlawfully seized, took, and carried away all of the aforesaid personal property and converted the same to their own use, whereby plaintiff was damaged by such unlawful taking and conversion on the part of said defendants in the sum of \$4,772.15, which was the market value of said tomatoes and Egyptian corn at the time of said conversion."

The defendants were and are represented by different attorneys. The defendant corporation demurred to the complaint on the general ground and also on certain special grounds, among which was that of misjoinder of parties defendants, and that "several causes of action have been improperly united, or not separately stated." Section 430, subd. 5, Code Civ. Proc.

The defendant Powers demurred to the complaint on the general ground. The demurrer in each instance was disallowed, and within due time the defendants filed separate answers, in both of which the material allegations of the complaint were specifically denied. Each of the answers also set up several special defenses, which will hereinafter be noticed.

Upon the close of plaintiff's case, the defendants made separate motions for a nonsuit, the same were granted, and the action as to each of the defendants was dismissed. The cause is before us on appeal by the plaintiff from the judgment entered upon the orders granting said motions.

A case growing out of precisely the same transactions has previously been before, and decided by, this court; the judgment of nonsuit from which the appeal therein was prosecuted by the plaintiff there and here having been affirmed. *Ramsey v. Cal. Pack. Corp.* et al., 51 Cal. App. 517, 201 P. 481.

The facts of the transactions from which this action arose were gone into more extendedly or in greater detail at the trial of the

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RAMSEY v. POWERS et al. (Civ. 1967.)

(District Court of Appeal, Third District, California. Oct. 19, 1925. Hearing Denied by Supreme Court Dec. 16, 1925.)

1. Judgment ⇨570(4)—Doctrine of res adjudicata as a plea in estoppel not available as to a judgment entered upon an order granting a nonsuit.

The doctrine of res adjudicata as a plea in estoppel is not available as to a judgment entered upon an order granting a nonsuit.

2. Chattel mortgages ⇨229(2)—Mortgagee alleging single act of conversion must prove single act done jointly by defendants.

In action by mortgagee against two defendants for conversion of corn and tomatoes, where complaint alleged a single trespass by joint act of defendants, it was incumbent upon plaintiff to prove that the taking of tomatoes and corn constituted a single act of trespass, done jointly and in concert by both defendants.

3. Action ⇨50(6)—Where complaint alleged single act of trespass by two defendants jointly, but evidence showed each defendant acted independently, there was misjoinder of causes of action and parties.

In an action by mortgagee against two defendants for alleged conversion of corn and tomatoes where complaint charged a single act done jointly by both defendants, but the evidence showed two independent transactions, carried out by persons acting independently, held there was a misjoinder of parties as well as causes of action.

4. Torts ⇨26(2)—Where evidence shows only one committed wrong, court should hold offending party and dismiss case as to other.

Where two parties are alleged to have jointly committed a tort, but evidence shows only one committed the wrong, it is duty of court to hold offending party and dismiss case as to other.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by W. C. Ramsey against E. Powers and another. From a judgment of nonsuit, plaintiff appeals. Affirmed.

A. H. Carpenter, of Stockton, and Frank W. Sawyer, of San Francisco, for appellant. Nutter, Hancock & Rutherford, of Stockton, and Pillsbury, Madison & Sutro and Charles

former action than in the trial of the present action. It appears from the present record, as it was made to appear by the record in the former action, that the plaintiff was the owner of a certain ranch, situated in San Joaquin county, and consisting of 320 acres; that on the 1st day of November, 1917, he leased the whole of said ranch to one W. T. Kim and one C. H. Hahn, for the term of one year; that, on the 18th day of March, 1918, said Kim and Hahn executed and delivered to the plaintiff their promissory notes for the sum of \$3,000 and \$2,000, respectively, and at the same time, as security for the payment of said notes, gave to plaintiff a mortgage on all crops of sugar beets, tomatoes, beans, Egyptian corn, and similar products "being, standing and growing" on the demised land, and which is described in the mortgage. It further appears that Kim and Hahn first attempted to grow sugar beets on the land. In January, 1918, they planted the entire acreage of the land to sugar beets, but, as Kim stated, they "blew out." Shortly thereafter they again planted sugar beets in the land, with the same result. In May, 1918, they put the land in tomatoes and Egyptian corn. When these crops had matured, Kim and Hahn sold the tomatoes to the defendant California Packing Corporation, and the corn to the defendant Powers. They (Kim and Hahn), upon effecting those sales, conveyed the tomatoes to Manteca, a railroad station not far distant from the land, and there put them aboard a car and consigned them to the defendant corporation at its packing plant. The corn, by request of Powers, was removed from the land and deposited on "high land" near a road, a short distance from the Ramsey ranch, at which point Powers took possession of the corn and by means of trucks carried it away.

The above comprehends a statement of the general facts.

The only testimony in this case directly bearing upon the transactions constituting the bases of this action was that contained in a deposition given by Kim. There was some other testimony received, but it has no direct relation to the transactions herein involved, and need not, therefore, be here presented.

[1] The nonsuit here was based on substantially the same grounds as those upon which the nonsuit in the former action was allowed, and many, if not all, the legal points herein urged upon us in support of the appeal were presented and considered in the appeal from the judgment of nonsuit entered in the former action. There were, however, two other grounds added in this case to those presented in the former case, to wit: (1) That there is a misjoinder of parties defendants; (2) that arising upon the pleas of estoppel interposed by defendants as against the right of the plaintiff to maintain this action in that the judgment in the former action is *res adjudicata*. In limine, it may as well be stated

that the doctrine of *res adjudicata*, as a plea in estoppel, is not available as against a judgment entered upon an order granting a nonsuit. "It is fundamental that the doctrine of *res adjudicata* has no application to judgments of nonsuit." *Merritt v. Campbell*, 47 Cal. 543; *City and County of San Francisco v. Brown*, 153 Cal. 644, 648, 96 P. 281.

On the appeal from the judgment entered in the former action, these points, among others, were raised and considered: (1) That the mortgage in question there and here does not cover or include the crops of tomatoes and Egyptian corn purchased by the defendants; (2) that the mortgage, the execution of which was acknowledged by the mortgagors before one Emerson, as a notary public, was, as to third parties, invalid, because said Emerson was a partner of the plaintiff in the ownership of the mortgage and the notes it was given to secure. As to what was said in the opinion disposing of the appeal in the former action upon those propositions, the Supreme Court, in denying a hearing there, expressly declined to state its views. *Ramsey v. Cal. Packing Corp. et al.*, 51 Cal. App. 517, 201 P. 481. Clearly what was said in that opinion with regard to the scope of the mortgage was dictum. As to the other point, the Supreme Court in effect held that the judgment of this court could be sustained without regard to whether the mortgage covered the crops in question. But neither of these propositions need be considered here, since we are convinced that the nonsuit was properly granted upon the ground that there is a misjoinder of parties defendants.

[2, 3] Upon the face of the complaint there is therein alleged a single trespass or tort, which it is alleged was committed by the joint act of the two defendants. It was incumbent upon the plaintiff to make his case as his pleading submitted it, to prove that the taking of the tomatoes and the corn constituted a single act of trespass and that it was done jointly or in concert by the defendants. This the plaintiff failed to do. There is absolutely no evidence tending to show that the defendants ever maintained with or between each other any business relations of any kind or character. There is not the slightest evidence that the two jointly acted in the transactions involved in this dispute. To the contrary, the evidence conduces to the conclusion that the act of taking the tomatoes and the act of taking the corn constituted two different, distinct, and independent transactions carried out by two different persons acting independently of each other. Kim testified that the original agreement by him and Hahn with the packing corporation for the purchase of the tomatoes was made in the month of December, 1917; that the negotiations leading to said agreement were conducted on behalf of the corporation by a Mr. Davis, the "buyer" of the said defendant; that, through said Davis, the agreement with that corpora-

tion was that the latter was to provide the financial means necessary for the planting, cultivation, and harvesting of the tomatoes, and that Kim and Hahn were to sell the vegetable to the corporation at the rate of \$20 per ton; that the delivery of the tomatoes to the corporation was made before the corn was sold and delivered to defendant Powers; and that such delivery was made by Kim and Hahn at the railroad station at Manteca in pursuance of the written memorandum of the agreement between them. Kim further testified:

"Q. Did Mr. Davis or California Packing Corporation or anybody representing or connected with California Packing Corporation ever talk to you about corn? A. No. Q. Never had anything to do with corn? A. No. Q. Nothing at all? A. No. Q. Did they ever take any corn off that place, off the Ramsey place; did Mr. Davis or California Packing Corporation ever touch any corn or buy any corn or take any corn off the Ramsey place? A. No. Q. Not a grain? A. No, just the tomato. Q. They bought tomato from both ranches? A. Yes. Q. Baccieleri ranch, other ranch? A. Yes. Q. Forty acres and eighty acres? A. About 70 to 80. Q. But never touch any corn? A. No. Q. Did Mr. Powers ever talk to you about tomatoes? A. No. Q. Did Mr. Powers ever buy any tomatoes from you? A. No. Q. Did you ever give any tomatoes, or deliver any tomatoes, to Mr. Powers? A. No. Q. Off the Ramsey place? A. No. Q. In 1918? A. No. Q. Or at any other time? A. No. Q. California Packing Corporation and Mr. Powers never come together to do anything? A. No. Q. Never saw them together? A. No. Q. Any time? A. No."

The transaction resulting in the sale of the corn to Powers, so Kim testified, took place after the tomatoes were sold to the corporation, one Hooper, buyer for Powers, representing or acting for the latter therein.

The above testimony stands uncontradicted in the record, there having been introduced, as before stated, no other testimony than that of Kim directly relating to the two transactions. And thus it is clear that, as before declared, assuming that the sale and the removal from the land of the tomatoes and the corn were tortious and in violation of the rights of the plaintiff under his mortgage, the plaintiff not only failed to show that the defendants were joint tort-feasors, but that the evidence affirmatively shows that they acted in two entirely different transactions and independently of each other, or, in other words, that there was, in the carrying out of the two transactions, no concert of purpose between them. It follows that there is here not only a misjoinder of parties defendants, but a misjoinder of causes of action. For these reasons alone, if for no other, there was no alternative left to the trial court but to grant the motion for a nonsuit. The authorities are quite uniform upon this proposition.

In *Miller v. Highland Ditch Co.*, 87 Cal. 430, 25 P. 550, 22 Am. St. Rep. 254, the action was

for damage to plaintiff's land, alleged to have been caused by the acts of defendants in maintaining ditches whereby "foreign waters" were diverted into and through the mountain canyon in which said land was situated, with the result that the said land was inundated and as a consequence seriously injured. The complaint proceeded upon the theory that the three defendants were joint tort-feasors, but the evidence disclosed that they maintained, independently of each other or without acting in unison in such maintenance, three different ditches, all, however, contributing to the damage complained of. The Supreme Court, in disposing of the case on appeal, and speaking through the late learned Justice McFarland, said:

"It is clear that the rule as established by the general authorities is that an action at law for damages cannot be maintained against several defendants jointly, when each acted independently of the others, and there was no concert or unity of design between them. It is held that in such a case the tort of each defendant was several when committed, and that it does not become joint because afterwards its consequences united with the consequences of several other torts committed by other persons. If it were otherwise, say the authorities, one defendant, however little he might have contributed to the injury, would be liable for all the damage caused by the wrongful acts of all the other defendants, and he would have no remedy against the latter, because no contribution can be enforced between tort-feasors. *Chipman v. Palmer*, 77 N. Y. 51 [33 Am. Rep. 566]; *Little Schuylkill Nav. Co. v. Richards*, 57 Pa. 182 [142], [98 Am. Dec. 209]; *Sellick v. Hall*, 47 Conn. 260; *Gould on Waters*, § 222; *Pomeroy on Remedies*, §§ 307, 308. The case of *Blaisdell v. Stephens*, 14 Nev. 17 [33 Am. Rep. 523], is very similar to the case at bar, and involved the very point under discussion. In that case several defendants were sued 'for wrongfully flowing waste water from their lands, to the injury of plaintiff's ditch, and for an injunction to restrain such wrongful flowing of waste water.' It appeared, however, that the defendants 'own, occupy, and irrigate separate and distinct tracts or parcels of land, each in his own right'; and they moved for a nonsuit upon the ground that it did not appear that the injury complained of 'was the result of the joint or concurrent act of defendants.' The trial court overruled the motion, and, on appeal, the Supreme Court of Nevada held that the nonsuit should have been granted, and said in its opinion: 'The general principle is well settled that where two or more parties act, each for himself, in producing a result injurious to plaintiff, they cannot be held jointly liable for the acts of each other.'"

In the case of *Livesay v. First Nat. Bank*, the Colorado Supreme Court (36 Colo. 526, 532, 86 P. 102, 104, 6 L. R. A. [N. S.] 598 at page 601) announced the same doctrine, and the case of *Miller v. Highland Ditch Co.*, supra, among other cases, is cited. In the Colorado case the action was against several defendants, acting independently of each oth-

er, for tortiously taking certain goods from plaintiffs. The court said:

"The question then is: Was there sufficient evidence to warrant the court in submitting to the jury the issue of joint liability by reason of the joint acts of the defendants? It is admitted that the action was against the defendants as joint tort-feasors. A failure to prove the joint liability of all the defendants was a failure to prove the cause of action alleged. Proof of several separate and distinct liens or trespasses was fatal to the cause of action, and warranted the court in directing a verdict. * * * The principle is the same whether the question is *ex contractu* or *ex delicto*."

See, also, *Pomeroy, Remedies and Remedial Rights* (2d Ed.) p. 265; *Mau v. Stoner*, 15 Wyo. 109, 87 P. 434, 440, 89 P. 466; *Bonte v. Postel*, 109 Ky. 64, 58 S. W. 536, 51 L. R. A. 187, 189; *Farley v. Crystal Coal & Coke Co. et al.*, 85 W. Va. 595, 102 S. E. 265, 9 A. L. R. 933.

[4] It may be suggested that, where a tort has been committed and two or more parties are alleged by the plaintiff to have jointly committed the same, and the evidence shows that one of the defendants only had committed the wrong or the damage, then it would be the duty of the trial court to hold the offending defendant liable and dismiss the case as to the others. That is not this case, however. Here, as seen, we have two different torts, neither of which was jointly committed by the defendants, but each of which, if committed at all, was by the defendants acting independently of each other or for himself, or, in other words, the one defendant taking no part in the commission of the alleged tortious act committed by the other.

For the reasons stated, we find it to be our duty to affirm the judgment, and it is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

74 Cal. App. 580

SAUER v. SUPERIOR COURT OF SAN DIEGO COUNTY et al. (Civ. 4985.)

(District Court of Appeal, Second District, Division 1, California. Oct. 15, 1925. Hearing Denied by Supreme Court Dec. 14, 1925.)

1. Dismissal and nonsuit — §57 — Failure to serve summons and make return within three years held to deprive trial court of jurisdiction other than to dismiss action.

Under Code Civ. Proc. § 581a, failure to serve summons and make return thereon within three years from commencement of action held to deprive trial court of jurisdiction other than to dismiss action.

2. Dismissal and nonsuit — §50 — Jurisdiction, lost through failure of plaintiff to serve summons and make return within three years, held not resumed by stipulation of parties.

Jurisdiction of cause, lost under Code Civ. Proc. § 581a, through plaintiff's failure to serve

summons and make return within three years, held not resumed by stipulation that defendant would not take advantage of delay theretofore or thereafter occurring.

Application by Joseph G. Sauer for writ of prohibition to be directed to the Superior Court of San Diego County and C. N. Andrews and others as Judges thereof. Writ granted.

E. F. Du Fresne, of San Diego, for petitioner.

Crouch & Sanders, of San Diego, for respondents.

CONREY, P. J. On writ of prohibition. On the 25th day of June, 1921, Brown, special administrator of the estate of Murray, filed his complaint against Anna M. Sauer and others for the foreclosure of a mortgage on real property in San Diego county. On the 29th day of December, 1924, pursuant to notice duly given, Joseph G. Sauer, petitioner herein, who was a defendant in that action, presented to the superior court his motion for an order to dismiss said foreclosure action and for judgment of dismissal thereof. The stated ground of the motion was as follows:

"That more than three years have elapsed since the commencement of said action, and a summons has not been served and return thereon made within three years after the commencement of said action, according to the provisions of section 581a of the Code of Civil Procedure of the state of California. * * *"

There is no contention that the summons in said action was not issued promptly. The motion was heard upon affidavits and the record of the action. The court denied that motion, and in connection therewith asserted its jurisdiction to further proceed in said action, and will so proceed unless prevented by peremptory writ of prohibition.

Contending that the superior court is without jurisdiction to proceed further in said action, petitioner relies upon the following provisions of section 581a of the Code of Civil Procedure:

"No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced must be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have issued within one year, and all such actions must be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action. But all such actions may be prosecuted, if appearance has been made by the defendant or defendants, within said three years in the same manner as if summons had been issued and served. * * *"

The affidavits and record show that no appearance in the action was made by petition-

er within three years from the time of commencement of the action. It does appear from the affidavits, and we assume the fact to be, that on November 13, 1924, petitioner, as defendant in said action, signed and delivered to plaintiff's attorney a document, wherein he stated that about one week after the action was commenced, said defendant J. G. Sauer and his codefendant, Anna M. Sauer, secured a continuance and postponement of all proceedings therein by agreement with the plaintiff that they be given time to refinance the loan and pay off the note and release the mortgage; "and that any additional delay that may be taken would be for the same purpose, and these defendants will not take advantage of such delay." Also there is other evidence that said defendants had so obtained a continuance and postponement of all proceedings in the action, but there is no evidence that any agreement made by them in that connection was made in writing.

[1] Section 581a was added to the Code of Civil Procedure in the year 1907. But it was not new legislation. The same provisions, without any material difference, had been contained in section 581, as subdivision 7 thereof, for many years prior to 1907. During this long period of time, these provisions of the Code have been the subject of discussion by the Supreme Court in many cases. Some of the principal cases were reviewed in *Davis v. Superior Court*, 184 Cal. 691, 195 P. 390. The actual case there presented arose under section 581b, which, in language identical with section 581a, prohibits the further prosecution and requires the dismissal of an action in which, after an order for change of venue, the plaintiff has not within the required time paid the costs and fees incident to such change of venue. The decisions relating to section 581a, Code of Civil Procedure, were therefore directly applicable in determining the meaning and effect of said section 581b. The Supreme Court summarized the matter as follows:

"It appears, therefore, as matter of law, from the facts disclosed by the moving papers, that the fees had not been paid in time. This being the case, it follows, under the plain provisions of section 581b and the principles established by the decisions above cited in regard to the meaning and application thereof, that the superior court had then no power or jurisdiction to entertain the motion or to do anything in the action except to dismiss it. If there had been no judgment of dismissal at that time, the only duty resting upon the court and the only power it had, from the admitted facts, was to enter a judgment of dismissal."

It will be seen that the court thus directly held that on the record made in the case, the court had lost jurisdiction of the action except for the single purpose of dismissal. For that reason the court in that case issued a peremptory writ of prohibition forbidding the

superior court to proceed further in the action.

Respondent attempts to establish a difference between that part of section 581a which deals with cases where the summons has not been issued within one year, and the remainder of the section. The contention is that that part of the section which declares that the action shall not be further prosecuted and no further proceedings shall be had therein does not apply except in cases where the summons has not been issued within one year; that, where the defect consists only in the fact that the summons has not been served and return made thereon within three years after the commencement of the action, the only penalty is that the action must be dismissed. The argument is that, even though it be conceded that in the first instance the court is without jurisdiction to proceed further, it retains its jurisdiction in the second instance. In view of the fact that in several decisions the rule adverse to respondent's contention has been enforced without regard to this attempted distinction, we do not feel at liberty to make such distinction at this time. Rules of practice which have been so long established upon a definite understanding of a statute should not be disregarded without a compelling reason. For a list of cases in which the rule of section 581a has been applied to the full extent in cases where the summons (although issued promptly at commencement of action) was not served and returned within the prescribed period of time, see *Bellingham Bay Lumber Co. v. Western Amusement Co.*, 35 Cal. App. 515, 518, 170 P. 632.

[2] Respondent further contends that the stipulation signed by petitioner, to which we have referred, was a waiver of petitioner's right to ask for a dismissal of the action, and that this waiver is sufficient to authorize the court to proceed with the action. To adopt this view of the matter would be, in effect, to deny that, at the time when said stipulation was made, the court had lost jurisdiction of the case, or to hold that, by stipulation of the parties, a jurisdiction which has been lost can be resumed. Neither of these alternatives can be accepted. There have been several instances in which it has been sought to avoid the effect of section 581a (or subdivision 7 of section 581, as formerly in force), by showing that the delay and failure to serve summons was at the solicitation of the defendants or pursuant to stipulations made by them. In *Siskiyou County Bank v. Hoyt*, 132 Cal. 81, 64 P. 118, there is a review of such cases which had been decided prior to that time. The court held that, notwithstanding such solicitations made by defendant, accompanied even by a verbal authority to take judgment in the case at any time, these facts were not sufficient to remove the case from the operative effect of said provisions of the Code. So far as we are aware,

this decision in *Siskiyou County Bank v. Hoyt*, supra, has not been overruled.

Let the peremptory writ issue.

We concur: HOUSER, J.; CURTIS, J.

74 Cal. App. 585

**HANSON et ux. v. BOARD OF TRUSTEES
OF TOWN OF MILL VALLEY et al.**
(Civ. 5128.)

(District Court of Appeal, First District, Division 1, California. Oct. 16, 1925. Hearing Denied by Supreme Court Dec. 14, 1925.)

1. Pleading $\S$ 364(5) — Allegations of probative and not ultimate facts properly stricken from complaint to declare proceedings in awarding contract void.

In action to have declared void proceedings leading to award of contract for certain improvements, fact of levy of special tax for purpose of paying for lands purchased by city for delinquent taxes for such improvements is admissible only as tending to show belief of trustees that benefits derived would be less than cost of improvements, and allegations thereof, being allegation of probative and not of ultimate fact, were properly stricken from complaint.

2. Evidence $\S$ 181 — Purported copy of map properly rejected, in absence of competent proof of original.

Map purporting to be copy of map found in office of town clerk, in absence of competent preliminary proof of official character of map found, was properly rejected as evidence.

3. Evidence $\S$ 245 — Board of trustees not bound by declarations of member at public meeting.

Board of trustees of city is not bound by declarations of member of board made at public meeting, not a meeting of board, as to policy and intentions of board with reference to certain improvement.

4. Municipal corporations $\S$ 323(3) — Testimony of town clerk of delinquencies in taxes in districts other than one in question properly rejected.

Testimony of town clerk as to delinquencies in payment and sales of land for nonpayment of assessments in districts other than one in question *held* properly rejected as irrelevant.

5. Evidence $\S$ 314(2) — Testimony of witness, as to opinions of real estate dealers of effect of certain improvement on value of land, held incompetent.

Testimony of witness as to opinions of real estate dealers as to effect of proposed improvement on land value *held* incompetent as hearsay.

6. Municipal corporations $\S$ 323(3) — Testimony that effect of improvement was to depreciate values inadmissible, in absence of allegation.

In action to declare void proceedings leading to contract for improvements, testimony of

real estate dealer that effect would be to depreciate values *held* inadmissible, in absence of allegation that no benefit would accrue to land, and that evidence presented to board on objection was all evidence on which board acted.

7. Municipal corporations $\S$ 450(4) — Determination by trustees property included in assessment district will be specially benefited, conclusive in absence of fraud.

Where an assessment district is formed to pay cost of improvements, determination by trustees of municipality that property included in district will be specially benefited is conclusive in absence of fraud, and absence of benefit cannot be a judicial question unless fact found by board is unsupported by evidence.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by C. H. Hanson and wife against the Board of Trustees of the Town of Mill Valley, R. C. Ward, and others, as members of said Board of Trustees, and another. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

M. J. Gillespie and E. B. Mering, both of San Francisco, for appellants.

H. C. Symonds, of San Francisco, and Daniel V. Marceau, of Stockton, for respondents.

CASHIN, J. An action was brought by C. H. Hanson and Lucretia K. Hanson, appellants herein, against respondents R. C. Ward, W. H. Derr, C. E. Hatch, O. C. Cappelman, and R. L. Heminway, who were on December 11, 1923, the members of the board of trustees of the town of Mill Valley, a municipal corporation of the sixth class, and Frank C. McIntire, the contractor for the work of constructing certain improvements hereinafter mentioned, to have declared void the proceedings leading to the award of a contract therefor and to enjoin further action thereunder.

Respondent board on December 11, 1923, adopted a resolution of intention to order certain work to be done and improvements to be made in the grading and paving of certain streets within the town in accordance with plans and specifications therefor adopted on the same date, the expense of the improvement, as provided in the resolution, to be charged upon a district thereby created, declared therein to be benefited by the improvement and to be known as assessment district No. 6, it being therein provided that the proposed work should be done pursuant to the act known as the Improvement Act of 1911 (St. 1911, p. 730), and amendments thereto, and therein fixed a day on which objections to the proposed improvement might be made and of which due and legal notice was given.

On the day fixed appellants, who were the owners of a certain lot within the assessment district, filed in writing their objections to the proposed improvement. Thereafter at an

adjourned meeting respondent trustees overruled the objections and ordered the improvement to be made in accordance with the resolution of intention. A contract was thereafter entered into with respondent McIntire for the construction thereof, and the action mentioned was brought, appellants alleging therein that the trustees failed to consider the objections made, acted contrary to and against the evidence, that their order overruling such objections was an abuse of discretion in that they "well knew and believed that the benefit derived from such improvement would be far less than the assessment to be imposed."

Certain portions of the complaint having on motion been stricken therefrom, respondents answered, denying the allegations mentioned above, and upon the trial of the action a judgment of nonsuit was entered, from which the appeal herein was taken.

Appellants contend that the order striking out the portions of the complaint mentioned and hereinafter considered was improper, and that the trial court erred in sustaining objections to the introduction of certain evidence offered by appellants at the trial of the action.

The portions of the complaint stricken therefrom were as follows: An allegation that respondent board, having in view the improvements contemplated, ordered a special tax of 10 cents on each \$100 of assessable property in the town for the purpose of paying for any lands which might be purchased by the town at a delinquent sale of any property subject to assessment for the proposed improvement; that such tax was irregular, in that it was an inducement held out to bidders to enter into contracts for doing the proposed work; certain allegations describing the location and the character of the population of the town, the history and the effect upon values of other previous assessments and assessment districts made and created therein by its board of trustees, which did not include or affect the lands involved in the present proceeding; alleging hardships and losses suffered by the owners in said districts; describing specifically certain property included therein with the names of the owners thereof, and in detail the individual experiences of such owners in selling or attempting to sell their lands after the completion of such improvements.

[1] The fact of the levy of the special tax mentioned would be material, if at all, only as evidence tending to show a consciousness or belief on the part of the trustees that the benefits which might be derived from the proposed improvement would be less than the cost of construction, and, such fact appearing, that they abused their discretion in making the order therefor; and the allegations setting forth the history of other assessment districts were likewise of facts having a possible probative value for the same purpose,

but, being allegations of probative and not of ultimate facts, were properly stricken from the complaint. *Bowen v. Aubrey*, 22 Cal. 566; *Harris v. Hillegass*, 54 Cal. 463; *County of San Joaquin v. Budd*, 96 Cal. 47, 30 P. 967; *Ahlers v. Smiley*, 11 Cal. App. 343, 104 P. 997.

[2] At the trial there was offered a map prepared by a draughtsman called as a witness for the appellants, which purported to be a copy of certain maps, testified by the witness to have been found in the office of the town clerk, of certain improvement districts within the town other than the district in question. No competent preliminary proof of the official character of the maps found was offered; and though the map prepared by the witness was allowed by the court to be referred to in his testimony, an objection on the ground stated above was properly sustained to its introduction in evidence.

[3] Appellants offered the testimony of certain witnesses, to which objections were sustained by the court, and in the rulings thereon appellants contend that the court erred. Respondent Cappelman was asked to testify as to declarations made by him at a public meeting held prior to the adoption of the resolution of intention mentioned above, not a meeting of the board, as to the policy and intentions of the board with reference to the improvement here involved. Objection to the offered testimony, on the ground that neither the town nor the board could be bound by declarations by a trustee not made while acting in the course of his duties as such, was properly sustained.

[4] Objection was sustained to the testimony of the town clerk as to delinquencies in payment and sales of lands for the non-payment of assessments in districts other than the one in question, offered, as stated by counsel for the appellants, for the purpose of showing that the members of the board "expected people to lose their property, and they make provision for it in advance." The facts sought to be shown, as well as the offered evidence, were irrelevant for any purpose, and an objection was properly sustained on that ground.

[5] An objection to the offered testimony of appellant Lucretia K. Hanson as to inquiries made by her of various dealers in real estate as to the effect of the improvement upon land values within the assessment district, and which clearly would have been hearsay, was properly sustained.

[6] Appellants further sought to show by the testimony of a real estate dealer of the town that the effect of the proposed improvement would be to depreciate property values within the district. It was not alleged that no benefits would accrue to appellants' land by reason of the improvement, or that the evidence presented in support of appellants' protest constituted all the evidence on which the board acted in making its order. In the

absence of such allegations, the opinion of a witness as to the effect of such improvement would be irrelevant and immaterial, and respondents' objection to the testimony on that ground was properly sustained.

[7] Where an assessment district is formed to pay the cost of improvements, the determination by the trustees of a municipality that the property included in the district will be specially benefited is conclusive in the absence of fraud or such an abuse of discretion as is equivalent to fraud (*Beale v. City of Santa Barbara*, 32 Cal. App. 235, 162 P. 657); and the absence of benefit cannot be a judicial question unless the fact found by the board be unsupported by evidence (*Duncan v. Ramish*, 142 Cal. 686, 76 P. 661), nor does the validity of the proceedings depend upon the ability to show that the benefits to the property included therein will be identical with the burdens (*Lent v. Tillson*, 72 Cal. 404, 14 P. 71; *Federal Construction Co. v. Ensign*, 59 Cal. App. 200, 210 P. 536; *Larsen v. San Francisco*, 182 Cal. 1, 186 P. 757).

In the instant case no evidence was adduced in support of the allegation of the complaint that the board failed to consider appellants' protest; nor could there be fairly or reasonably drawn from the evidence offered and admitted the conclusion that the board abused its discretion in making its order; and it appearing that the court did not err in its rulings in the instances urged by appellants and hereinbefore considered, the judgment should be affirmed, and it is so ordered.

We concur: TYLER, P. J.; KNIGHT, J.

74 Cal. App. 629

PACIFIC SOUTHWEST TRUST & SAVINGS BANK v. TULLEDO et al. (Civ. 2972.)

(District Court of Appeal, Third District, California. Oct. 19, 1925.)

1. Abatement and revival §17—Judgment of foreclosure of mortgage on property in custodia legis held not premature.

Judgment of foreclosure of mortgage on property in custodia legis by virtue of a prior claim and delivery proceeding held not subject to criticism as premature, where the issue of ownership was tendered and determined and no defendants interposed a plea in abatement nor objected to proceeding with trial, and all parties to claim and delivery proceeding were parties to foreclosure suit.

2. Abatement and revival §17—When mortgagee entitled to judgment of foreclosure as to property in custodia legis, stated.

Independently of question whether property taken under a claim and delivery proceeding is subject to execution in a foreclosure suit, a mortgagee has the right to have foreclosure of

judgment entered, if the court with all the parties before it finds the property belonged to the mortgagor at the date of the execution of the mortgage.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Suit by the Pacific Southwest Trust & Savings Bank, a corporation, against V. Tulleedo and two others. From an adverse judgment, defendants J. V. Fernandes and Mary V. Fernandes appeal. Affirmed.

Russell & Heid and G. W. Zartman, all of Tulare, for appellants.

D. E. Perkins and Feemster & Cleary, all of Visalia, for respondent.

PLUMMER, J. Action to foreclose chattel mortgage on certain live stock. Plaintiff had judgment, and the defendants J. V. Fernandes and Mary V. Fernandes appeal.

The record in this case discloses that on or about the 20th day of October, 1922, Mrs. M. Elma Foster, the owner of a certain ranch known as the Foster ranch in the county of Tulare and also of a certain band of cattle, leased said ranch to one V. Tulleedo and also sold the live stock thereon to the said Tulleedo, and to secure the payment of the purchase price thereof took from said V. Tulleedo a chattel mortgage covering the personal property then and there sold and delivered to the said Tulleedo, and also a promissory note evidencing the amount remaining due on said purchase price; that thereafter, and on or about the 14th day of November, 1922, said note and chattel mortgage were assigned to the plaintiff herein, and on the 15th day of November, 1922, the chattel mortgage was recorded in the office of the county recorder of Tulare county, state of California, in the official records of said county. The property covered by the mortgage is set out and described therein and consisted of 59 head of cattle and other personal property not involved herein. It also appears from the record that prior to the purchase by the defendant Tulleedo from Mrs. Foster of the property herein referred to, the said Tulleedo had, upon a conditional contract of sale, purchased from the defendant Fernandes certain other live stock consisting of a band of cattle of between 40 and 50 head; that the said defendant Tulleedo had this band of cattle on the Foster place, together with other cattle, numbering in all 96 head, a portion of which is alleged to have belonged to a brother of the defendant Tulleedo. It further appears that after the transactions herein referred to were had, the cattle were further marked by the said Tulleedo so as to render them more readily capable of being identified and some of them moved to different ranches.

The defendant Tulleedo not having complied with the terms and conditions of the conditional contract of sale by which he acquired

possession of the cattle theretofore belonging to the defendants Fernandes, the said Fernandes took possession of a portion thereof, and on or about the——day of February, 1923, began an action in claim and delivery, and took possession of some 40 head of the cattle hereinbefore referred to, claiming to be the owner thereof. Said cattle were taken under claim and delivery proceedings by the sheriff of the county of Tulare in an action against the defendant V. Tulleo, and, no redelivery bond being executed by him, were by the sheriff, upon the faith of the sureties, executed by the defendants Fernandes, turned over to them. Thereafter, and on or about the 6th day of April, 1923, the plaintiff began this action to foreclose the chattel mortgage hereinbefore referred to as having been executed by the defendant Tulleo to Mrs. M. Elma Foster and assigned to the plaintiff, joining as defendants in said action V. Tulleo and J. V. and Mary V. Fernandes. The complaint sets forth the execution and the assignment of the mortgage, the noncompliance with its terms by the defendant Tulleo, the mortgagor therein named, and also alleges that the defendants Fernandes claim some interest in said property. The defendants Fernandes demurred to the sufficiency of the plaintiff's complaint, which being overruled, made answer to said complaint, and, among other things, alleged ownership of the property in question and also set forth that on or about the 29th day of January, 1923, said defendants Fernandes as plaintiffs began an action in the superior court of the county of Tulare to recover possession of 56 head of live stock; that upon the filing of said complaint the defendants furnished the undertaking required by law and instructed the sheriff of said county to take possession of said property; that possession thereof was taken by the sheriff, was thereafter delivered to the said Fernandes and that the said action in claim and delivery is still at issue in the superior court of said county, and not yet tried. The defendants Fernandes alleged that they had no live stock in their possession included in said chattel mortgage, and further set forth:

"That by reason of the want of knowledge as to what, if any, of said live stock taken by the said sheriff of said county of Tulare in the action of claim and delivery by these defendants against said V. Tulleo were included in said chattel mortgage set out in said amended complaint, these defendants cannot state how many, if any, of the live stock so taken by said sheriff were included in said chattel mortgage, and basing their denial on that ground deny that any of the live stock taken by the said sheriff of said county of Tulare were live stock included in the mortgage executed to said M. Elma Foster."

The court made findings in accordance with the prayer of plaintiff's complaint, found that the property in question was the property sold by Mrs. M. Elma Foster to the

defendant Tulleo and was not the property sold by the defendants Fernandes to the defendant Tulleo, and also made the following finding:

"That on or about January 29, 1923, defendants J. V. Fernandes and Mary V. Fernandes began an action against the said V. Tulleo in the superior court of the said county of Tulare for the recovery of the possession of 56 head of live stock and other personal property owned by said J. V. Fernandes and Mary V. Fernandes, and on the filing of said complaint furnished to the sheriff of said county of Tulare, the undertaking and affidavit required by law, together with instructions to said sheriff to take the personal property mentioned in said complaint and affidavit from the possession of said defendant V. Tulleo, and pursuant to said instructions, said sheriff did, thereafter, take a portion of the personal property, to wit, 26 head of heifers and calves he was instructed to take, and after retaining them for five days, said sheriff delivered possession thereof to said plaintiffs in that action, and that said action is now at issue in said superior court of this county, and has not yet been tried."

Upon this appeal it was argued by the appellants: First, that their demurrer should have been sustained; and, second, that the property was in custodia legis, and therefore that any judgment of foreclosure and sale before the termination of the replevin suit was premature and contrary to law. While it may be true that the demurrer of the defendants Fernandes was technically well taken, we think that any error therein is cured by the provisions of section 4½ of article 6 of the Constitution relative to any errors or matters of pleading which do not result in a miscarriage of justice. The testimony relative to the description of the property appeared to the trial court to be sufficient to enable any one upon inquiry to ascertain and determine the property covered by the chattel mortgage, and we have not had pointed out to us any reason why the findings of the trial court in this particular should be disturbed.

[1] The real controversy before the trial court was as to the ownership of the property; that is, whether the property covered by the chattel mortgage, 26 head of which were taken under claim and delivery proceedings by the defendants Fernandes, was the live stock sold to the defendant Tulleo by Mrs. Foster, or by the defendants Fernandes. We think the testimony sufficiently supports the finding of the court as to the ownership of the property and from whom title thereto was acquired by the defendant Tulleo. The testimony of the defendant Tulleo, if believed by the trial court, was sufficient to support the court's findings. It is clear and direct to the point that the property in controversy is the live stock obtained by him from Mrs. Foster and covered by the chattel mortgage. His testimony also accounts for the property acquired by him from the de-

defendants Fernandes and what had become of the same. The real point in issue in this appeal is as to whether the judgment of foreclosure in this case was or was not premature. An examination of the record fails to disclose that request, either by pleading or otherwise, was ever made to the trial court to continue or delay the trial of the foreclosure action until after the action in claim and delivery had been heard and determined. This case also presents the differentiating feature from that of the other cases which have been called to our attention, in the fact that both the plaintiffs and the defendant in the claim and delivery action are made parties defendant in the foreclosure proceedings, and that the question of ownership and title to the property has been presented and litigated with all the parties present without any objection being made to the proceeding with the trial of the issues presented. In *Hawi Mill, etc., Co., Ltd., v. Leland*, 56 Cal. App. 224, 205 P. 485, the ruling was had that personal property taken in an action upon claim and delivery and thereafter delivered to the plaintiff under the provisions of section 514, Code of Civil Procedure, remains in custodia legis after such delivery and is not subject to a writ of execution. It is also further held that mandamus will lie to compel redelivery of such property to the plaintiff in the claim and delivery action, in the event that the same is taken from him upon an execution issued in another action. In that case an execution was issued in an attachment suit, the institution of which brought about the claim and delivery proceeding. The reasons given for the rule are that the sureties of the plaintiff in the claim and delivery proceeding, in the event the plaintiff therein is unsuccessful, have a right to have delivery to them of the replevied property in the event that they are called upon to pay the judgment for damages and the value of the property taken in the claim and delivery action against the plaintiff therein. To the same effect is the opinion of the court in *Bisconer v. Billing* (Cal. App.) 236 P. 329. In applying the principle involved in actions similar to the present, the court, in *Hunt v. Robinson*, 11 Cal. 262, on pages 274-279, sets forth that where attached property is taken on claim and delivery proceedings and then redelivered to the sheriff, such redelivery to the sheriff exonerates the sureties in the claim and delivery proceeding to the extent of the property so redelivered.

[2] In the case at bar and following the opinion of the court in *Hunt v. Robinson*, supra, the taking of the property from the defendants Fernandes in an action in which the defendant Tullado is also joined would constitute an exoneration of the sureties in the claim and delivery action, for the simple reason that the ownership of the defendant Tullado therein is completely and absolutely

foreclosed. The ownership of the defendants Fernandes in and to the 26 head, taken under the claim and delivery proceeding, was also tendered and determined by the trial court. Without any plea in abatement in the foreclosure proceedings, without any objection to the court proceeding with the trial of the issues therein tendered other than the pleading which we have hereinbefore set forth, we do not very well see wherein any valid objection is urged to the entry of the judgment of foreclosure in this action. Irrespective of whether the property taken under the claim and delivery proceedings is subject to execution in the foreclosure proceeding, the plaintiff, nevertheless, possessed the right under his chattel mortgage to have foreclosure of judgment entered covering the property therein mentioned, if the court with all the parties before it claiming any interest therein found the property in question belonged to the mortgagor at the date of the execution of the chattel mortgage.

As the reasons assigned for reversal do not appear to us sufficient, it is hereby ordered that the judgment be, and the same is, hereby affirmed.

We concur: FINCH, P. J.; HART, J.

74 Cal. App. 637

METCALF et al. v. GUERCIO et al.
(Civ. 5239.)

(District Court of Appeal, First District, Division 2, California. Oct. 21, 1925. Hearing Denied by Supreme Court Dec. 16, 1925.)

1. Brokers ⚡86(1)—Evidence held sufficient to sustain findings for defendants sued for real estate agents' commission.

In action by real estate agents to recover commission for securing lessee, evidence that person claimed to have been secured was only acting as agent for another, who was not bound by written contract, held sufficient to sustain findings for defendants.

2. Estoppel ⚡63—Letter by property owner to real estate agent held not to preclude defense that lessee found by agents was not ready, able, and willing to execute lease.

Letter by property owners, claimed to be acceptance of lessee found by agents, did not estop owner from asserting that alleged lessee was not ready, able, and willing to execute lease, where all parties knew that such alleged lessee was acting as agent for another.

3. Appeal and error ⚡173(9)—Estoppel not raised at trial cannot be raised on appeal.

Where plaintiffs made no objection to evidence that alleged lessee found by them was not ready, able, and willing to execute lease, and that he executed contract as agent of undisclosed principal, without presenting point that owners were estopped to assert that alleged lessee was not ready, able, and willing to execute

lease, they could not on appeal defend on ground of such estoppel.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by H. F. Metcalf and another, co-partners, doing business under the firm name and style of Metcalf & Ryan, against V. W. Guercio and another to recover a real estate agents' commission. From judgment for defendants, plaintiffs appeal. Affirmed.

Hearing denied by Supreme Court; Myers, C. J., dissenting.

Goudge, Robinson & Hughes and F. Walton Brown, all of Los Angeles, for appellants.

Page & Hurt and Eugene D. Williams, all of Los Angeles, for respondents.

STURTEVANT, J. The plaintiffs commenced an action against the defendants to recover a judgment for commissions alleged to have accrued in their favor. The action was tried before the judge of the trial court sitting without a jury. Judgment went for the defendants, and the plaintiffs have appealed, bringing up the judgment roll and a bill of exceptions.

In their complaint the plaintiffs alleged that the defendants authorized the plaintiffs to negotiate a lease of property owned by the defendants, and which was situated at the southwest corner of Grand avenue and Sixth street in the city of Los Angeles. The alleged authorization was embodied in a letter, dated July 2, 1919, which is as follows:

"Los Angeles, California, July 2, 1919.

"Metcalf & Ryan, Agents, 626 South Spring Street, City—Gentlemen: Referring to our property at the southwest corner of Grand avenue and 6th street, this city, said property having a frontage of approximately 95 feet on West 6th street and running south to a depth of approximately 115 feet on Grand avenue, we desire to enter into a ground lease on said property. Therefore, we hereby give and grant to you for a period up to and including August 5th, 1919, the sole and exclusive right to act as our agents, and we request you to secure for us an acceptance of a lessee's right for a ground lease on said property.

"Provided you do secure for us such acceptance, it is understood and agreed that a lease will be at once executed after such acceptance and said lease shall be drawn in the usual form of ground leases as executed on Los Angeles property of this character; and the following, in so far as the intent and design is apparent, shall become a part of the terms and conditions in said lease:

"It is understood and agreed that the property is now subject to an incumbrance of thirty-five thousand (\$35,000) dollars; this said incumbrance the lessee must pay to us as a bonus coincident with the execution of the lease.

"Lease to be for a period of 99 years from and after January 1st, 1920; lessee to pay as rental the sum of one thousand (\$1,000) dollars per month for each month of said term. The lessee to pay, in addition to the said rental, all taxes,

assessments or liens that may be levied against the property during the period of the lease, with the exception of any income, personal property, or inheritance tax or charge, which shall be paid by us; lessee also to pay all insurance charges of any description, it being the spirit of this agreement that rental shall be net to us and that we shall not be called upon to pay any charges of any nature whatsoever levied against the property, with the exception of those certain taxes or charges above mentioned.

"Lessee shall carry fire insurance in responsible fire companies, approved by lessor, to the extent of at least 40 per cent. of the cost of improvement to be erected by lessee; also, lessee shall carry an amount of accident, casualty and employee's and other liability insurance as will reasonably and continuously protect both lessor and lessee from liability, or from loss or from damage to any person or property through any occurrence relating to the lessee's leasehold on the ground or in the buildings now or at any other time on said ground.

"The nonpayment of rent or insurance after 30 days' written notice has been given by the lessor shall constitute the breaking of a covenant of said lease, and the lessor may then have the right to enter the premises, take possession thereof, and declare the said lease forfeited; provided, however, that the lessee may at any time within 60 days after such forfeiture pay up all back rent and insurance charges with interest on same at the rate of 10 per cent. per annum, and shall then have the right to resume full possession of the said premises just as though no such forfeiture had occurred.

"The nonpayment of taxes, assessments or any other charges after 30 days' written notice has been given by the lessor shall constitute the breaking of a covenant of said lease and the lessor may then have the right to enter the premises, take possession thereof and declare the said lease forfeited; provided, however, that the lessee may at any time within six months after such forfeiture, pay up all such unpaid taxes, assessments or other unpaid charges of any kind with interest on same at the rate of 10 per cent. per annum, and shall then have the right to resume full possession of the said premises just as though no such forfeiture had occurred.

"It is to be understood and agreed that, within five (5) years after January 1st, 1920, the lessee will commence the erection, on said property, of a class A building costing not less than \$150,000; such building to be fully completed within one year from the date of beginning construction and to be clear of any levy or lien or incumbrance whatsoever that would in any way become or be regarded as a lien or incumbrance against the real property.

"It is understood and agreed that, coincident with the execution of a ground lease by the lessor and lessee, the lessee will provide lessor with a good and sufficient bond in the sum of \$50,000, said bond being signed by a surety or sureties who would be and will be approved by Security Trust & Savings Bank of Los Angeles, California, as being a good and reasonable surety or sureties for such amount. Said bond shall remain in full force and effect until said building, as above provided, shall have been fully completed and free from any incumbrance that would effect the title of lessors.

"The lessee may have the right to sell, assign or transfer his right in said lease, but by so do-

ing it shall not relieve the lessee of his full responsibility under the terms of the lease until the \$150,000 building above mentioned shall have been erected according to the terms of the lease. After said building shall have been fully completed, and free and clear of any lien or incumbrance that would effect the title of the lessor, the lessee may assign or sell his interest in said lease and thereafter be relieved of all liability under the terms of said lease.

"It is understood and agreed that the lessor will deliver the said property to the lessee on or before the said January 1st, 1920, free and clear of all incumbrances except an incumbrance in favor of the city of Los Angeles for the widening of West Sixth street; this incumbrance lessee shall assume. Also, a certain lease expiring not later than January 1st, 1921, on the corner storeroom, which lease, however, can be bought from the tenant by payment of one thousand (\$1,000) dollars.

"Provided that you do secure, on or before the said August 5th, 1919, such acceptance as above described, we agree to pay you as commission and compensation for your services in having secured such acceptance, the sum of seven thousand (\$7,000) dollars, said sum payable upon the execution of said lease.

"Provided that, on or before the said August 5th, 1919, you have not secured such acceptance as above provided, and provided that you pay to us the sum of two hundred fifty (\$250) dollars, then, in such event, we agree that you may have an additional period in which to secure for us such acceptance, said additional period to extend up to and including September 10th, 1919. Provided that you do secure such acceptance on or before the said September 10th, 1919, then in such event, you are to be paid the commission and compensation as above provided and in the same manner, and also the sum of two hundred fifty (\$250) dollars paid to us shall be repaid to you.

"Yours truly,

V. W. Guercio.
"John Menagh."

The term of the authorization extended to August 5, 1919, but extensions were regularly issued extending the time to September 17, 1919. On the latter date the plaintiffs advised the defendants by letter that they had procured an acceptance by James E. Crawford. On the next day the defendants wrote to the plaintiffs asking them to draw a lease and submit the lease to the defendants for approval. On the 5th day of March, 1920, the defendants leased the property to other parties and on October 5, 1920, this action was commenced.

[1] The appellants claim that during the term of the contract that they procured a lessee ready, able, and willing to execute the lease, and that they therefore earned their commission. At the outset they admitted that the trial court made findings of fact against them, but they maintain that the findings of fact referred to are not sustained by the evidence.

On the trial of the case the plaintiffs called as a witness Mr. Crawford. He testified that he is a partner of the plaintiffs in the insurance business. He was shown a paper which

was evidently the above letter written by the defendants, dated July 2, 1919, and testified that he signed the acceptance attached thereto. Continuing, he stated:

"I intended to accept the lease there described. At that time I stated in my acceptance that when the lease was executed I would sign and transfer the same. I had in mind Lee A. Phillips or a group of men of which Lee A. Phillips would be the nucleus as the persons to whom I intended to assign the lease."

On cross-examination the witness testified that, acting upon the request of Mr. Ryan, he signed a letter dated September 17, 1919, and also a letter dated March 13, 1920.

"At the time I signed the acceptance there was no stipulated sum that I was to get out of it. I might have gotten something out of it. I did not intend to put up my own money in the deal. I did not intend to go out and get a bond for \$50,000. The money was to be provided by Mr. Phillips. I talked to Mr. Ryan; I did not talk to Mr. Phillips about it. My negotiations and conversations in the matter were altogether with Mr. Ryan. Personally, I had no agreement with Mr. Phillips that he was going to put up the money. If Mr. Phillips had failed to put up the money I might have been able to get it. I had an agreement with Mr. Ryan that the money would be provided, but Mr. Ryan signed no papers, and none were signed by Mr. Phillips and myself. None were signed by anybody else to provide this money. I did not have that amount of money. The letter dated March 13, 1920, is the first demand I made that the lease should be drawn. I did not make any demand before that. Before January 1, 1920, Mr. Ryan did not ask me to make a demand that the lease be drawn. He did not at any time present to me a lease for my signature."

The plaintiffs also called as a witness Mr. Phillips. He testified:

"I got my information from Frank Ryan that the owners would lease the property. He informed me of the terms on which the owners would lease. Exhibit A attached to the amended complaint looks like the paper they brought to me. I said, 'Get me as much time on this proposition as you can. * * * I will put up \$35,000 and take the lease, provided you can handle it in a way that I will not be known in the transaction until such time as I have completed certain other transactions which you are handling for me.' I asked Mr. Ryan whether he had any one in the office who would be willing to accept the lease and enter into it with the understanding that I would take the responsibility of paying the \$35,000 and carrying out the terms of the lease and supplying the bond. Mr. Ryan said that Mr. Crawford, whom I had met in their office, was willing to carry out the acceptance under the terms of the contract, and that I could thoroughly rely upon him, and that they would have the proper arrangements made as soon as executed, and I agreed to that arrangement. At the time I had that conversation with Mr. Ryan and since that time I had the actual money to pay the \$35,000, and I have many times this amount of good clear property that I could have mortgaged; so that there is no question about that. The parties that would

sign the bond would have the credit at the Security Bank for many times the amount provided in the bond. I was willing and able to provide such a bond as security for Crawford if the lease were accepted by him."

On cross-examination he testified:

"I did not sign a paper to the effect I would pay the \$35,000 cash. I did not sign any paper to the effect I would provide a bond. I had \$150,000 government bonds which I did not want to sell on the then market, and that is one reason for my desiring delay on this. There has never been any writing between Metcalf and Ryan and Crawford and myself in regard to any of our business transactions including this particular transaction."

Mr. John F. Calhoun, manager in the office of the plaintiffs, testified that on September 17, 1919, he heard a conversation between Mr. Ryan and Mr. Guercio, in which Mr. Ryan stated to Mr. Guercio that in this transaction Crawford represented other people.

The foregoing testimony is in the record as uncontradicted. It is perfectly clear that not Mr. Crawford, but Mr. Phillips, was principal. Looking at Mr. Phillips as the principal, the record discloses that he never entered into any enforceable contract whereby he became bound to enter into a contract as lessee, or that he became lessee, or that he authorized Crawford, as his agent, to do so.

If the trial court believed the testimony of Mr. Calhoun, and in support of the judgment we are bound to assume that it did, then the trial court reached the conclusion that Crawford in all things was acting as agent, and, as the testimony subsequently disclosed, that he was acting as the agent of Phillips and his associates, principals unknown to defendants. But, taking this view of the facts, there was no writing executed by Phillips authorizing Crawford to do anything whatever. *Standard Live Stock Co. v. Bank of California* (Cal. Sup.) 227 P. 962; *Garcia & Maggini Co. v. Colvin*, 53 Cal. App. 79, 199 P. 1113. When thereafter the plaintiffs asserted a claim to commissions they had not made any showing that they had brought the lessor and lessee to an agreement or that an agreement had been executed which could be enforced by Phillips and his associates, or by the defendants against Phillips and his associates. *Gunn v. Bank of California*, 99 Cal. 349, 33 P. 1105. There is nothing in the record, therefore, that indicates that the findings are not sustained by the evidence.

[2, 3] The appellants contend that the letter written by the defendants on September 18, 1919, was, in legal effect, an acceptance of Crawford as lessee, and that the defendants are estopped from thereafter asserting that Crawford was not ready, able, and willing to execute the lease. To that contention there are two answers. One answer is that accord-

ing to the testimony of Mr. Calhoun all parties knew that Crawford was not to be lessee. The other answer is that the point was not presented in the trial court, because no objection whatever was made to the evidence which was adduced, but both parties proceeded to introduce evidence to the effect that Crawford was or was not ready, able, and willing to execute the lease, and that he executed the purported contract as the agent of an undisclosed principal.

The judgment is affirmed.

We concur: LANGDON, P. J.;
NOURSE, J.

74 Cal. App. 576

HOLLAND v. KELLY. (Civ. 5188.)

(District Court of Appeal, First District, Division 1, California. Oct. 15, 1925. Hearing Denied by Supreme Court Dec. 14, 1925.)

1. Deeds $\S$ 211(1, 4)—Conflicting evidence, in suit to set aside deed of gift, held sufficient to support finding in favor of grantees.

In suit to set aside deed of gift, on ground that grantor was incompetent, and that grantee exercised undue influence in procuring it, conflicting evidence held sufficient to support finding in favor of grantee.

2. Appeal and error $\S$ 1011(1)—Trial court's findings on conflicting evidence not disturbed on appeal.

Under Code Civ. Proc. $\S$ 1847, credibility of witness is question for trial court, and where substantial conflict in evidence exists, and conclusions of trial court find reasonable support from the evidence, its findings cannot be disturbed on appeal.

3. Evidence $\S$ 318(3)—Tags purporting to record liquor deliveries held properly excluded as hearsay.

In suit to have deed set aside, on ground that grantor was incompetent by reason of excessive use of intoxicating liquors, tags or slips purporting to record deliveries of liquor to grantor, offered as evidence of such deliveries, were properly excluded as hearsay.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Patrick Holland against William A. Kelly, as executor of the last will and testament of Julia McCarthy, deceased, substituted as defendant in place of said deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 177 Cal. 507, 171 P. 421.

W. E. Cashman, of San Francisco (R. M. F. Soto, of San Francisco, of counsel), for appellant.

William A. Kelly, of San Francisco, for respondent.

CASHIN, J. An action by Patrick Holland, appellant herein, to set aside an instrument, in form a deed of gift to certain real property situated in the city and county of San Francisco, purporting to have been executed on April 18, 1911, by Mary Anne Holland, then the wife of appellant, to Julia McCarthy, her maternal aunt. The latter, who was the original defendant in the action, has since died, and William A. Kelly, as executor of her last will and testament, was substituted as defendant and respondent herein.

Appellant's wife at the time of her death, which occurred on May 7, 1911, was the owner of separate property which, not including the land involved in this action (the latter being also her separate property), was valued at more than \$100,000, and to which, she having died intestate, appellant and a sister of deceased have become the sole heirs. The complaint alleged that the instrument in question was not in fact signed, acknowledged, or delivered by Mary Anne Holland; that she had been, for a period prior to and including the date of the instrument, addicted to the excessive use of intoxicating liquors; that due to such use her mind had become enfeebled to such an extent as to render her incompetent; that if such instrument had in fact been executed it was due to the acts and importunities of Julia McCarthy, who, aware of such enfeebled mental condition, contributed thereto by supplying and administering intoxicants to her niece that she might and did thereby and by undue influence induce the execution thereof. The allegations mentioned being denied upon the trial of the issues, the court found against appellant, and entered its judgment accordingly. From the judgment the appeal was taken.

Appellant contends that the findings and judgment are not supported by the evidence; that the court erred in sustaining an objection to the introduction in evidence of certain tags or slips purporting to record deliveries by a certain liquor dealer to Mary A. Holland of certain liquors and which tags were obtained by appellant from the dealer after the death of his wife.

[1, 2] Appellant with numerous witnesses, who had been neighbors and friends of himself and wife, testified to the use by the latter of alcoholic liquors for a period of nearly a year prior to her death; that she had been an invalid since the year 1908, and that after the death in February, 1911, of Vincent Holland, the only child of the marriage, she became greatly depressed and her use of liquor thereafter increased and became excessive; that Julia McCarthy became a frequent visitor at the house of appellant after the death of his son, assisted in caring for his wife, gratifying her craving for alcohol by supplying and administering liquor in excessive quantities; and that while under its influence, by suggestion and requests, pro-

cured the execution of the deed and the transfer from her niece to herself of a certain deposit account in a San Francisco bank. From the testimony of these witnesses, if believed, the trial court might fairly have found for the appellant.

Defendant with her witnesses—many with the same opportunities for observation as the witnesses for appellant—testified with equal positiveness that the use of liquor by Mrs. Holland, though constant, was not excessive in quantity; that its use did not affect her competency; that she was competent to and did care for the affairs of her household and the business connected with her estate, was not subjected to undue or improper influences or solicitations by Mrs. McCarthy; that she had on different occasions voluntarily expressed a desire to make some provision for her aunt, and that on the occasion of the purported execution of the deed she was not intoxicated, and did sign, acknowledge, and deliver the instrument as contended by respondent. Among these witnesses were two nurses who attended Mrs. Holland at different times during the period from December, 1910, to the date of her death, one of whom was in attendance on the day on which the deed was signed, and whose testimony was in part corroborated by a real estate dealer, who drafted the deed, and a notary public, whose certificate is thereto attached, who both testified that Mrs. Holland on the occasion of its execution was not intoxicated, and that she did, with an intelligent understanding of the nature and consequences of her acts, sign, acknowledge, and deliver the instrument. Bearing upon the question of her mental condition is the testimony of a witness for the appellant, who testified that on the 1st day of April, 1911, he visited Mrs. Holland and was consulted by her with reference to the preparation of her will; that she gave him instructions as to such preparation, stating her wishes as to the provisions therein for the disposition of her property; that such instrument was prepared accordingly and read to her; and that its execution was deferred owing to her desire that appellant, who was not then present, should first see and read it. The facts as testified by the witnesses mentioned, together with the testimony of others who, with more or less frequency, visited and conversed with Mrs. Holland during the months immediately preceding her death, created a conflict in the evidence on every material issue, and, being believed by the trial court, were sufficient to support the findings.

The credibility of the witnesses was a question for the determination of the trial court (Code Civ. Proc. § 1847; *Badover v. Guaranty Trust & Sav. Bank*, 186 Cal. 775, 200 P. 638; *Crow v. Crow*, 168 Cal. 607, 143 P. 689; *Dracovich v. Dracovich*, 53 Cal. App. 361, 200 P. 44); and, though it should appear to this court that other conclusions of fact

might fairly and reasonably have been drawn from the evidence, yet where a substantial conflict therein exists, as here, and the conclusion of the trial court finds reasonable support therefrom, the rule is well settled that its findings cannot be disturbed on appeal (*Waer v. Waer*, 189 Cal. 178, 180, 207 P. 891; *Webster v. Lowe*, 177 Cal. 385, 170 P. 850; *Levi v. Chesley*, 178 Cal. 145, 172 P. 607).

[3] The tags mentioned above purporting to record deliveries of liquor to the home of appellant, offered by him as evidence of the fact of such deliveries, the matters therein contained, not being within his knowledge, were the statements of a person not sworn as a witness or subject to cross-examination by the defendant, were hearsay, and the objection on the ground of their incompetency was properly sustained.

Th evidence being sufficient to support the findings, and, no error being shown, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

74 Cal. App. 646

PARKER v. PARKER. (Civ. 2973.)

(District Court of Appeal, Third District, California. Oct. 21, 1925.)

1. Marriage §50(1)—Evidence held to sustain finding that there was no common-law marriage.

Evidence held to sustain finding that there was no common-law marriage.

2. Husband and wife §264—Evidence held to sustain finding that there was no community property.

Evidence held to sustain finding that there was no community property, but that husband acquired property before marriage within Civ. Code, § 163.

3. Husband and wife §297—Wife suing for maintenance and division of property has burden of showing husband's net profits.

In so far as husband's net profits enter into determination of amount to which wife is entitled for maintenance, burden is on wife to show amount of such profits.

4. Evidence §98—In absence of sufficient evidence, issue must be decided against party having burden of proof.

In absence of sufficient evidence, issue must be decided against party having burden of proof.

5. Appeal and error §1071(6)—Failure to find on issue, necessarily found against complaining party, is not ground for reversal.

Failure to find on issue, which must necessarily have been found against complaining party, is not ground for reversal.

6. Husband and wife §298(1, 2)—Allowance for wife's maintenance is largely in trial court's discretion subject only to revision for abuse of discretion.

Allowance to wife for maintenance is largely in trial court's discretion, subject only to revision for abuse of discretion.

7. Husband and wife §298(1, 2)—Allowance for wife's maintenance held not abuse of trial court's discretion.

Allowance of \$100 per month maintenance to wife, whose husband was worth about \$45,000, held not abuse of discretion, in view of meretricious relation of parties prior to marriage and conditions under which marriage was contracted.

8. Husband and wife §299(3)—On proper showing, court may at any time increase maintenance allowed to wife.

Under Civ. Code, § 137, court, on proper showing by wife, may at any time increase maintenance allowed to wife.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by Olga Falke Parker against Frank C. Parker. From a judgment granting insufficient relief, plaintiff appeals. Affirmed.

Parkinson & Parkinson, of Stockton, for appellant.

Carlton C. Case, of Stockton, for respondent.

FINCH, P. J. Plaintiff brought this action for permanent maintenance and a division of alleged community property, on the grounds of desertion, willful neglect to provide, and extreme cruelty.

In the first three causes of action it is alleged that the parties intermarried on the 11th day of June, 1921, and ever since have been and now are husband and wife. It is further alleged therein that on the 14th day of August, 1914, the parties "began to live together as husband and wife in England, and that plaintiff was induced so to do by the promise of defendant to plaintiff that he would marry plaintiff as soon as they arrived in New York; that plaintiff, at defendant's request, took the name of Mrs. Olga Parker; that plaintiff and defendant continued to live together as husband and wife at all times since the 14th day of August, 1914," until their separation as alleged in the complaint, after their marriage on the 11th day of June, 1921.

In the fourth cause of action it is alleged that the parties entered into a contract marriage in the state of New York in September, 1914, and thereafter lived together in the state of New York as husband and wife until May, 1918, when they came to California, that such contract and assumption of marital rights constituted a valid legal marriage under the laws of that state, and that at all

times since such common-law marriage the parties have been and now are husband and wife.

The complaint alleges that property of the value of \$84,000 stands in the name of defendant, all of which, except \$2,000 is community property, acquired by the joint efforts of the parties while residing in California, that plaintiff is "nervous and unable to work and produce any income whatever," and "has no income sufficient to provide for her the necessities of life," and that \$500 a month is a reasonable sum to be allowed her for permanent support and maintenance. The prayer, in so far as material here, is for a division of the alleged community property and permanent maintenance in the sum of \$500 a month.

The answer admits the marriage of June 11, 1921; denies the alleged contract marriage; denies that the defendant ever promised to marry plaintiff; admits that the parties at various times lived together and traveled together temporarily as husband and wife, but alleges that they did not do so with any "intention whatever of being or becoming husband and wife"; alleges that on the 20th day of August, 1921, plaintiff commenced an action against defendant in which she alleged that she was the owner of one-half of all of defendant's property, that the parties "compromised said action," and defendant "paid plaintiff \$5,000 upon her promise and agreement to release all claims to defendant's property." The agreement, executed August 24, 1921, is attached to and made a part of the answer. The answer denies that the property standing in defendant's name is community property, or of a value in excess of \$40,000 or was accumulated while the parties were living together as husband and wife, and denies that \$500 is a reasonable sum to be allowed plaintiff for maintenance. There are many other allegations in the complaint and allegations and denials in the answer, but enough has been stated to show the issues involved in this appeal. There are no children of the marriage.

The court found that the parties did not enter into the alleged common-law marriage; that "prior to the 11th day of June, 1921, neither of the parties ever agreed or intended to be or to become husband and wife, and neither of them regarded themselves as such"; that "by mutual consent, and in order that they might more conveniently and safely practice * * * illicit sexual intercourse without attracting the attention of the public, the plaintiff assumed the name of Mrs. Frank C. Parker," and that the parties "represented to persons with whom they came in contact that they were husband and wife"; that at various times and places they lived together in such meretricious relation, but that prior to June 11, 1921, they "never agreed to live together as husband and wife,

save and except for the false and wrongful purpose of concealing their illicit sexual intercourse"; that the parties executed the aforesaid agreement of August 24, 1921; that at the time of the marriage on June 11, 1921, and at the time of the trial, the defendant had property of the value of \$45,000; that "all of said property was acquired by him prior to his marriage with plaintiff, or was purchased by defendant after such marriage with funds possessed by him prior to said marriage"; that "there is no community property belonging to the parties"; that the plaintiff has \$4,500 in cash, which is her separate property, and which produces an income of \$180 a year; that she "is 39 years of age, is in good health, and is in all respects capable of earning sufficient money for her support and maintenance"; that "defendant's income is uncertain, changeable, and fluctuating; that during certain periods defendant has had a net income realized from his labors and from his separate property which aggregates \$700 per month, and at other times defendant has suffered monthly losses by reason of insufficient proceeds from business to pay overhead expenses"; that the sum of \$100 a month "is a reasonable and proper amount to be contributed by defendant to plaintiff, and said sum, when added to the funds which plaintiff is capable of earning, will enable her to live in a manner befitting her rank, station, and requirements in life, and in the manner in which defendant would be able to support her if said parties were living together as husband and wife." The court found in favor of plaintiff on the issues of desertion and willful neglect and against her on the issue of extreme cruelty. Judgment was entered in accordance with the findings, and the plaintiff has appealed.

[1] Appellant contends that the finding against the alleged common-law marriage is contrary to the evidence. Plaintiff testified that a verbal contract of marriage was entered into by the parties as alleged. Defendant's testimony is equally positive to the contrary. Admittedly they lived together during various periods after September, 1914, and held themselves out to others as husband and wife. Admittedly also they had continuously indulged in acts of sexual intercourse with each other for many months prior to the alleged contract marriage. The plaintiff testified that this first occurred after the defendant had asked her to marry him. He denies that he ever asked her to marry him, or that there was any understanding, prior to June, 1921, that the parties would marry. They first met during the latter part of the year 1912. Both were of mature years and wide experience. The plaintiff speaks the German, Swedish, Finnish, Russian, Danish, and English languages, and, probably by reason thereof, she made many trips to Europe as the companion of wealthy American

women. She testified that she had crossed the Atlantic about seventeen times. The illicit relations between the parties commenced in about three months after they first met, or in the early part of 1913. From the foregoing statement it is apparent that the finding complained of has sufficient support in the evidence, and the details of the illicit relations between the parties may well be omitted.

[2] It is urged that the evidence does not support the finding to the effect that the defendant accumulated no property after the marriage, and that the evidence shows that at least \$6,000 was accumulated since the marriage. The defendant testified that he purchased the Lyric Theater in Stockton August 12, 1919; that he then had between \$8,000 and \$9,000, a part of which he used in making the purchase; that at the time of the marriage in 1921 he owned property of the value of between \$40,000 and \$50,000; and that at the time of the trial the value of all of his property was between \$30,000 and \$40,000. He gave lists of the property owned by him at both times and an estimate of the values thereof. No witness testified to the contrary. The defendant owns and conducts, alone or in association with others, several moving picture theaters and also is the owner of a one-third interest in a prune orchard. His other property consists of stocks and bonds and moneys deposited in banks. He receives a salary of \$20 a week from one of the theaters in which others are interested. He testified that he had no other income, except the profits which he receives from the foregoing businesses and property.

"All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property." Civ. Code, § 163.

The compromise agreement of August 24, 1921, contains the following covenant:

"It is further agreed that the property now in the hands of each of said parties at the time of the consummation of this agreement shall be the separate property of each of said parties."

The court was justified in finding that "there is no community property belonging to the parties."

Appellant contends that the finding, to the effect that the defendant during certain periods has had a net income of \$700 a month and at other times has suffered monthly losses, "is no finding of fact whatever, and is too indefinite upon which to base their award," and that the "evidence supports finding of an average income of \$750 per month throughout the year." Defendant's first testimony relative to his income was given August 1, 1922. He then testified:

"My income from the Lincoln Theater has been \$20 a week and from the Modesto Thea-

ter of course nothing at all; there won't be for a long time. From the Concord Theater I have never taken a nickel out, I am trying to sell it; it has been a losing proposition. And the Lyric Theater I have lost anywhere from \$150 to \$200 a week for the last three months; it approaches that. I am trying to sell it too. * * * It has not paid last winter. I may have got a living out of it, but that is not making any real money. * * * Up until around last September or October, November, I was making money about three months last year, then from there on I started to lose money. I have been losing money ever since. * * * It is just occasionally when you make money, I have been losing money now for a year * * * on the Lyric. * * * The receipts of the Lyric Theater during the last three months was \$11,881.75; the expenditures was \$13,815.19. * * * My best year was almost two years ago. * * * It is more expensive now; the operator's or union salaries have gone up; the pictures are more expensive; advertising is more expensive."

The defendant was again examined as a witness on the 1st of November, 1922. Relative to receipts of the Lyric Theater, he then testified:

"It has made a little money since I was here last. * * * I don't think it is making a penny these last two weeks. Before that time I made in the neighborhood of \$800 or \$1,000 when I had some big pictures there. * * * I had a bunch of big pictures I put on September 1st up until about two weeks ago."

[3-5] He further testified that from July 27, 1922, when it was opened, to November 1 of that year, the receipts from the Modesto Theater averaged \$200 a month above operating expenses. The defendant owns a half interest in that theater. At plaintiff's request, the defendant produced his account books, which he testified contained all of his receipts and disbursements. Counsel for plaintiff examined the defendant at considerable length relative to receipts during the months of September and October of every year since defendant commenced business in Stockton. They were as follows: 1919, \$10,088; 1920, \$12,432; 1921, \$8,026; 1922, \$10,330. The defendant testified that the expenses of 1921 and 1922 were "almost double" what they were in 1919 and 1920; that his operator's weekly salary had been increased from \$37.50 to \$49; that of organist from \$35 to \$75; ushers from \$7 to \$10; cashier from \$10 to \$16; and janitor from \$10 to \$14; and that the price of pictures had "increased almost 200 or 300 per cent." His testimony shows that his profits in 1920 were about \$10,000. The evidence also showed that certain amounts paid out in the purchase of property during 1921 and 1922 had been entered on his books as expenses. The defendant testified that counsel for plaintiff was "picking out the best weeks we have ever had." Showing the net profits for such weeks does not justify the inference that equal profits, or any profits, were made

during the year as a whole. The expenses would continue during periods of small receipts, and may have resulted in such losses as to eat up the profits of the fat weeks. The court said: "There is a way of getting the exact balances there." Counsel for defendant replied: "Yes; we have submitted the books absolutely to counsel. He has been over and over the books previously over at the theater; he can produce it if he wishes." Counsel for defendant did not see fit to introduce the books in evidence. Making proper deductions from the expense account of items improperly charged thereto, the plaintiff might readily have shown the defendant's net profits. In so far as the defendant's net profits enter into the question of the amount to which plaintiff is entitled for her maintenance, the burden is on her to show what those profits were. In the absence of sufficient evidence, an issue must be decided against the party having the burden of proof. Failure to find upon an issue which must necessarily have been found against the complaining party is not ground for reversal.

[6, 7] The amount to be allowed a wife for her maintenance is largely in the discretion of the trial court, subject to revision only in case of an abuse of discretion. In this case it does not appear that such discretion has been abused. The court found, on sufficient evidence, that during the meretricious relationship of the parties "the plaintiff was supported partly by her own labor and partly by such funds as the defendant voluntarily gave to her"; that in July, 1919, "defendant left plaintiff in Pasadena, Cal., and came to Stockton, without the intention of returning to plaintiff, or of again resuming the aforesaid meretricious relations; that plaintiff remained in Pasadena for a period of eighteen months, during which time very little correspondence was exchanged between the parties; that in January, 1921, plaintiff came to Stockton where defendant had established himself in business and endeavored to induce defendant to again resume the said meretricious relations; that defendant refused so to do; that thereupon plaintiff demanded that defendant marry her, which defendant also refused to do;" that the plaintiff threatened that, unless the defendant married her, she would "expose to the public the meretricious relations in which plaintiff and defendant had lived," and promised "that, if the defendant would marry her, she would not ask or expect him to live with her, that after the performance of the ceremony she would immediately leave Stockton and 'would not bother the defendant any more,' * * * that she wanted defendant to marry her in order that she might legally use his name in obtaining passports and returning to her native country, Finland, as an American citizen; * * * that relying upon the said promises made by plaintiff, and fearing the

threats of exposure and the damage to his reputation and business, * * * and believing that plaintiff would keep and perform the said promises and agreements, the defendant consented to the performance of a marriage ceremony, and the same was performed * * * on June 11, 1921; * * * that immediately after the said ceremony the parties separated;" that plaintiff failed to keep her promise, but "on the contrary returned to the city of Stockton, frequently called at defendant's place of business and annoyed and molested him by requesting him to live with her, and on the 20th day of August, 1921," commenced the action against him hereinbefore referred to; and that "defendant desired to avoid the scandal incident to the trial of the issues which would be joined by contesting the said action," and entered into the aforesaid contract of August 24, 1921.

[8] The foregoing statement of facts found by the court is not made for the purpose of excusing in any manner the reprehensible conduct of the defendant prior to the marriage of the parties, but of showing that this is not an ordinary case of a wife suing for maintenance, after living with her husband in lawful wedlock during the best years of her life. Such facts and circumstances would naturally appeal to the discretion of the court in fixing the amount to be awarded for maintenance. On a proper showing by plaintiff, the court may at any time increase the monthly amount to be paid by the defendant. Civ. Code, § 137.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

74 Cal. App. 704

HOGAN v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. No. 5369.)

(District Court of Appeal, First District, Division 1, California. Oct 28, 1925. As Modified Nov. 24, 1925. Rehearing Denied Nov. 25, 1925. Hearing Denied by Supreme Court Dec. 24, 1925.)

1. Judgment ☞279—Probate orders and decree held not part of judgment roll in action by administrator.

In suit by administratrix, who was discharged before she obtained a judgment, order and decree of settlement of account and final distribution, and order of final discharge of administratrix, do not constitute part of judgment roll, and cannot be considered in determination of question of nullity of judgment.

2. Judgment ☞470, 521—Writ will not lie to prohibit enforcement of judgment unless judgment is void.

Proceeding to prohibit enforcement of judgment is collateral attack upon it, and judgment

must be held valid, unless void on its face, or shown to be void by judgment roll.

3. Judgment ⚡470—In seeking to prohibit enforcement of judgment, every presumption is in favor of validity.

In proceeding to prohibit enforcement of judgment, every presumption and intendment is in favor of its validity.

4. Judgment ⚡499—Judgment roll only evidence considered in determining jurisdiction on collateral attack.

In collateral attack upon judgment, judgment roll is only evidence that can be considered in determining question of jurisdiction.

5. Judgment ⚡497(1) — If jurisdiction was once obtained, judgment roll must show it to be lost if collateral attack is to succeed.

Where trial court has obtained jurisdiction of both res and parties, subsequent proceedings cannot be collaterally attacked, unless it be ascertained from judgment roll that jurisdiction was thereafter lost.

6. Judgment ⚡499—Matters of fact outside judgment roll not admissible in collateral attack.

In collateral attack on judgment, matters of fact not appearing on judgment roll, but depending for their establishment upon extrinsic proof, are wholly inadmissible.

7. Executors and administrators ⚡440—Judgment for administratrix, discharged after commencement of suit and before judgment, held voidable.

A judgment in favor of administratrix, who was discharged as such after commencement of action but before judgment, *held* neither void nor valid, but voidable.

8. Prohibition ⚡12—Dismissal of appeal conclusive, and prohibition cannot be used to serve purposes of appeal.

Where a judgment is not void, and its irregularities have been attacked on appeal, the dismissal of the appeal is conclusive, and the aid of writ of prohibition may not be invoked to serve its purposes.

9. Judgment ⚡874(1)—Question of validity of order of substitution held not vital to enforcement of judgment.

Where plaintiff, who was administratrix and sole heir, recovered a judgment, and later secured an order substituting herself individually as party plaintiff instead of as administratrix, validity of such order *held* not vital to enforcement of judgment, because plaintiff was only person entitled to enforce it.

10. Parties ⚡58—Prohibition ⚡3(3)—Right of substitution discretionary, and prohibition not proper remedy for irregularities growing out of substitution of parties.

A transferee's right of substitution as party to suit rests in discretion of court, and irregularities growing out of it should be corrected by appeal and not by writ of prohibition, because rules applying to immunity of judgments from collateral attack apply with equal force to orders of court.

Application by Walter Hogan for writ of prohibition, prayed to be directed to the Superior Court of California in and for the City and County of San Francisco, J. J. Van Nostrand, Judge, to prevent the enforcement of a judgment. Writ denied.

J. L. Smith, of San Francisco, for petitioner.

Harry I. Stafford, of San Francisco, for respondents.

KNIGHT, J. Prohibition. Walter Hogan, the petitioner herein, is a judgment debtor in an action brought against him by Barbara Hecker, as the administratrix of the estate of Charles Valentine Hecker, deceased, and seeks by this proceeding to prohibit the enforcement of a money judgment rendered against him in that action, upon the ground that said judgment is void.

It appears from the judgment roll, a certified copy of which is annexed to and made part of respondents' return herein, that the judgment in said action was rendered by the respondent court on February 19, 1924, after trial, in favor of "the plaintiff Barbara Hecker, administratrix of the estate of Charles Valentine Hecker, deceased, and sole heir of said estate," for the sum of \$11,890 and costs. It further appears from said judgment roll that an appeal from the judgment was taken by the petitioner, and on April 7, 1925, on motion of plaintiff and respondent therein, was dismissed by the Supreme Court. Thereafter, and on April 10, 1925, the petition alleges, said superior court granted an ex parte order substituting Barbara Hecker, individually, as party plaintiff in said action in the place and stead of Barbara Hecker as administratrix of said estate, which substitution, it is alleged, was followed by the issuance of an execution in the name of the substituted plaintiff.

[1] The ground upon which petitioner claims said judgment is void is that, after the action was commenced, and prior to the trial thereof, the estate of said deceased had been distributed, the administration thereof closed, and the administratrix discharged, and that therefore the action was without a plaintiff when it was tried and when judgment was rendered. None of those facts is revealed even inferentially by the judgment roll; they are brought before us in this proceeding by means of a pleading which petitioner has offered for filing since oral argument, entitled "Petitioner's Reply to Respondents' Answer," and which sets forth copies of the following documents: Order substituting party plaintiff, made after dismissal of the appeal; order made after dismissal of appeal for entry of judgment against the sureties on the appeal bond; order and decree of settlement of account and final distribution; and order of final discharge of

administratrix, in the matter of the estate of said deceased; also a copy of the engrossed bill of exceptions settled and allowed by the trial judge, in the matter of petitioner's appeal from the judgment in said action. Nothing is contained in either the order of substitution or the order for entry of judgment against the sureties, relating to the discharge of said administratrix. Assuming, as petitioner contends, that said order of substitution and said order directing entry of judgment against the sureties do form part of the judgment roll in said action, it is apparent that the probate orders and decree, embodied in said pleading, do not constitute any part of said judgment roll, and hence, under the authorities, neither of those documents, nor any matter or fact appearing therein can be considered in the determination of the question of the nullity of said judgment.

[2-5] A proceeding of this nature, to prohibit the enforcement of a judgment, constitutes a collateral attack upon that judgment (*Wiggin v. Superior Court*, 68 Cal. 398, 9 P. 646; *Frey v. Superior Court*, 22 Cal. App. 421, 134 P. 733), and, being a collateral attack, "the judgment must be held to be valid unless the record thereof, the judgment roll, shows it to be void—unless, as the authorities put it, it is void upon its face. In determining the question, we are restricted to the evidence afforded by the judgment roll." *Crouch v. H. L. Miller Co.*, 169 Cal. 341, 146 P. 880. Every presumption and intendment is in favor of the validity of the judgment, and any condition of facts consistent with the validity of the judgment will be presumed to have existed, rather than one which will defeat it. *Canadian, etc., v. Clarita Co.*, 140 Cal. 672, 74 P. 301, and cases cited therein. In other words, to be attackable collaterally for lack of jurisdiction, the judgment must be void on its face, and it is not void on its face unless the record affirmatively shows that the court was without jurisdiction to render the judgment. *Crouch v. Miller*, 169 Cal. 341, 146 P. 880; *Emery v. Kipp*, 154 Cal. 83, 97 P. 17, 19 L. R. A. (N. S.) 983, 129 Am. St. Rep. 141, 16 Ann. Cas. 792; *Estate of Eikerenkotter*, 126 Cal. 54, 58 P. 370; *Butler v. Soule*, 124 Cal. 69, 56 P. 601; *Dunn v. Dunn*, 114 Cal. 210, 46 P. 5; *Layne v. Johnson*, 19 Cal. App. 95, 124 P. 860; *Seaboard National Bank v. Ackerman*, 16 Cal. App. 55, 116 P. 91. The record is the judgment roll, and upon collateral attack is the only evidence that can be considered in determining the question of jurisdiction. Extrinsic evidence is wholly inadmissible, even though it might show that jurisdiction did not in fact exist. *Crouch v. Miller*, supra; *Lake v. Bonyng*, 161 Cal. 120, 118 P. 535; *Estate of McNeil*, 155 Cal. 333, 100 P. 1086; *Parsons v. Weis*, 144 Cal. 410, 77 P. 1007; *Galvin v. Palmer*, 134 Cal. 426, 66 P. 572; *Jacks v. Baldez*, 97 Cal. 91, 31 P. 899; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742; *Calif. C. C. Co. v. Crescent City Co.*, 30 Cal.

App. 619, 159 P. 209; *Shirran v. Dallas*, 21 Cal. App. 405, 132 P. 454, 462. The true rule is not whether jurisdiction has been legally exercised, but whether it was obtained at all. Once the trial court has obtained jurisdiction of both the res and the parties, its subsequent proceedings cannot be collaterally attacked, unless it be ascertained from the judgment roll that jurisdiction was thereafter lost. In the Matter of Hughes, 159 Cal. 360, 113 P. 684; *Baldwin v. Morgan*, 50 Cal. 585.

[6] The judgment roll here shows that the trial court acquired jurisdiction over the parties and of the subject of the action; the judgment is regular upon its face, and embraces only such matters as were within the power of the trial court to adjudicate and within the scope of the pleadings. Its jurisdiction was therefore complete (*Crew v. Pratt*, 119 Cal. 139, 51 P. 38), and it follows that the matters of fact set forth in petitioner's final pleading, pertaining to the settlement of the estate of said deceased and the discharge of the administratrix, being admittedly matters of fact not appearing in any part of the judgment roll, but depending for their establishment upon extrinsic proof, which, as we have already seen, is wholly inadmissible in a collateral attack, cannot be allowed to impeach the integrity of the judgment.

[7] Petitioner's contention that the judgment is void is based upon the theory that under all circumstances a judgment rendered for or against a dead person is void, and he likens the situation of the plaintiff administratrix herein to that of a party plaintiff who has died since the commencement of an action, but in whose name the judgment is nevertheless rendered. In support of such theory he cites the *Estate of Parsell*, 190 Cal. 454, 213 P. 40, 25 A. L. R. 1561. Conceding that the analogy drawn by petitioner between the two cases is a logical one, we are unable to agree with his contention that under all circumstances a judgment is void where it is rendered for or against a deceased party, and the *Estate of Parsell*, as we understand it, does not so hold. *Freeman on Judgments* states the rule as follows:

"If an action is begun by and against living parties, over whom the court obtains jurisdiction, and some of them subsequently die, it is not thereby deprived of its jurisdiction; and, while it ought not to proceed to judgment without making the representative or successor in interest of the deceased parties to the action, yet, if it does so proceed, its action is irregular merely, and its judgment is not void collaterally, particularly where the fact of death is not shown by the record." [*Freeman on Judgments*, vol. 1, p. 885, § 406.]

The rule just quoted has been followed in a number of cases in this state (*Todhunter v. Klemmer*, 134 Cal. 60, 66 P. 75; *Tyrrell v. Baldwin*, 67 Cal. 1, 6 P. 867; *Phelan v. Tyler*, 64 Cal. 80, 28 P. 114; *Martin v. Wagner*,

124 Cal. 204, 56 P. 1023; *Wallace v. Center*, 67 Cal. 133, 7 P. 441), and is summarized in California Jurisprudence as follows:

"But the death of a party pending suit does not render a judgment for or against him after death void, although there was no substitution of his representative; it is merely voidable." 14 Cal. Jur. p. 928.

In *Todhunter v. Klemmer*, supra, it is said:

"But the dictum in the case cited [*McCreery v. Everding*, 44 Cal. 284] has been expressly overruled by the later decisions of *Phelan v. Tyler*, 64 Cal. 82 [28 P. 114] and *Tyrrell v. Baldwin*, 67 Cal. 2 [6 P. 867], where it is held that the death of a party pending suit does not oust the jurisdiction of the court, and hence that the judgment is voidable only, not void. This does not mean that a judgment can be really rendered for or against a dead man, but that it can be rendered nominally for or against him, as representing his heirs, or other successors, who are the real parties intended."

And in *Phelan v. Tyler*, supra, in giving the reason for the rule, the court says:

"There is nothing in the Code which would justify the inference that the death of a party pending an appeal ousts the jurisdiction of the Supreme Court and renders its judgment void unless before the rendition thereof a representative of said deceased party be substituted in his stead. * * * The reason why, 'in such cases, the judgment is simply erroneous, but not void, * * * is because the court having obtained jurisdiction over the party in his lifetime, is thereby empowered to proceed with the action to final judgment; and, while the court ought to cease to exercise its jurisdiction over a party when he dies, its failure to do so is an error to be corrected on appeal if the fact of the death appears upon the record, or by writ of error coram nobis if the fact must be shown aliunde.' *Freeman on Judgments*, 153."

The decision in *Martin v. Wagner*, supra, is to the same effect, the court saying:

"In this state, however, it has been decided that when, in his lifetime, jurisdiction of the party and of the subject-matter has been acquired, the rendition of a judgment after his death, without substitution of parties, is not void, but at most erroneous"—citing *Phelan v. Tyler*, supra, and *Wallace v. Center*, supra.

The early case of *Gregory v. Haynes*, 21 Cal. 443, holds that, even where substitution has been made, the entry of judgment in the name of the deceased does not invalidate the judgment collaterally. True, a judgment cannot be rendered for or against a party who was dead at the time the action was begun, and if such judgment be rendered it is wholly void and may be attacked collaterally. *Freeman on Judgments*, vol. 1, p. 884, § 406. This doctrine has been held to apply to corporations which had been dissolved before the commencement of the action in which they were made parties. *Cal. Nat. Supply Co. v. Flack*, 183 Cal. 124, 190 P. 634; *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 89

P. 335. But the proceeding before us does not fall within the rule just stated, because the plaintiff here was the qualified and acting administratrix at the time of and subsequent to the commencement of the action. The decision in the *Estate of Parsell*, supra, cited and relied upon by petitioner, does not establish any different rule. There a direct appeal was taken from a modified decree of distribution by which the probate court sought to modify its original decree wherein it had distributed a portion of the estate to a deceased person, the fact of the death of said distributee affirmatively appearing in the record; and it was held on appeal that the original decree could not be so modified because it was wholly void, the court saying:

"The decree of distribution is in the nature of a judgment [citing numerous cases]. A judgment rendered for or against a dead person is void (*De Leonis v. Walsh*, 140 Cal. 175, 178 [73 P. 813]), with certain exceptions (section 669, Code Civ. Proc.; *Fox v. Hale & Norcross S. M. Co.*, 108 Cal. 478 [41 P. 328]; *Estate of Page*, 50 Cal. 40) not applicable to the facts of this case."

The statement made therein, to the effect that a judgment rendered for or against a dead person is void, must be interpreted in the light of the state of facts there under consideration, and evidently was not intended to be a broad and absolute rule applying to all cases where a judgment is rendered for or against a deceased party, for the reason that the statement itself notes certain exceptions wherein valid judgments may be rendered against deceased parties, and it does not pretend to deal with that middle class of cases represented by the authorities hereinabove cited, wherein judgments against deceased parties are held to be neither void nor valid, but at most erroneous and consequently voidable. The judgment in question manifestly belongs to that middle class, and therefore is immune from collateral attack.

[8] Furthermore, it would appear that, since said judgment is not void, whatever objections petitioner may have had to its irregularity were involved in the appeal which was subsequently dismissed, and that he is concluded by such judgment of dismissal (*Lake v. Bonyng*, 161 Cal. 120, 118 P. 535; *Michelin Tire Co. v. Bentel*, 184 Cal. 315, 193 P. 770; *Estate of Chase*, 169 Cal. 625, 147 P. 461), and may not now invoke the aid of this remedy in prohibition to serve the purposes of the appeal which has already been dismissed.

[9, 10] The judgment herein, which was obtained by former counsel for Mrs. Hecker, was by its terms made payable to Barbara Hecker in the dual capacity of administratrix and sole heir of said estate. The entire estate being distributed to her, she became the successor in interest, as such distributee, to the fruits or said judgment. *Blinn Lumber Co. v. McArthur*, 150 Cal. 610, 89 P. 436. Bar-

bara Hecker therefore is the only person entitled to enforce the judgment or to receive the amount due thereunder, and, since petitioner under the circumstances cannot possibly be called upon to pay the judgment a second time, it can make no difference to him whether he pays the amount thereof to Barbara Hecker as administratrix or as sole heir and distributee of said estate. Any question which might afterwards arise as to whether the money so paid belonged to the estate of her deceased son or to Barbara Hecker personally is a matter that must concern the estate's creditors and not its debtors. For the foregoing reasons we believe that the question of the validity of said order of substitution, which can in no sense be considered an amendment to the judgment, is not vital to the enforcement of said judgment. Moreover, a transferee's right of substitution is permissive, resting in the discretion of the court, and, under some circumstances, may be granted following the rendition of judgment. *Fay v. Steubenrauch*, 138 Cal. 656, 72 P. 156. Plaintiff was therefore afforded a complete and adequate remedy by appeal, to correct any irregularity growing out of the substitution herein; and this is true, even though a jurisdictional question be involved. *Glougie v. Superior Court*, 169 Cal. 675, 147 P. 972; *Lindley v. Superior Court*, 141 Cal. 220, 74 P. 765; *Jacobs v. Superior Court*, 133 Cal. 364, 65 P. 826, 85 Am. St. Rep. 204; *White v. Superior Court*, 110 Cal. 54, 42 P. 471; *Agassiz v. Superior Court*, 90 Cal. 101, 27 P. 49; *Johnston v. Superior Court*, 4 Cal. App. 90, 87 P. 211. In that situation prohibition does not lie, the rules applying to immunity of judgments generally from collateral attack applying with equal force to orders of court. *Galvin v. Palmer*, 134 Cal. 426, 66 P. 572; *Rowe v. Blake*, 112 Cal. 637, 44 P. 1084; *Clark v. Sawyer*, 48 Cal. 133; *Agoure v. Peck*, 17 Cal. App. 759, 121 P. 706.

For the reasons above stated, the writ is denied.

We concur: TYLER, P. J.; CASHIN, J.

74 Cal. App. 782

COSTELLO v. MARTIN BROS. et al.
(Civ. 2988.)

(District Court of Appeal, Third District,
California. Oct. 29, 1925.)

1. Landlord and tenant §103(1)—Lessor, on lessee's default, may either sue for installments due or terminate lease on nonpayment after demand.

On lessee's default in payment of rent, lessor has option of suing directly for installments of rent then due, allowing lease to continue in force, or of terminating lease in event of nonpayment after demand and notice.

2. Landlord and tenant §194(1)—On lessees surrendering premises under option given by lessor, latter could not recover rentals subsequent thereto.

Where lessees, who defaulted in payment of rent, exercised option given them by lessor and surrendered premises, lease thereby terminated, and lessor could not recover rentals due subsequent to such surrender.

3. Landlord and tenant §194(1)—Lessees surrendering premises under option given by lessor not exempt for liability for rent accruing prior thereto.

Though lessees' surrender of premises, pursuant to option given them by lessor, terminated lease as to lessor's right to rentals subsequent to such surrender, it did not affect lessees' liability for rent accrued prior to such surrender.

4. Landlord and tenant §94(1)—Where lessee vacated on notice, payment of accrued rent held not to keep lease in force.

Where lessor, on lessee's default, served notice requiring lessee to pay rent within three days or surrender possession, and lessee thereupon vacated premises, the fact that thereafter, and within the three days, he also paid the accrued rent, did not keep the lease in force.

5. Landlord and tenant §139(4)—Lessees of alfalfa land held not liable for destruction of alfalfa, resulting from general rise of water table in land.

Lessees of alfalfa land held not liable for destruction of alfalfa growing on land, due to general rise of water table in land, where to preserve alfalfa, lessees would have had to drain whole irrigation district.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action for damages for breach of lease by George Costello against Martin Bros., a copartnership, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Levinsky & Jones, of Stockton, and E. H. Christian and Ernest S. Leslie, both of Oakland, for appellant.

Berry & Watson and Hubert H. Briggs, all of Stockton, for respondents.

FINCH, P. J. The complaint alleges that the plaintiff leased certain lands to defendants for the term of five years from the 1st day of October, 1919; that defendants went into possession under the lease; that on the 17th day of August, 1923, they "abandoned the said premises and informed the plaintiff that they * * * would no longer be bound by any of the terms of the said lease"; that the plaintiff, since such abandonment, has diligently endeavored to procure a tenant for the premises, but has been unable to do so; and that by reason of said abandonment he has been damaged in the sum of \$4,225.

For a second cause of action it is alleged:

That the defendants "failed to keep all of the alfalfa on said premises in first-class condition; that they failed to seed and re-seed, tend, and irrigate the said alfalfa in accordance with the most approved methods of farming, as they had in said lease covenanted to do, but allowed the said alfalfa on said premises to decay and become of little or no value, thereby diminishing or reducing the value of the said lands in the sum of \$200 per acre."

The complaint alleges other breaches of the lease by the defendants, but the court found against the plaintiff thereon and such findings are not attacked on this appeal.

The answer alleges:

That the plaintiff "terminated said lease, * * * and notified the said defendants and each of them that said lease was terminated, and notified the said defendants and each of them to quit said premises, and that said lease would be of no further force and effect, and that the defendants or either of them would have no further right therein"; that pursuant to said notice and termination, "and at the request of the plaintiff, the said premises were surrendered to the plaintiff by the defendants and each of them, and plaintiff immediately accepted the surrender and entered into possession thereof."

In addition to denials of the allegations contained in plaintiff's alleged second cause of action, the answer alleges that:

"The principal and material inducement for the leasing of said premises, and which the plaintiff well knew, was the raising of alfalfa thereon for * * * dairy purposes; that at the time of the leasing of said premises the said lands thereof did produce and there was growing thereon a good and sufficient quantity of alfalfa; that thereafter, and notwithstanding the best efforts of the defendants in farming said premises as aforesaid, and notwithstanding that the defendants did re-seed and attempt to restore said alfalfa, said alfalfa during the year 1922 commenced to deteriorate and perish and continued to deteriorate and perish until the greater part thereof had entirely perished by reason of unfavorable soil and water conditions in said locality and not for the want of ordinary care on the part of the defendants or any of them, and the stand and growth of alfalfa on said premises did, on or about August 17, 1923, become entirely insufficient for said dairy purposes; and by reason thereof the defendants did on said 17th day of August, 1923, vacate the said premises and surrender the same to the plaintiff with his full consent to and acceptance of said surrender."

The court made findings of fact against the plaintiff and in favor of the defendants, substantially in the language of the answer, and gave the defendants judgment for costs of suit. From this judgment the plaintiff has appealed.

The premises described in the complaint contain 120 acres of land, on which were buildings and fences suitable for dairy purposes. It was stipulated at the trial that at the time the defendants went into possession

there was a first-class stand of alfalfa on all of the land.

The lease provided for the payment by the defendants of a monthly rental of \$325, payable in advance on the 1st day of each month; "that said land is leased and taken for dairy purposes only and for no other purpose whatsoever;" that, "if default shall be made in the payment of the rents and or in any of the covenants herein contained, then it shall be lawful for the lessor to re-enter said premises and remove all persons therefrom; * * * that time is of the essence of said agreement of the lessees to make said payments as above provided." On the 15th day of August, 1923, the plaintiff signed and caused to be served on defendants the following notice:

"Notice to Pay Rent.

"To Martin Bros., Tenant in Possession:

"You are hereby required to pay, within three days after the service on you of this notice, the rent of the premises hereinafter described, and of which you now hold possession, said rent now amounting to the sum of \$450.00 from the 9th day of July, 1923, to the present 10th day of August, 1923. Or to deliver up possession of the said premises within said three days to George Costello or his attorney, E. H. Christian, who is hereby authorized to receive possession thereof, or any rent due or unpaid, from you, or I shall institute legal proceedings against you to recover possession of said premises, with treble rents, said premises are situated in the county of San Joaquin, state of California, and described as follows: As being the south twenty (20) acres of lot two (2) and also lots 63, 64A, and 64B, of the Naglee-Burk tract, of said county and state, and containing in all one hundred and twenty (120) acres, more or less.

"Reference is hereby made to that lease made by the parties hereto on the first day of October, 1919, and its terms made a part of this notice."

The defendants vacated the premises on the 17th day of August, 1923, and on the next day they paid all rent due up to the 31st of that month. The plaintiff moved onto the premises "the last part of August," 1923, and has resided there ever since. He endeavored to relet the premises to others, but was unable to do so, except for short periods and at small rentals. He commenced this action on the 5th day of September, 1923. The record is silent as to when the defendants first had notice of the action, other than that it shows they filed a demurrer to the complaint on the 1st day of October, 1923.

[1-4] On the defendants' default in payment of rent, at least two courses were open to plaintiff. He had the option to sue directly for the installments of rent then due, allowing the lease to continue in force, or to terminate the lease in the event of nonpayment after demand and notice. He elected to pursue the latter course, and by the foregoing notice he gave the defendants the option of

paying the amount due within the time prescribed or surrendering possession. The defendants exercised the option given them by the notice by vacating the premises. Had they failed to avail themselves of either option, it is to be inferred from the contents of the notice that the plaintiff would have commenced an action of unlawful detainer against them. Had he recovered possession of the premises in such an action, he would have been entitled to judgment for rents due up to the time of such recovery, but he would not have been entitled in that action, or in any other action, to a judgment based upon subsequent rents or rental values. It is not perceived that a different rule should apply where a lessee voluntarily surrenders possession under one of the options given him by the lessor. The notice did not of itself terminate the lease. It was in the nature of an alternative offer which became effective upon the acceptance by defendants of one of the alternatives thereof. The case is unlike that of *Downing v. Cutting Packing Co.*, 183 Cal. 91, 190 P. 455, where the lessor, after giving a similar notice to the lessees, abandoned the proceeding for a forfeiture of the lease within the three-day period, accepted payment of the overdue rent, and the lessees remained in possession. In that case, at page 96 (190 P. 457), it is said:

"If the notice had terminated the lease or created the forfeiture, or if Ibos and Roche [the lessees] desired that it should have that effect, it was their duty to vacate the premises on or before the expiration of the three-day period."

In this case the lessees did vacate the premises within the three-day period, and it must be held that the effect thereof was to terminate the lease. The fact that on the following day, also within the three-day period, the lessees paid the overdue rent is immaterial. Such payment was but the discharge of an obligation which they were bound to perform, and the time of such performance is of no consequence here; it being after the surrender of the premises. While the surrender of the premises, under the circumstances stated, terminated the lease as to the lessor's right to rentals subsequent to such surrender, it did not affect the lessees' liability for rent accrued prior to such surrender. *Brewing Ass'n v. American P. Co.*, 59 Cal. App. 718, 723, 211 P. 817. If the defendants had not paid the accrued rent until after the expiration of the three-day period, or one day later than that on which it was actually paid, it could not be contended that the lease was continued in force. No reason appears why a different effect should be given to a payment made within that period but after the surrender of the premises in compliance with one of the options given by the notice.

[5] The evidence fully supports the findings of the court against plaintiff on his sec-

ond alleged cause of action. The land in question lies in an irrigation district. Lands outside the district at a higher elevation than those within it are under irrigation. Several witnesses testified that during the years 1922 and 1923 the water table gradually rose in plaintiff's land and in other lands in the district to such level as to destroy most of the alfalfa growing thereon. The engineer of the district, an experienced irrigation engineer, testified:

"The first indications of a serious water logging of the land were developed in the summer of 1922. * * * The major cause of it is due to the irrigation of the higher lands."

On plaintiff's land in 1923, the water table "varied from 18 to 30 inches." That condition prevailed "to a major extent" throughout the district. "It destroyed the tap root of the alfalfa and to a certain extent destroyed the corona so there would be no production of any consequence." On plaintiff's land "most of it was in very bad shape." "Q. Would it be possible by the resowing, plowing, farming it in proper and farmer-like manner to get alfalfa to grow and produce ordinary fair crop with the water table as high in that land as you found it? A. No; can't be done." In 1921 the water table on plaintiff's land varied "from 4 to 6 feet" from the top of the ground. In 1922 it was from "2½ to 4 feet in this particular property." The rise in the water table "is due to the seepage through various strata of alluvial soils there. * * * It does not flow on the surface." In 1923 the district was "installing a pumping drainage unit which was not put in until the latter part of the summer, consequently there was a great accumulation of drainage water in there, and the drainage canal which, in relation to this ranch, flows practically along the south line, that was wholly full of water. The river was fairly high and * * * the water in the river is higher than this land, so a good area of this land that has been supplied lies between the hydrostatic pressures of the water surface and the ground waters to the south of it and also to the reaction of the river." If the drainage unit had been in operation in 1922, "it would naturally have been beneficial, but that benefit is something that is not brought about instantaneously; it takes time. * * * The reaction from the river * * * is quite decided. * * * When the tide backs up to the river, * * * the flow of water in the drainage ditches is reversed." The witness, testifying the latter part of March, 1924, further stated that since the drainage unit had been installed "the hydrostatic line * * * has uniformly receded throughout that country about 6 inches," and that "we had hopes that we would get it down so that there will be a growing plane of 4½ feet." He also testified that prior to the installation of the aforesaid pumping unit the district had in

operation a drainage pump capable of discharging 6 second-feet of water, but that it "was totally inadequate to handle the water."

From the foregoing statement of facts it is clear that the defendants are not liable for the destruction of the alfalfa growing on the land at the time they went into possession. They could have saved such alfalfa or caused other alfalfa to be planted and successfully grown on the land only by operating pumps of sufficient capacity to keep the water table down to a growing level. It is usually true, and the evidence shows it to be true in this case, that the water table in a single parcel of land cannot be materially lowered as a separate unit, but that the draining of one parcel necessarily drains out the ground waters in the surrounding lands which are immediately connected therewith. In other words, it is impossible to drain one part of a reservoir without correspondingly lowering the water surface of the whole thereof. It was stipulated that there was a good stand of alfalfa on the land in February, 1922. The evidence shows without conflict that practically all of the alfalfa, except that on a few acres, was dead when defendants surrendered possession. The overwhelming weight of the evidence is to the effect that the destruction was due to the general rise of the water table in the land. The lease provides that—

"The lessees will farm said land * * * in a good and farmer like manner and in accordance with the usual custom or course of farming practiced in the neighborhood, and that they will keep all of the alfalfa on said premises in first-class condition and will seed and re-seed, tend and irrigate the said alfalfa in accordance with the most approved methods of farming."

In ascertaining the meaning of the covenant to "keep all of the alfalfa on said premises in first-class condition," consideration must be given to those parts of the sentence which immediately precede and those which follow the language last quoted. From the sentence as a whole it clearly appears that it was not the intention of the parties to make the lessees insurers of the stand of alfalfa growing on the land at the time of the execution of the lease, but rather that the parties contemplated that some of the alfalfa would die, in which event the lessees were to "seed and re-seed, tend and irrigate the said alfalfa in accordance with the most approved methods of farming." No "approved method of farming" would warrant the seeding of land to alfalfa where the original stand had been destroyed by the presence of an existing high-water table and any new stand must inevitably perish from the same cause. Neither would the "most approved method of farming" require the lessees to go to the great expense of draining the whole irrigation district in order to preserve the lessor's alfalfa or to develop a new crop, and it cer-

tainly was not within the contemplation of the parties that this should be done by the lessees. Since nothing of value would have resulted from re-seeding the land under the circumstances stated, the plaintiff has suffered no damage from the failure of defendants to do so, and the defendants were not required to do a vain thing. If this were an action for rent under a lease still in force, and the lessees were defending on the ground of the destruction of the alfalfa, other considerations might prevail, but, under the circumstances of this case, the defendants are not liable in damages, because they were without fault, and any attempt on their part to prevent or repair the injury suffered by plaintiff would have been futile and would have resulted in no benefit to him.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

75 Cal. App. 16

PEOPLE v. ANDURSKY. (Cr. 1261.)

(District Court of Appeal, Second District, Division 1, California. Oct. 31, 1925.

Hearing Denied by Supreme Court.
Dec. 28, 1925.)

Criminal law §=878(4)—Findings on separate counts of information held inconsistent and conflicting so as not to support judgment of conviction.

Finding of not guilty on count of information which charged violation of the Juvenile Court Law in inducing girl to go with accused to room and having sexual intercourse, held inconsistent and conflicting with finding of guilty on count charging rape, the two counts concededly relating to the same transaction, and not to support judgment of conviction.

Appeal from Superior Court, San Diego County; L. D. Jennings, Judge.

Solomon Andursky was convicted of rape. From an order granting a new trial, the People appeal. Affirmed.

Hearing denied by Supreme Court; Seawell, J., dissenting.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Chester C. Kempley, Dist. Atty., and E. L. Johnson, Deputy Dist. Atty., both of San Diego, for the People.

Edward J. Kelly, of San Diego, for respondent.

CURTIS, J. Respondent was charged and found guilty of the crime of rape, alleged to have been committed on or about the 10th day of November, 1924, upon Martha E. Biggs, a female of the age of 15 years and not the wife of respondent. He was also charged in a second count of the information with the crime of violation of the Juvenile Court Law of the state of California (St.

1915, p. 1225), in that on or about the 10th day of November, 1924, he did cause, and tend to cause and encourage and induce, and endeavor to induce, said Martha E. Biggs, a female of the age of 15 years, to perform such acts and to follow such course of conduct and to so live as would manifestly tend to cause said minor to become and remain a person coming within the provisions of the said Juvenile Court Law, in that said defendant on the 10th day of November, 1924, did induce said Martha E. Biggs to remain away from her home and usual place of abode, and did then and there induce her to go with defendant to a room in a rooming house, and said defendant did then and there occupy the same bed in said room with said Martha E. Biggs, and did then and there accomplish acts of sexual intercourse with her.

The jury returned a verdict of "not guilty" as to the second count of said information. Thereafter respondent made a motion for a new trial on the ground that the verdict was against law in that the verdict finding him guilty of the crime of rape as charged in the first count of the information was inconsistent with the verdict acquitting him of the crime charged in the second count of the information, wherein it is alleged, among other things, that respondent accomplished acts of sexual intercourse with said minor. The court granted respondent's motion, and the people have appealed from said order.

It is conceded that the charges set forth in the two counts of the information grew out of and relate to the same transaction or state of facts. While they are not identical, the respondent is accused in each count of the commission of sexual intercourse with the said female minor, Martha E. Biggs. In the first count this is the sole charge against him, and in the second count the acts of sexual intercourse, together with other acts, are charged against the respondent in alleging a violation of the Juvenile Court Law. A verdict acquitting him of the crime of rape would not be equivalent to a finding that he was not guilty of the charge contained in count 2 of the information, for he may have enticed the minor from her home and taken her to his room in a rooming house and there occupied the same bed with her, which acts might reasonably be considered to be a violation of said act, and not have committed sexual intercourse with her. On the other hand, however, a verdict of acquit-

tal of the charge contained in count 2 would necessarily be a finding on the part of the jury that he was not guilty of any of the acts charged against him in said count. It would therefore be a finding of the jury that he had not committed sexual intercourse with said minor. The jury therefore, by its verdict of guilty of rape as charged in count 1, found that the respondent had committed sexual intercourse with said minor, and by its verdict of not guilty of the charge contained in count 2 found that he had not committed said act of sexual intercourse. These two findings are inconsistent and conflicting, and, as such, they would not support a judgment of conviction. While this question appears never to have been directly before the appellate courts of this state, it has frequently been so held in other jurisdictions.

In *Rosenthal v. United States* (C. C. A.) 276 F. 714, the defendant was charged in one count with having bought and received stolen property with knowledge that it had been stolen, and in a second count with having the same property in his possession with like knowledge. The jury found him not guilty of the charge contained in the first count and guilty of that set out in the second count. Upon appeal the judgment was reversed by the Circuit Court of Appeals, for the reason that the two findings were wholly inconsistent and conflicting.

In *Kuck v. State*, 149 Ga. 191, 99 S. E. 622, a similar question was presented. In that case it was decided, reading from the syllabus:

"Where a person is accused in one count on a charge of misdemeanor, alleging that * * * the defendant did sell spirituous liquors, etc., and in another count of the same accusation it is alleged that the defendant on the same day did have, control, and possess spirituous liquors, etc., and the same evidence is relied on to convict under both counts, a verdict finding the defendant guilty on the first count, and not guilty on the second, is void for repugnancy."

See, also, *State v. Akers*, 278 Mo. 368, 213 S. W. 424; *Second Bishop's New Criminal Procedure*, § 1015; 16 C. J. § 2596.

These authorities appear to sustain the order of the trial court in granting respondent a new trial. Said order is therefore affirmed.

We concur: CONREY, P. J.; HAHN, Justice pro tem.

74 Cal. App. 658

MILLER et ux. v. TOWN OF SEBASTOPOL
et al. (Civ. 2990.)(District Court of Appeal, Third District,
California. Oct. 23, 1925.)**1. Municipal corporations ⇨293(2)—Resolution of intention to improve street held to cover part of street not improved by gutters.**

A resolution of intention by board of trustees of town ordering improvement on part of avenue for full width of roadway, except where gutters are now constructed, means that improvement, instead of covering full width of street, shall be extended only to gutter, but is not intended to exclude entire width of street in front of gutters, as it is a matter within range of common experience that street might require repaving though gutters be in good condition.

2. Municipal corporations ⇨513(7)—Evidence held to show no "constructed gutter."

Evidence held to show that there was no constructed gutter in front of plaintiff's house within meaning of resolution of intention to improve avenue for full width of roadway, except where gutters are now constructed; "constructed gutter" is one so constructed as to serve in full or proper measure purposes of conduit for carrying off of water.

3. Municipal corporations ⇨293(2)—Resolution of intention to improve street held to refer to gutters of character contemplated by improvement.

Resolution of intention by board of trustees ordering improvement on avenue except where gutters are now constructed is intended to declare that gutters existing when work was begun should be such as corresponded with character of work of improvement as called for by plans and specifications in resolution.

4. Municipal corporations ⇨330(4)—Proceedings for improvement held not void because restricting purchase of materials.

Proceedings for improvements of streets held not void because they require contractor to purchase materials from certain parties at fixed price, thereby preventing competitive bidding.

5. Municipal corporations ⇨339(3)—Proceedings for improvement held not void because requiring contractor to be liable for unforeseen difficulties.

Proceedings for improvement of streets held not void as imposing unreasonable or unwarranted burden on contractor by requiring him to be liable for all loss or damage resulting from unforeseen construction or difficulties in work.

6. Municipal corporations ⇨533—Proceedings for improvements held not void because contractor's warrant and return was not properly recorded.

Proceedings for improvement of streets held not void because warrant and return signed by contractor duly verified, stating nature and character of demand, was not returned to superintendent of streets and recorded as required by law.

Appeal from Superior Court, Sonoma County; H. L. Preston, Judge.

Action by John F. Miller and wife against the Town of Sebastopol, a municipal corporation, and E. F. Jewell and others, as trustees thereof. Judgment for plaintiffs, and defendants appeal. Reversed.

G. W. Libby, of Sebastopol, and H. C. Symonds, of San Francisco, for appellants.

E. S. Page, of Oakland, for respondents.

HART, J. This action was instituted by the plaintiffs to relieve their property from the lien of an assessment imposed thereon by virtue of the provisions of the street improvement laws of the state for the improvement of the street, in the town of Sebastopol, upon which said property is situated, and to secure an injunction against the issuance of bonds in pursuance of the provisions of the Improvement Bond Act of 1915 (St. 1915, p. 1441), "to represent and be secured by unpaid assessments for such improvement." The relief prayed for in the complaint was granted and a decree entered accordingly. A motion for a new trial by defendants was denied. From the judgment the defendants prosecute this appeal.

The trial court found that the resolution of intention to improve the street upon which the property of the plaintiffs abuts, by its terms, as construed in the light of the evidence, does not include, or, rather, excludes, the said property from the operation thereof, and upon such finding predicated its judgment, and that finding presents the principal point of controversy here. Counsel, in their briefs, discuss some other points, which will be given due attention.

[1] The part of the resolution of intention which is important here reads as follows:

"Resolved, that it is the intention of the board of trustees of the town of Sebastopol to order the following work to be done and improvement to be made in said town, to wit:

"That the portion of Bodega avenue, for the full width of the roadway thereof, except where gutters are now constructed, from a line parallel and distant one hundred and eighty (180) feet southwesterly along Bodega avenue from the southwesterly line of South Main street projected northwesterly, to the southwesterly line of Florence avenue projected southeasterly, be improved as follows: * * * That concrete curbs be constructed along both sides of said portion of Bodega avenue above described, of the size, in the manner, and at the places as shown by said plans and specifications, except where said concrete curbs are already constructed to line and grade."

The said resolution further provided that the work and improvement therein referred to "is to be done in accordance with the plans and specifications made therefor by

the town engineer, * * * which plans and specifications are now on file in the office of the town clerk of said town of Sebastopol, and are hereby referred to and made a part hereof."

The views of counsel diverge upon the meaning of the language of the resolution of intention which, as given above, is in italics. The plaintiffs contend that that language means that where, at the time the resolution of intention was passed by the council or trustees, gutters had been constructed and were in existence in front of any property abutting upon the street to be improved, and included within the district to be improved, then that part of the street is and was intended to be excluded from the operation of the resolution: that is, no work of improvement was to be done on that part of such street. The defendants contend that the language referred to merely means that the full width of the street or the roadway thereof shall be improved except in those instances where "gutters are now constructed," in which case the improvement, instead of covering the full width of the street, shall be extended only to the gutter, or include only that part of the width of the street which is not already improved by the construction thereon of gutters. In other terms, the language means, as the defendants conceive, that where gutters have already been constructed, that part of the width of the street that is so improved and used shall not be included in the work of improvement.

We are not in accord with the plaintiffs' notion of the meaning of the language in question. The width of streets of towns and cities is from curb to curb, of which a small part is always devoted to the purposes of gutters. The street, or a portion thereof, concerned in the proceeding before us had once before been paved, and, it may be assumed, gutters in some places constructed thereon. It is obviously true that while a street, although well paved, will, in the course of time, wear out or become so impaired as to render it unfit and even unsafe for use and so require repaving, the gutters properly constructed thereon when the street was first paved will still remain in good condition, sufficient in all respects for the purpose they are intended to serve. This is so because, manifestly, streets are subject to more violent and perhaps more constant use than are gutters. All these are matters that come within the range of common experience. Hence, when the governing board of a city or town proposes, by the authorized legal methods, to order the improvement of a street, once paved and improved, quite naturally and justly anticipating that the gutters constructed thereon at the time of the first improvement would or might be sufficient for the proposed new improvement of the street, it would so frame its proposition to

repave the street as to exclude therefrom that portion of the street upon which sufficient gutters had previously been and "are now" constructed, thereby relieving the owners of property abutting upon the street to be improved, and which must stand for the expense of the improvement, of the additional financial burden which would be entailed if the full width of the street, from curb to curb, were repaved. Thus we have the reason underlying and prompting the insertion in a proposal to improve streets of such a provision as the one under consideration. This view is, we think, conclusively established by the consideration that the interpretation of the provision in question, as given by the plaintiffs, would, in many instances of its practical application, produce absurd consequences. If, for illustration, several blocks of a street or avenue were included within the district thus to be improved, and there were gutters "now constructed" along the street or avenue in one of the blocks, that portion of the street or avenue would be excepted from the operation of the resolution, even though it were true that such portion of the street would be in need of improvement, even in greater need thereof than any other part or portion of such street. Indeed, it is not impossible that such a situation might arise where one block only of the street was proposed to be improved. It might happen that in front of a single piece of property in such block there existed a well-constructed gutter, while in front of the other property in the same block there was no "constructed gutter"; that is, a gutter so constructed as that it will properly function according to its purposes. In such case, obviously, upon the assumption of the correctness of plaintiffs' interpretation of the language in question, a portion of the street in one block would not be subject to the terms of the resolution, albeit a particular portion of such street might require repaving, or be in even greater need of such improvement than any other part or portion of the street in such block. The possibility that a situation so absurd could and might arise entirely forecloses any and all justification for holding that it was the intention of the trustees to ascribe to the language in question the meaning claimed for it by plaintiffs.

It is to be conceded that the sentence embracing the exception, as punctuated, is, on first blush, apt to be misleading. If the comma at the end of the word "avenue" in the sentence, were omitted, the language would be clearer in expressing the meaning which we are convinced it was intended to bear. At any rate, we cannot believe that, upon careful reflection, any other conclusion, as to the meaning of the exception provided in the resolution of intention and now under consideration and as to the intention of the trustees with respect to the scope thereof, can

reasonably be justified than that to which we have been persuaded.

[2] Upon the foregoing considerations alone a reversal of the judgment would be required. But we are further of the conviction that the evidence does not support the finding that, at the times mentioned herein, a gutter was "constructed" in front of the property of plaintiffs. The plaintiff John F. Miller testified that, on the 26th day of August, 1921 (the date of the adoption and passage of the resolution of intention), "there was a gutter constructed in front of my house or place on Bodega avenue, in the town of Sebastopol." This was the full extent of his testimony brought out on direct examination on the subject of the gutter. On cross-examination he testified:

"Q. What character of gutter was constructed? A. It was a macadam gutter.

"Q. In what way was it constructed? A. Well, it was graveled the same as the street; the street and the gutter was all the same thing.

"Q. Simply the dirt in its natural condition, wasn't it, practically? A. Well, it was a graveled street, and there was a graveled gutter there also.

"Q. In other words, the street simply went down lower for the water to run along the curb? A. No, sir; it was curbed that way.

"Q. What? A. I say, it was curbed that way when the street was in before; when they put the gravel on the street they made the street and the gutter.

"Q. Was there any constructed gutter? A. Well, yes, there was a constructed gutter there.

"Q. Constructed separately from the street? A. How is that?

"Q. Was there any gutter that was constructed separately from the street? A. Well, the street and the gutter was all one, just the same as it is now.

"Q. So that the gutter was just the same as the street, was it? A. Well, it was a gravel gutter, yes, and a gravel street.

"Q. It was the same material, the street came right down to the gutter, of the same material? A. Yes, it was gravel."

Joseph Frates, for the plaintiff, testified:

That the gutter was "constructed apparently at the same time the street was constructed, and of the same material" (that is, of gravel); that "the street just came down into a lower place where the water ran. And a curb was run on the extreme sides of the street, and the gutter and the curb meet.

"Q. What kind of a curb? A. Wooden curb.

"Q. A wooden curb, was it? A. Yes, sir.

"Q. And this portion of the gutter, similarly constructed to the street, ran up to this wooden curb? A. Yes, sir."

Charles E. Mueller, town engineer, who prepared the plans and specifications for the work of improvement, testified that there was in front of the property of plaintiffs nothing more than a gutter line formed by the sloping of the street to the curb; that no gutter was constructed there prior to the

time work under the present proceedings was begun; that the gutter line in front of said property was scarcely a ditch, the base or surface of which was formed of rocks; that it was not what is known as and understood to be a constructed gutter. In short, the witness declared that in front of plaintiffs' property "there was nothing called a gutter; it was anything but a gutter; it did not serve the purpose of a gutter." He further stated that the plans "show a pavement from curb to curb in front of the property of plaintiffs," and that they also called for a curb in front of said property; that is, a curb of concrete and the pavement to be extended to the curb, but do not specifically provide for a gutter.

[3] The foregoing is substantially all the oral testimony upon the question whether there was a gutter in front of the property of plaintiffs at the times mentioned, and it is clear therefrom that there did not exist in front of said property at the time the resolution of intention was adopted by the board of trustees, or at the time the work of improvement was begun, a gutter that would serve in full or proper measure the purposes of such a conduit or passageway for the carrying off of water. This is clearly enough shown to be true by the testimony of the plaintiff John F. Miller, himself, and that of his witness Frates. According to their testimony, there was nothing in the shape of a gutter before the property involved herein but the depression necessarily formed by the sloping of the street, as originally macadamized, towards and to the curb line in front of said property. The base or surface of the depression was made of rock or gravel, and the curb of wood, but the construction and the condition thereof by reason of such construction, so testified the town surveyor (and in this he was not contradicted), was such that it would practically be no gutter at all as a part of the work proposed to be done and which was done under the plans and specifications adopted in the proceedings involved herein. It is undoubtedly true that by the language, "gutters now constructed," the trustees meant to declare in the resolution of intention adopted in the present proceedings that the gutters existing when the work was begun should be such in the general character of construction as would correspond, at least approximately, with the character of the work of improvement of the street as called for by the plans and specifications, as briefly outlined in the resolution of intention.

Upon the present branch of the case we are satisfied that the testimony is practically without conflict in showing that, prior to the time of the doing of the work of improvement under the proceedings with which this appeal is concerned, there were no gutters constructed and in existence in front of the property of plaintiffs, within the meaning of

the phrase "gutters now constructed," as used in the resolution of intention.

[4-6] Other points urged by plaintiffs in support of the judgment are: (1) "That the proceedings are void because they require the contractor to purchase materials from Warren Bros. at a fixed price, thereby preventing competitive bidding." (2) That the proceedings are void for the reason that an unreasonable or unwarranted burden was imposed upon the contractor by reason of the requirement by the specifications that he (the contractor) shall himself be liable for all loss or damage resulting from "any unforeseen construction or difficulties" encountered in the prosecution of the work. (3) That the warrant and return signed by the contractor, duly verified, "stating the nature and character of the demand," was not returned to the superintendent of streets and recorded by that officer, as required by law. All these points were presented and urged in the recent case of *Woodworth v. Town of Sebastopol* (Cal. App.) 236 P. 981, and were, in an opinion by Presiding Justice Finch, held to be without merit. The points are fully considered in that case, and there is, therefore, no need of considering them herein.

For the reasons herein stated, the judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

75 Cal. App. 29

PEOPLE v. BALLARD. (Cr. 1244.)

(District Court of Appeal, First District, Division 2, California. Nov. 2, 1925.)

1. False pretenses ☞51—Question of defendant's fraudulent intent in inducing purchase of stock held for jury.

In prosecution for obtaining money by false representations that defendant was organizing a corporation for purpose of drilling for oil, and that he was authorized on behalf of organizers to receive subscriptions for shares of stock, question of defendant's fraudulent intent held for jury.

2. False pretenses ☞49(1)—Evidence held to sustain conviction for obtaining money by false pretenses.

In prosecution for obtaining money by false representations that defendant was organizing a corporation for purpose of drilling oil, and that he was authorized by organizers to receive subscriptions for shares of stock, evidence held to sustain conviction.

3. Criminal law ☞1169(11)—Admission of testimony relating to offense not charged against defendant held not prejudicial.

In prosecution for obtaining money by false representations that defendant was or-

ganizing a corporation to drill for oil and that he was authorized to receive subscriptions for shares of stock, admission of testimony of deputy from office of corporation commissioner that no permit had been issued for selling of securities of corporation which defendant purported to represent held not prejudicial, & that defendant was not charged with selling stock without a permit, where it appeared that conviction was justified.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Howard W. Ballard was convicted of obtaining money by false pretenses, and he appeals. Affirmed.

Walter Duane, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant from a judgment convicting him of a felony, to wit, obtaining money by false pretenses. The record presents the following facts, which appellant contends are insufficient to sustain the verdict of guilty.

About April, 1922, defendant met the complaining witness, Johnsen, upon a ferryboat traveling between San Francisco and Oakland. Johnsen was a deckhand, and defendant was a passenger on the boat. Defendant engaged Johnsen in conversation, and inquired if he had any money. Johnsen said he had about \$2,000 in the bank and was getting 4 per cent. interest upon it. Defendant told him that he (Johnsen) was getting too old to work such long hours and said: "I can make it better for you than that, and if you come to my office for every dollar you invest, I guarantee next October you will have to work no more." Johnsen said he couldn't come to defendant's office, because he had no leisure time. Defendant inquired where he lived, and was given the address. The following day defendant called at Johnsen's home, and said:

"Mr. Johnsen, you come down; we are having a stockholders' meeting to-day. You dig up a thousand dollars, and by October you will have \$5 for every one you invest."

Johnsen replied that he could not come, and defendant said:

"Three o'clock is the stockholders' meeting; got to have the money in by that time."

Johnsen thereupon went to the bank with defendant in defendant's automobile, and withdrew \$1,000 and gave it to defendant. The next day Johnsen received through the mail a receipt reading as follows:

"I hereby subscribe the sum of \$1,000 for preliminary purposes to be used as such in the Lafayette Oil & Gas Company, now organizing; such sum to participate in the development fund as an investment, to share pro rata in

all profits and dividends which may accrue hereafter from the actual organization of said corporation. Signed this 22d day of April, 1922.

"H. A. Johnsen.

"I, Howard W. Ballard, have this day received of H. A. Johnsen the sum of \$1,000 to be used for the purposes stated above.

"Howard W. Ballard."

About May 11, 1922, defendant again called at Johnsen's home and said he wanted \$300 more, explaining:

"We are taking up 300 acres more of land. All the rest of the stockholders are willing to do it, and you must follow up. By October 1st you will have lots of money. You will have five or six dollars to every one you invest."

Mrs. Johnsen, who was a woman over 80 years of age, hearing this conversation, expressed her doubt of the outcome of the investment, and began to cry. Defendant said:

"Don't think that of me. By October 11 you will have lots of money and you will have a limousine, and Harry will drive you around, Mrs. Johnsen."

Johnsen demurred, but finally yielded to defendant's persuasion, and went to the bank and withdrew \$300, which he gave to defendant, and for which he received a receipt similar to the one hereinbefore set forth. At this time defendant stated that the company was formed and they were having stockholders' meetings, and it was called the Lafayette Oil Company. Johnsen heard nothing more from defendant until about September 11, when defendant called at Johnsen's home about 6 or 7 o'clock in the morning. Johnsen testified that defendant said:

"I come here to tell you we took out 300 more acres of land, adjoining land, and all the rest of the stockholders is in for it again, and I want \$300."

Johnsen said he did not have \$300 to give to defendant, and defendant told him to come to the city as soon as possible, and bring the money. Johnsen and his wife came to defendant's office in San Francisco, and brought him \$300 additional. Johnsen testified that this money was obtained from him to buy another 300 acres of land for the Lafayette Oil Company. It also appears that in October Johnsen went to the defendant's office, and defendant attempted to get some more money from him, but failed. Johnsen testified that he believed the representations made to him by defendant, and, because of them, parted with his money.

Defendant's own testimony is to the effect that no corporation known as the Lafayette Oil Company was ever formed, and no additional land, nor any land, was ever purchased; that, when he secured the first \$1,000 from Johnsen, he had a lease, individually, of some land in Contra Costa county upon which he hoped to find oil; that on October

24, 1922, together with two other persons as trustees, he executed a declaration of trust, by which said persons declared themselves trustees of a trust to be designated as the California Oil & Gas Company. This declaration of trust was never filed and was never operative. Defendant stated there was an "understanding" that he would turn over his lease to these trustees, and that this trust declaration with reference to the California Oil & Gas Company was to take the place of the incorporation of the Lafayette Oil Company. However, defendant admits that Johnsen was never consulted about this change, nor given any interest in the California Oil & Gas Company, and, indeed, this legal entity attempted to be created appears never to have had any assets at all. Defendant admits that he never executed any assignment or transfer of the lease which he held to the trustees, but was content to allow the matter to rest upon the assumption that "there is a little honor among men." It also appears that this lease and its extensions had expired at the time of the execution of the declaration of trust, so there was nothing that could be assigned.

Later defendant closed his offices in San Francisco, and when he was arrested he was in Los Angeles, promoting another oil company, known as the Lessors' Oil Company. His general defense was that, if he had not been arrested in July, 1923, he would have acquired some valuable land and oil rights for the last-named company, and would have added these to the Contra Costa county lease, and would have given the subscribers to the stock of the proposed Lafayette Oil Company the benefit of an income realized from such sources.

[1] It is not surprising that the jury refused to take this statement of future intentions as an evidence of good faith, in view of the many incidents appearing in the record which indicate bad faith, and in view of the fact that the Contra Costa county lease had expired, and that some practical legal obstacles would prevent subscribers to the stock of one company without assets from participating in the assets of a different company. Several other victims of defendant testified that they had given him money upon representations similar to those made to defendant. To some of these he gave receipts showing them to have subscribed to the stock of a corporation to be called the Contra Costa Oil Company. The testimony of all of these persons, taken together, gives a very clear picture of defendant's methods and activities. The question of fraudulent intent was one for the jury. *People v. Boyd*, 67 Cal. App. 292, 227 P. 783.

The count of the information upon which he was convicted charged that defendant, on or about September 11, 1922, by false and fraudulent representations, obtained Johnsen's money by falsely and fraudulently rep-

resenting to said Johnsen that there was then being organized by him, under the laws of California, a corporation to be named Lafayette Oil & Gas Company, for the purpose of drilling for oil in the county of Contra Costa, Cal., and that the said Ballard was authorized on behalf of the organizers of said corporation to solicit and receive subscriptions for shares of the capital stock; whereas there was no such corporation being organized by Ballard or any one else, and Ballard was not authorized on behalf of the organizers of said corporation to solicit and receive subscriptions of money for such stock, or for any purpose for said corporation, as Ballard well knew; that Johnsen believed and relied upon said fraudulent representations, and was deceived thereby, and induced thereby to deliver to Ballard \$300 for the purchase of said stock.

[2] The foregoing recital of testimony taken from the record establishes the allegations in the information, and is an answer to appellant's position that the evidence was insufficient to justify the verdict. It is clear that defendant obtained Johnsen's money by representing that he was organizing a corporation to be known as the Lafayette Oil & Gas Company. He was not organizing such a corporation. The most that can be said, even from his own testimony, is that he was thinking about doing so. He never put this thought into execution, if he entertained it. He stated that he decided to change the name to California Oil & Gas Company, and this might have furnished him some excuse, if he had organized such a corporation, or even filed and operated under the declaration of trust, naming such a legal entity, and had thereafter transferred assets, such as he had represented the Lafayette Oil Company to have, to said California Oil & Gas Company, and permitted the subscribers to the Lafayette Company to share in the assets of the California Company. But he did none of these things. The facts appear to be that the money raised to purchase 300 acres of land for the nebulous Lafayette Company was never used to purchase any land, and the oil lease supposed to belong to this company to be created was never assigned to the California Company, and, indeed, had expired when the declaration of trust was executed. The prosecution established the false representations as to the creation and existence of the Lafayette Oil & Gas Company, and that is sufficient to sustain the verdict. *People v. Griesheimer*, 176 Cal. 44, 167 P. 521; *People v. Gibbs*, 98 Cal. 661, 33 P. 630.

[3] There are some assignments of error in the admission of testimony by the trial court, such as the objection to the testimony of a deputy from the office of the corporation commissioner, who testified that no permit had been issued for the selling of securities of the Lafayette Oil Company. It is contended that,

as the defendant was not charged with the offense of selling stock without a permit, the testimony should have been excluded. It does not appear that this testimony could have prejudiced the defendant, and certainly, with a record such as the one before us, we would not be justified in reversing the judgment for an error of this kind, if we concede it to be such, where it appears that justice has been done by the verdict and judgment.

There are no other matters requiring discussion, and the judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

74 Cal. App. 666

PEOPLE v. McDUGAL. (Cr. 1216.)

(District Court of Appeal, Second District, Division 2, California. Oct. 24, 1925.)

1. Criminal law $\S$ 1023(13)—Order denying defendant's motion for new trial is appealable.

Order denying defendant's motion for new trial is appealable.

2. Infants $\S$ 20—Statute held intended to make criminal commission of any act tending to cause minors to become delinquent or dependent.

Juvenile Court Law, $\S$ 21, is intended to make criminal the commission of any act tending to cause minors to become dependent or delinquent, and to protect children from influences manifestly inclining them to enter such state.

3. Criminal law $\S$ 308—Presumption of innocence does not require jurors to blind their eyes and shackle their reason in viewing evidence.

Presumption of innocence where conclusion of guilt or innocence may reasonably be drawn from evidence does not require jurors to blind their eyes and shackle their reason in viewing evidence and judging accused's intention.

4. Criminal law $\S$ 1043(1)—Appellate court held authorized to consider objection that proof did not sustain verdict of guilty.

Appellate court may consider objection that proof does not sustain verdict of guilty, where accused objected to introduction of any evidence on ground that information did not charge public offense.

5. Infants $\S$ 20—That child was of unquestioned character held not to authorize reviewing court to say that she would be unaffected by accused's misconduct.

That minor girl was of unquestioned character as matter of law, and probably would not be injuriously affected by accused's improper suggestions, held not to authorize reviewing court to say that child may not be subject of criminal act of contributing to her delinquency within Juvenile Court Law, $\S$ 21.

6. Infants ⇨20—Information held to charge public offense of contributing to delinquency or dependency of minor child.

Information charging that accused accosted 12 year old girl on public streets and suggested that she visit his room *held* to charge public offense of contributing to delinquency or dependency of minor child, under Juvenile Court Law, § 21.

7. Indictment and Information ⇨91(3)—Information charging contributing to delinquency of child need not repeat words willfully, unlawfully, and feloniously in connection with each averment.

Information charging that accused contributed to delinquency of female child under Juvenile Court Law, § 21, need not repeat words willfully, unlawfully, and feloniously in connection with each averment of acts enumerated alleged to have been so committed.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Alexander McDougal was convicted of contributing to the delinquency of a female minor child. From an order denying motion for new trial and from the judgment plaintiff appeals, and the Attorney General moves to dismiss appeal from the judgment and appeal from order denying new trial. Motion to dismiss appeal from judgment granted, motion to dismiss appeal from order denying motion for new trial denied, and order denying motion for new trial affirmed.

Mulligan & Rysek, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CRAIG, J. The defendant was charged with contributing to the delinquency of a minor child; before any evidence was introduced, defendant's counsel objected to its introduction on the ground that the information did not charge a public offense; the objection was overruled, a trial was had, and a verdict of conviction was rendered; motion for new trial was made and denied. At the time fixed for pronouncing judgment and sentence the trial court made an order that the defendant be placed upon probation. The appeal purports to be from the order denying the motion for new trial, as well as from the judgment. The Attorney General moved to dismiss the appeal upon two grounds, the first of which was that the application required by section 1247 of the Penal Code had not been filed. The record did not at first contain this application, but it appears that it has since been filed, and has been added to the record on appeal, so that no further mention need be made of this point.

[1] The second contention of the people as a basis for the motion is that it does not appear from the record that the defendant ap-

peals from the final judgment of conviction and sentence. It is not clear whether or not this claim has been abandoned; at any rate it is untenable. An order denying a defendant's motion for new trial is one from which an appeal may be taken. *People v. Robinson*, 17 Cal. App. 273, 119 P. 527; *People v. Hartman*, 23 Cal. App. 72, 137 P. 611.

We now proceed to consider the merits of the appeal. The principal grounds urged by appellant are that the information does not state facts sufficient to constitute a public offense, and that the evidence does not show that the defendant committed any crime. The acts charged to have been committed and alleged to constitute an offense of which the defendant was convicted are that:

He "did on the 28th day of September, 1924, * * * willfully, unlawfully, and feloniously contribute to the delinquency and dependency of (a child 12 years of age) by then and there willfully and unlawfully accosting (her) on the public streets of the city of Ontario, and by then and there engaging her in conversation, and by then and there suggesting that the said (minor) visit the room of said Alexander McDougal in a hotel, and the said Alexander McDougal then and there promised the said (minor) that if she would visit him in his room at his hotel he would give her candy, and would give her \$5 in money, and did thereafter on the same day, pursuant to said conversation, meet the said (minor) on said public streets of the city of Ontario, and did proceed with the said (minor) along the said public streets and along an unlighted alley in the direction of the room occupied by the defendant in a hotel in the city of Ontario, and did then and there attempt to take the said (minor) to his said room, as aforesaid. All of which acts would manifestly cause the said (minor) to become a delinquent and dependent child and would have a tendency to cause the said (minor) to lead a dissolute, lewd and immoral life."

[2] Section 21 of the Juvenile Court Law (Stats. 1915, p. 1225), provides:

"Any person who shall commit any act or omit the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of twenty one years to come within the provisions of any of subdivisions one to thirteen inclusive of section one of this act, or which act or omission contributes thereto, or any person who shall, by any act or omission, or by threats, or commands, or persuasion, induce or endeavor to induce any such person, under the age of twenty one years, to do or to perform any act or to follow any course of conduct, or to so live as would cause or manifestly tend to cause any such person to become or to remain a person coming within the provisions of any of subdivisions one to thirteen inclusive of section one of this act, shall be guilty of a misdemeanor."

Subdivision 11 of section 1 of the act designates as within its provisions any person

under the age of 21 years, "who is leading, or from any cause is in danger of leading, an idle, dissolute, lewd or immoral life."

The purpose of this statute is to make criminal the commission of any act tending to cause minors to become dependent or delinquent. It is intended to protect and safeguard children from those influences which would manifestly incline them toward entering a state of dependency or delinquency. *People v. Bergotini*, 172 Cal. 717, 158 P. 198, is strongly relied upon by appellant. In that case, the defendant was charged with inducing the mother of certain children to live an immoral life and otherwise to misconduct herself. The weakness of the information was held to be that there was nothing to indicate that the pursuit of this wrongful course by her affected the children in that way, but, on the contrary, it affirmatively appeared from other allegations of the information that, before the defendant's baneful influence was exercised upon the mother, the children had no parental control, and the home in which they lived was a place of depravity. There was nothing in the pleading or proof to show how Bergotini's influence affected the children or that it did affect them. There was an utter lack of showing that his action operated directly upon the minors. The same situation existed in *People v. DeLeon*, 35 Cal. App. 467, 170 P. 173. But, as distinguished from these cases, whatever the defendant McDougal is charged with having done operated directly against the young girl. Here the question is primarily one of fact. In so far as determining whether or not the information states a public offense, it is just this: Would the defendant's conduct toward her cause or manifestly tend to cause her to become a delinquent child? For a man to accost a young girl and invite her to his room in a hotel might be considered by a jury as in itself suggestive of such improprieties as would tend to reduce the moral standards of the child, and encourage her to enter upon a course of conduct manifestly tending to induce her to become a delinquent person. If such advances are reasonably susceptible of this interpretation, the later clandestine meeting with the child and attempt to take her through a dark alley to the man's room in a hotel alleged in the information would clearly and in a more marked degree, tend to produce the same evil result. The facts pleaded were such that the jurors would have a right to judge this defendant's conduct in the light of human experience. They would be entitled as jurors, as well as men, to recognize the fact that it would be rare indeed that a man would seek by gifts of candy and money to induce a girl to go to his room for purposes of purity and with good intentions. It was well said in *People v. Baker*, 38 Cal. App. 28, 175 P. 88, that:

"It may very properly be said that a definite duty is owed by all persons to abstain from doing any act having a tendency to cause a minor to become a delinquent or dependent."

[3] A man of the defendant's age, and, for that matter, all men, owe a definite duty to refrain from interfering with other people's children in any manner calculated to take such children from their parents' control, and which tends to lead them into immoral habits of thought or action. It is true, as suggested by appellant, that where two conclusions may reasonably be drawn concerning the defendant's conduct, one assigning a guilty and the other an innocent purpose thereto, it is the law that innocence will be presumed rather than guilt. But to give due weight to the presumption of innocence does not require that jurors blind their eyes and shackle their reason in viewing the evidence and in judging the defendant's intentions. The defendant's advances toward this little girl as pleaded in the information were not as consistent with innocence as with guilt. Likewise, it was fairly within the province of the jury to believe that the proposal and acts of the defendant as alleged in the information would and did suggest to the child the wicked purposes existing in the man's heart. It follows that this course of conduct upon his part might reasonably be believed to have manifestly tended to cause the child so mistreated to become a delinquent person as defined in section 1, subdivision 11, of the Juvenile Court Law.

[4, 5] It is urged that the proof does not sustain the verdict of guilty. We are authorized to consider this point inasmuch as the defendant's counsel objected to the introduction of any evidence, before the same was admitted, upon the ground that the information did not charge a public offense. There are facts shown in evidence from which we might conclude that this minor child was of so high character that she probably was not injuriously affected by her experience with the defendant. She immediately informed others of the defendant's proposal, particularly her parents, and she seems to have willingly assisted in the defendant's apprehension. These were facts proper for the consideration of the jury, as well as those tending to establish the defendant's guilt, but surely it cannot be said by a reviewing court that as a matter of law a child of unquestioned character may not be the subject of criminal act under the inhibition of the statutory provisions here involved. It is important to bear in mind, in this type of case perhaps more than the ordinary, that the jury alone have an opportunity to observe and thus form a reasonable opinion upon the important element of the appearance of the man, and of the child, and their conduct as witnesses. It cannot be declared that be-

cause this child was of high character the defendant's conduct could not reasonably have tended to cause her delinquency, when the same conduct toward another child not so pure minded would manifestly have had that result. Of course, it is fair to presume that to a child of chaste character and unsullied mind acts and speech grossly immoral in their nature would be repulsive in the extreme. Such a child might so loathe the suggestion of lewdness as to cling even more firmly than before to her high standards and chaste life. Yet, it is inconceivable that anyone would advance the argument that immoral acts performed in the presence of or attempted against the most pure-minded minor would not constitute an offense denounced by the provisions of the law above quoted as manifestly tending to cause even that type of child to lead a "dissolute, lewd, and immoral life." Unquestionably these matters are entirely within the province of the jury, and it is equally clear that, being matters of fact, they constitute a realm in which an appellate court has no right to act as long as the record contains facts which the jury might reasonably view in such a light as to establish the defendant's guilt.

[6, 7] We conclude that there is no merit in the contention that the information failed to charge a public offense upon the grounds discussed. If the facts pleaded would permit of the construction above indicated, it cannot be said as a matter of law that the facts alleged in the information do not constitute a public offense. The information sufficiently charges the defendant with contributing to the dependency and delinquency of the minor child named therein, in so far as meeting the requirements that the acts he is charged to have committed were done willfully, unlawfully, and feloniously; for it is not necessary that these words "willfully, unlawfully, and feloniously" be repeated in connection with each averment of the acts detailed and enumerated as making up the charge contained in the information, and which was alleged to have been committed "willfully, unlawfully, and feloniously."

The evidence produced by the prosecution fully sustained each allegation of fact. It follows from the verdict of guilty that the jury believed that McDougal's conduct toward the child at least manifestly tended to cause her to lead a dissolute, lewd, and immoral life. We cannot say as a matter of law that they were wrong.

The motion to dismiss the appeal from the purported judgment is granted; the motion to dismiss the appeal from the order denying motion for new trial is denied; the order denying motion for new trial is affirmed.

We concur: FINLAYSON, P. J.;
WORKS, J.

197 Cal. 591

**WRYNN v. SUPERIOR COURT IN AND
FOR CITY AND COUNTY OF SAN
FRANCISCO et al. (S. F. 11617.)**

(Supreme Court of California. Dec. 10, 1925.)

1. Appeal and error ⇨623—Reporter's transcript on appeal held filed within time prescribed by statute.

Where proceedings on motion for new trial were terminated by denial of motion by operation of law on February 11, 1925, appellant, in view of Code Civ. Proc. §§ 939, 953a, had until February 21, 1925, to file notice of desire to appeal under section 953a, and reporter had until March 15th to prepare and file the transcript, and hence transcript filed on March 10, 1925, was in time.

2. Appeal and error ⇨623—Appellant's right to statutory time for preparation of transcript not impaired because filing notice of intention to appeal and request for transcript before required time.

That appellant filed her notice of intention to appeal and request for a reporter's transcript before termination of proceedings on motion for new trial did not cut off her right to statutory time for preparation of transcript after termination of such proceedings, in view of Code Civ. Proc. § 953a.

3. Appeal and error ⇨628(1)—Appellant held not chargeable with lack of diligence in having transcript prepared.

Where notice of motion to terminate proceedings to procure record on appeal was served and filed two days before time expired within which appellant could file her notice and request for a transcript, appellant was not chargeable with lack of diligence in having transcript prepared.

4. Mandamus ⇨57(1)—Writ of mandate to compel trial judge to certify reporter's transcript for appeal not denied because amendments not included.

Writ of mandate to compel trial judge to certify reporter's transcript for an appeal will not be denied because amendments to record were not incorporated therein, since it was within his power to require such incorporation.

5. Mandamus ⇨16(1)—Mandate to compel trial judge to settle bill of exceptions on appeal from order terminating proceedings to procure record for an appeal will be denied.

Writ of mandate to compel trial judge to settle bill of exceptions on appeal from order terminating proceedings to procure record on appeal in probate proceeding will be denied, such order not being appealable under Code Civ. Proc. § 963, subd. 3, and such order when erroneous not justifying refusal to certify transcript.

In Bank.

Application for writ of mandate by Josephine Marie Lee Wrynn against the Superior Court of the State of California in and for the City and County of San Francisco;

Frank H. Dunne, Judge thereof. Granted in part and denied in part.

Charles N. Douglas, of San Francisco, for petitioner.

Frank H. Dunne, in pro. per.

SHENK, J. This is an application for a writ of mandate to compel the respondent judge to certify the reporter's transcript on an appeal from a judgment taken pursuant to section 953a, Code of Civil Procedure, and to settle a bill of exceptions as provided by section 650, Code of Civil Procedure, on an appeal from a special order made after said judgment was entered.

It appears from the petition that the petitioner instituted a contest of the will of Robert S. Lee, deceased, on the ground that she was a pretermitted heir of the deceased; that after trial the issue was determined adversely to her contention, and judgment to that effect was entered; that on December 11, 1924, notice of the entry of judgment was served on her; that on the 20th day of December, 1924, she filed with the clerk a notice of her intention to appeal from said judgment and a request that a reporter's transcript of the proceedings be prepared in accordance with the requirements of section 953a, Code of Civil Procedure; that on said 20th day of December, 1924, she arranged with the reporter for his compensation for preparing the said transcript; that on the same day she served and filed a notice of motion for a new trial; that thereafter and within the time allowed by law she served and filed a notice of appeal from said judgment; that on February 16, 1925, the respondent court made and entered an order denying her motion for a new trial; that on February 19, 1925, one of the legatees under said will served and filed a notice of motion to terminate the proceedings pending in said court to procure a record on appeal, basing said motion on the ground that the petitioner had not proceeded with reasonable diligence in obtaining a transcript of the evidence to be used on said appeal and that more than 40 days had elapsed since the filing of the notice requiring the reporter to prepare said transcript; that on February 27, 1925, the respondent court heard and granted said motion; that no evidence was offered in support of said motion, and that the only evidence offered or received on said motion was the affidavit of petitioner's counsel to the effect that the said appeal was being prosecuted in good faith and that said counsel had made the necessary arrangement with the reporter to transcribe and complete said record on appeal; that on March 10, 1925, the reporter completed the said transcript and filed the same with the clerk as required by law; that said clerk thereupon gave notice of the time and place for the pres-

entation of said transcript to the judge for certification; that the respondent judge refused to certify said transcript notwithstanding demand on him so to do; that the petitioner appealed from the order of the court terminating the proceedings for the preparation of the said transcript, prepared a bill of exceptions on said last-mentioned appeal, and presented the same, together with amendments thereto proposed by said legatee, to the said judge for settlement; that upon said presentation the respondent judge refused to settle said bill of exceptions and announced that he would not settle the same; that the said reporter's transcript is a full, true, and correct transcript of the proceedings had in said cause to which the same relate, and that the proposed bill of exceptions is a full, true, and correct record of all matters pertaining to the said motion to terminate said proceedings for certification of said transcript.

In response to an alternative writ of mandate duly issued herein, the respondent judge in propria persona filed an answer wherein he denies that said court denied the petitioner's motion for a new trial, and alleges that said motion was denied by operation of law on the 11th day of February, 1925; denies that on the hearing of the motion to terminate the proceedings for the preparation of the record on appeal no evidence was taken by said court in support of said motion, and alleges that said court took into consideration the state of the record in said proceeding in determining said motion, and further alleges on information and belief that the petitioner had not up to the time of the receipt of the notice of motion to terminate proceedings arranged with the reporter to prepare a complete or any record on appeal from said judgment; alleges that the affidavit of petitioner's counsel presented on the hearing of the motion to terminate proceedings consisted wholly of conclusions of law and did not state any fact showing diligence on the part of the petitioner in preparing said transcript; alleges that on the day said transcript was presented to him for certification he considered the same and decided that as the proceedings for the procurement of said record had been terminated for want of diligence on the part of petitioner the said court had no jurisdiction of the matter before it, and for that reason refused to certify said record. It is further denied that the said reporter's transcript is a full, or true, transcript of the proceedings had in said cause for the reason that the respondent's amendments to said record were not incorporated therein. It is also denied that said proposed bill of exceptions is a full, true, or correct record of all the proceedings on said motion for the same reason, to wit, that the respondent's amendments thereto were not incorporated therein.

On the return of the alternative writ and the filing of said answer, the clerk of this court was appointed as referee to take testimony on the issue raised by said answer as to whether or not the petitioner had made proper or any arrangements with the reporter to prepare a transcript of said record on appeal and to report his findings thereon. Testimony was duly taken and the referee has filed a transcript of the evidence before him and his findings thereon, which disclose that the arrangement which the petitioner made with the official reporter of the respondent court to prepare said transcript on appeal consisted of the oral agreement of counsel for petitioner with the said reporter to prepare said transcript and the promise of said counsel to pay for the same, which promise was accepted by the reporter as a satisfactory arrangement, and that said arrangement was made on the 20th day of December, 1924. No good reason has been advanced or otherwise appears why the arrangement between counsel for petitioner and the reporter for the preparation of said transcript at the time and in the manner found by the referee should not be deemed in all respects sufficient. Pursuant to said arrangement, the transcript was actually prepared in accordance therewith.

The question for determination is this: Was the said transcript prepared with due diligence and presented to the respondent judge for certification within the time provided by law? We think the question must be answered in the affirmative.

[1-4] Section 939 of the Code of Civil Procedure provides that an appeal may be taken from a judgment or order of the superior court within 60 days from the entry of said judgment or order. If proceedings on motion for a new trial are pending, the time for appeal does not expire until 30 days after the order determining the motion for a new trial or other termination in the trial court of the proceedings upon such motion. The proceedings on the motion for a new trial in the present case were terminated by the denial of the motion by operation of law on the 11th day of February, 1925. Under section 953a of the Code of Civil Procedure, the petitioner had 10 days from that date or until the 21st day of February, 1925, within which to file with the clerk the notice of her desire or intention to appeal under that section (*Bernschein v. Whitaker*, 175 Cal. 130, 165 P. 523), and the reporter had 20 days, or until March 15, to prepare and file the transcript. Such transcript was filed on March 10, 1925, and was therefore filed within the time prescribed by the statute. The notice of motion to terminate proceedings was served and filed on February 19, 1925, or 2 days before the time expired within which the petitioner could file her notice and request for a transcript. We think the peti-

tioner under such circumstances should not be charged with lack of diligence in having the transcript prepared. Section 953a by its terms contemplates that the preparation of the reporter's transcript on appeal may abide the determination of a motion for a new trial, if one be pending, for the obvious reason that if the motion be granted the transcript may not be required. The fact that petitioner filed her notice of intention to appeal and request for a reporter's transcript before the required time should not operate to cut off or impair her right to the statutory time for the preparation of the transcript after the termination of the new trial proceedings. The denial in the answer that the said reporter's transcript is a full or true transcript of the proceedings for the reason that the respondent's amendments to said record were not incorporated therein does not constitute sufficient justification for refusal to certify the transcript, for the reason that it is within the power of the respondent court and the judge thereof to require said amendments to be incorporated in the transcript. No such requirement appears to have been made. No sufficient reason appears why the respondent judge should not be compelled to certify said transcript as requested by the petitioner.

[5] With reference to that portion of the petition herein which prays for the issuance of a writ of mandate to compel the respondent judge to settle a bill of exceptions on appeal from the order of February 27, 1925, terminating proceedings, it is obvious that the issuance of a writ of mandate for that purpose would be neither proper nor necessary to the full relief of petitioner. In the first place, said order is not an appealable order. It may be conceded to be a special order made after final judgment, but it is a special order in a probate proceeding and is not such an order as is made appealable by the third subdivision of section 963 of the Code of Civil Procedure. Estate of Winslow, 128 Cal. 311, 60 P. 931; Estate of Turner, 139 Cal. 85, 72 P. 718; Estate of Cahill, 142 Cal. 628, 76 P. 383; Estate of Spafford, 175 Cal. 52, 165 P. 1). Said order is not, therefore, reviewable on a separate appeal. In the second place, as said order was made before the expiration of the statutory time within which the proceedings which it purported to terminate could have been taken, the respondent court was in error in making the same. But such erroneous order may not justify a refusal to certify said transcript. When the transcript is settled as required herein, the petitioner has received all of the relief necessary to the perfection of her appeal and the question of settling the said proposed bill of exceptions becomes of no importance.

It is therefore ordered that a peremptory writ of mandate issue requiring the respondent

judge to certify, as provided by section 953a of the Code of Civil Procedure, the reporter's transcript on appeal from the judgment entered December 11, 1924.

We concur: MYERS, C. J.; RICHARDS, J.; SEAWELL, J.; WASTE, J.; LAWLOR, J.; LENNON, J.

197 Cal. 800

In re LEE'S ESTATE. (S. F. 11595.)

(Supreme Court of California. Dec. 10, 1925.)

Appeal and error ⇐628(2)—**Motion to dismiss appeal on ground that no record had been prepared, denied.**

Appeal will not be dismissed on ground that no record has been prepared and that proceedings for preparation of such record had been terminated by trial court, where it has been determined in a prior case that trial court was not justified in refusing to certify transcript and peremptory writ of mandate to compel him to do so has been ordered.

In Bank.

In the matter of the estate of Robert S. Lee, deceased. On motion to dismiss appeals from judgment and order of Superior Court, City and County of San Francisco; Frank H. Dunne, Judge. Motion denied as to judgment, and granted as to order.

Charles N. Douglas, of San Francisco, for appellant.

W. W. Watson, of San Francisco, for respondent.

SHENK, J. This is a motion to dismiss two appeals. The first is an appeal from a judgment entered on the 11th day of December, 1924, wherein it was adjudged that the contest of the will of said deceased by and on behalf of Josephine Marie Lee Wrynn was not well founded and ordering distribution of the said estate to the legatee named in said will. The motion is based on the alleged fact that no record on appeal has been prepared and that proceedings for the preparation of such record were terminated by the trial court on February 27, 1925. In the cause entitled Josephine Marie Lee Wrynn v. Superior Court et al. (S. F. No. 11617) 241 P. 849, this day decided, it was determined that the superior court and the judge thereof, respondents in said proceeding, were not justified in refusing to certify the reporter's transcript on appeal and ordering a peremptory writ of mandate to compel him to do so. The proceedings for the preparation of said record on appeal must be deemed to be pending before the superior court. There is therefore no proper basis for the dismissal of the appeal from said judgment, and the said motion is denied.

The second appeal sought to be dismissed is an appeal from the order made on the 27th day of February, 1925, terminating the proceedings for the preparation of said record on appeal. In the case of Josephine Marie Lee Wrynn v. Superior Court et al., supra, it was decided that said order was not an appealable order. On the authority of that case the motion to dismiss the appeal from the order of February 27, 1925, is granted, and said appeal is dismissed.

We concur: MYERS, C. J.; RICHARDS, J.; SEAWELL, J.; WASTE, J.; LAWLOR, J.; LENNON, J.

197 Cal. 556

DOBLE et al. v. SUPERIOR COURT IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO et al.
(S. F. 11554.)

(Supreme Court of California. Dec. 2, 1925.
Rehearing Denied Dec. 31, 1925.)

1. Criminal law ☞1207—Conspiracy to violate Corporate Securities Act, committed prior to act making offense punishable, is punishable under Conspiracy Act of Penal Code.

Where act of conspiracy to violate Corporate Securities Act was committed before terms of act itself made such offense punishable, the penalty for such offense must be found, if at all, within Pen. Code, § 182, defining and providing punishment for criminal conspiracy.

2. Conspiracy ☞51—Conspiracy statute of Penal Code held applicable to conspiracies to commit all crimes, including conspiracy to violate Corporate Securities Act; "any crime."

Pen. Code, § 182, defining and providing punishment for criminal conspiracy, subd. 1 of which provided for punishment for conspiracies to commit "any crime," includes all crimes, whether felonies or misdemeanors, and whether defined or made punishable by Penal Code or by any law or statute of the state is applicable to conspiracy to violate Corporate Securities Act.

3. Conspiracy ☞51—First penal paragraph of conspiracy statute held to cover and punish only conspiracies to commit felonies punishable under Penal Code and those prohibited by fifth section of statute.

The first penal paragraph of conspiracy statute of Pen. Code, § 182, providing for punishment of conspiracy "to commit any felony or to commit any act injurious to public health or public morals, etc. * * * to the same extent as in this Code provided for the punishment of the said felony or act, respectively," held to cover and punish only conspiracies to commit felonies which are punishable under the Penal Code and conspiracies to commit acts prohibited by Pen. Code, § 182, subd. 5.

4. Conspiracy ☞51—Second penal paragraph of conspiracy statute may prescribe punishment for remaining offenses not made punishable under first penal paragraph.

Where Pen. Code, § 182, subd. 1, created offense of conspiracy to commit "any crime," the fact that the first penal paragraph of such statute only provided for punishment of conspiracies to commit those felonies defined in the Penal Code did not preclude the construction that the second penal paragraph thereof may not prescribe punishment for the remainder of offenses not made punishable under the first paragraph.

5. Conspiracy ☞51—Second penal paragraph of conspiracy statute prescribes punishment for conspiracy to violate Corporate Securities Act.

Conspiracy statute of the Penal Code, § 182, the second penal paragraph of which provided for punishment for conspiracies to do "any of the other acts described by this section," held to provide punishment for conspiracies to commit any and all misdemeanors not included in section 5 and conspiracies to commit all felonies prohibited by some general law of the state other than the Penal Code, which are provided for by the first penal paragraph, and included conspiracies to violate the Corporate Securities Act.

6. Criminal law ☞1207—Amendment of Corporate Securities Act to provide punishment for conspiracies to violate it did not indicate that Legislature assumed that such violations could not be made basis for charge under conspiracy statute of Penal Code.

Amendment of Corporate Securities Act by St. 1925, p. 962, to provide punishment for conspiracy to violate such statute, did not reflect an assumption by Legislature that, previous to the passage to such amendment, such a violation could not be made the basis of a conspiracy charge under Pen. Code, § 182.

7. Criminal law ☞147—Charge for crime, which is either felony or misdemeanor, at judge's discretion, stands as felony until judgment, and judgment of misdemeanor not retroactive as far as statute of limitations concerned.

In a prosecution within the purview of Pen. Code, § 17, providing that, when a crime is punishable either as a misdemeanor or a felony in discretion of trial court, it shall be deemed a misdemeanor after judgment imposing punishment other than imprisonment in state prison, held, charge stands as a felony charge for every purpose up until judgment; but if judgment is for misdemeanor, it does not have a retroactive effect as far as the statute of limitation against misdemeanors is concerned.

8. Criminal law ☞147—Jurisdiction of conspiracy to violate Corporate Securities Act not lost because of one-year statute of limitations against misdemeanors.

In a prosecution under Pen. Code, § 182, for conspiracy to violate Corporate Securities Act, violation of which is either a felony or a misdemeanor, under section 14 of the act and within purview of Pen. Code, § 17, relative to

prosecution for offenses constituting either felonies or misdemeanor, held, court did not lose jurisdiction of case because of one-year statute of limitation on misdemeanors, Pen. Code, § 801, for charge in such case, under section 17, stood as a felony until judgment, and judgment, if for a misdemeanor, would not be retroactive so far as statute of limitations was concerned.

In Bank.

Application for writ of prohibition by Abner Doble and others, to be directed to the Superior Court of the State of California in and for the City and County of San Francisco and Michael J. Roche, Judge thereof, to prevent further proceedings in trial of petitioners under indictment for violation of the Corporate Securities Act. Writ denied.

See, also, 241 P. 860.

Haven, Athearn, Chandler & Farmer, of San Francisco, for petitioners Abner Doble and Harold E. Haven.

Edwin V. McKenzie, of San Francisco, for petitioners F. G. Cox and W. E. Barnard.

Devlin & Brookman, of San Francisco, for other petitioners.

U. S. Webb, Atty. Gen., Robert W. Harrison, Chief Deputy Atty. Gen., William F. Cleary, Deputy Atty. Gen., and Matthew Brady, Dist. Atty., and Robert E. Fitzgerald, Deputy Dist. Atty., both of San Francisco, for respondents.

LAWLOR, J. Application for a writ of prohibition.

In an indictment by the grand jury of the city and county of San Francisco, bearing date September 2, 1924, petitioners are charged by the first count thereof with a conspiracy under section 182 of the Penal Code, based on alleged violation of the Corporate Securities Act (Stats. 1917, p. 673). In six other counts petitioners are charged with certain specific violations of the said Corporate Securities Act, the punishment for which is prescribed by section 14 thereof. Petitioners interposed a demurrer to the indictment and to each and every count thereof. The demurrer was disallowed. A motion to set aside and dismiss the indictment was interposed and denied. On October 27, 1924, petitioners pleaded "not guilty" to the charges contained in the indictment and every count thereof. The trial of the general issue was thereupon set for January 12, 1925, whereupon the present application for a writ of prohibition was made.

In support of the application it is urged that the superior court and Hon. Michael J. Roche, as judge thereof, are without jurisdiction to try the petitioners upon or under the said indictment, or upon or under any count thereof. It is contended that the trial of said petitioners under the first count of the indictment would be without and in excess of the jurisdiction of the superior court, for the reason that said first count fails to

state a public offense, or any offense or crime known to the law of this state. As to the other counts of the indictment (2 to 7, inclusive), it is contended that the superior court and the said judge thereof are without jurisdiction to try the petitioners, for the reason that section 14 of the Corporate Securities Act makes a violation of its provisions punishable either as a felony or as a misdemeanor, and, it appearing affirmatively upon the face of each of the said counts 2 to 7 that the act complained of in each of said counts was committed more than a year in advance of the return of the indictment, it was not punishable because, under section 801 of the Penal Code, an indictment for a misdemeanor must be found or an information filed within one year after its commission. It is urged, therefore, that the superior court is without power to impose, in the event of conviction, misdemeanor punishment.

This proceeding involves two distinct questions of jurisdiction: First, does section 182 comprehend a conspiracy to violate the provisions of the Corporate Securities Act; and, second, has the trial court jurisdiction to proceed to trial on the six counts embracing alleged criminal acts, potentially punishable as misdemeanors, and which stand outlawed as such? For convenience and clarity we will set forth the respective contentions as to the first count, and discuss and dispose of the question there involved before taking up the problem connected with the remaining six counts of the indictment. The discussion of the problem involved under the first count will necessarily revolve about sections 182 and 183 of the Penal Code, in the light of sections 15, 16, and 17 thereof, and at this point we will quote the five sections at length.

"15. *'Crime' and 'Public Offense' Defined.* A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: 1. Death; 2. Imprisonment; 3. Fine; 4. Removal from office; or, 5. Disqualification to hold and enjoy any office of honor, trust, or profit in this state.

"16. *Crimes, How Divided.* Crimes are divided into: 1. Felonies; and, 2. Misdemeanors.

"17. *Felony and Misdemeanor Defined.* A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison."

"182. *Criminal Conspiracy Defined and Punishment Fixed.* If two or more persons conspire:

"1. To commit any crime;

"2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime;

"3. Falsely to move or maintain any suit, action or proceeding;

"4. To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises;

"5. To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.

"They are punishable as follows:

"When they conspire to commit any felony, or to commit any act injurious to the public health, or to public morals, or tending to pervert or obstruct justice, or the due administration of the laws, they shall be punishable in the same manner and to the same extent as in this code provided for the punishment of the commission of the said felony or act, respectively.

"When they conspire to do any of the other acts described in this section they shall be punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both, and cases of such conspiracy may be prosecuted and tried in the superior court of any county in which any overt act tending to effect such conspiracy shall be done."

"183. *No Other Conspiracies Punishable Criminally.* No conspiracies, other than those enumerated in the preceding section, are punishable criminally."

Count 1. As to this count the petitioners contend:

"The Corporate Securities Act contains nothing making it a crime to conspire to violate its provisions. Section 182 of the Penal Code is the only law which, in general terms, prohibits conspiracies to commit certain crimes. * * * It will be noted that section 182 has two penal paragraphs. For brevity, we shall refer to the first penal paragraph beginning, 'When they conspire to commit any felony,' as 'Pen. Par. No. 1,' and to the second penal paragraph, beginning, 'When they conspire to do any of the other acts,' as 'Pen. Par. No. 2.' * * *

"It will be noted that Pen. Par. No. 1 is limited to providing punishment for conspiracies to commit felonies and the acts enumerated in subdivision 5. It will be further noted that Pen. Par. No. 1 provides a punishment for conspiracies to commit such felonies only as are enumerated in the Penal Code. * * *

"It will be conceded that a violation of the Corporate Securities Act is a crime. We also believe * * * that subdivisions 2, 3, 4, and 5 of section 182 do not prohibit, and do not deal with, conspiracies of the character charged in count No. 1. It therefore follows that if the crime of conspiracy charged is to be found in section 182 at all, it must be embraced within subdivision 1 of section 182, 'To commit any crime.'

"It also follows that no punishment for the crime of conspiracy charged in count No. 1 is to be found in Pen. Par. No. 1, for the reason that Pen. Par. No. 1 is limited to the punishment of conspiracies to commit such felonies only as are enumerated in the Penal Code ('this Code'), and a violation of the Corporate Securities Act is not one of the crimes enumerated or found in the Penal Code. The Corporate

Securities Act is not a part of the Penal Code. [In re Isch, 174 Cal. 180, 162 P. 1026, is then cited in support of the contention that the words "this Code" found in "Pen. Par. No. 1" mean and refer to the "penal Code" exclusively.]

"Pen. Par. No. 1 covers all felonies, conspiracies to commit which are punishable criminally. * * *

"Subdivision 1 of section 182 reads: 'To commit any crime.' It therefore includes conspiracies to commit all felonies which are not included in the other subdivisions of section 182. The phrase, 'any felony,' used in Pen. Par. No. 1, is coextensive with and equally as broad as the phrase, 'any crime,' as far as the phrase 'any crime' relates to felonies. Subdivision 1, 'to commit any crime,' may be resolved into its component parts without changing its meaning and be written thus, 'to commit any felony or any misdemeanor,' because crimes are composed of both felonies and misdemeanors. Pen. Code, § 16. This throws into relief and emphasizes the fact that the phrase 'any felony' or Pen. Par. No. 1 is as 'all-inclusive' and as broad as the phrase 'any felony,' which is a component part of the phrase 'any crime' used in subdivision 1. Hence, the phrase 'any crime,' used in Pen. Par. No. 1, includes *every felony*, a conspiracy to commit which is punishable criminally.

"It therefore follows that if count No. 1 charges a conspiracy to commit a felony, the punishment therefor cannot be found in Pen. Par. No. 1. * * *

"There remain two further propositions to examine: (1) Is the crime charged in count No. 1 a conspiracy to commit a crime falling within the provisions of subdivision 1 of section 182? And, if so, (2) is the punishment therefor to be found in Pen. Par. No. 2?

"Let us now examine Pen. Par. No. 2, to ascertain if it does provide a punishment for conspiracies to commit misdemeanors included within the generic term 'crime' found in subdivision 1 of section 182. * * *

"(1) The conspiracies to commit felonies which are punishable criminally are strictly limited. Only conspiracies to commit such felonies as are specifically enumerated in section 182, directly or by reference to felonies a punishment for which is to be found in the Penal Code are punishable criminally, thereby giving force and effect to section 183 of the Penal Code, which declares that only the conspiracies *enumerated* in section 182 shall be punishable criminally.

"(2) If, however, the phrase 'any crime,' in subdivision 1 of section 182, is construed to embrace conspiracies to commit misdemeanors other than those specifically described in subdivisions 2, 3, 4, and 5 of section 182, then it must follow that a conspiracy to commit *any misdemeanor* is punishable criminally, and that the word 'described,' used in Pen. Par. No. 2, is without restrictive meaning, the word 'enumerated,' used in section 183, is likewise meaningless, and section 183 is without force or effect as regards conspiracies to commit misdemeanors. * * *

"What is the meaning of the phrase 'any of the other acts described in this section' [found in Pen. Par. No. 2]? Let us first determine what other acts are described in section 182 to which the phrase just quoted does *not apply*.

The phrase does not apply to felonies or misdemeanors described directly or by reference to the Penal Code within the generic term 'crime' found in subdivision 1 of section 182. These, as has been seen, are covered by Pen. Par. No. 1. Nor does it apply to felonies or misdemeanors described in subdivision 5 of section 182. These too are covered by Pen. Par. No. 1.

"Other acts" which are not covered by Pen. Par. No. 1 are found described in subdivisions 2, 3, and 4 of section 182. These acts, described in subdivisions 2, 3, and 4, are manifestly covered by Pen. Par. No. 2. * * *

"In conclusion count No. 1 having failed to charge a crime under section 182 of the Penal Code, it perforce follows that the superior court has no jurisdiction to put these petitioners to their defense thereunder."

In reply the Attorney General contends that:

"The issue under the first count is whether or not it is a crime for two or more persons to conspire to violate the provisions of the Corporate Securities Act. It is admitted by all parties that such act does not itself prohibit such a conspiracy, but it is contended by the state that section 182 of the Penal Code is broad enough in its terms to do so. This contention is opposed by the petitioners, and so the primary question is: Does section 182 of the Penal Code define, prohibit and make punishable a conspiracy to violate the provisions of the Corporate Securities Act?

"In answering the foregoing question in the affirmative, we call particular attention to subdivision 1 of section 182 of the Penal Code, which provides that if two or more persons conspire 'to commit any crime' they are guilty of a criminal conspiracy. We also call attention to the fact that under section 15 of the Penal Code a violation of the Corporate Securities Act is a crime.

"It is our contention that the phrase 'any crime' means and includes every felony and every misdemeanor prescribed by the laws of this state. Our opponents, on the other hand, contend that the term 'any crime' means 'any felony made punishable by the Penal Code.' We therefore have a secondary question, namely: What is meant by the term 'any crime' as used in subdivision 1 of section 182 of the Penal Code?

"In support of our contention that the term 'any crime' means and includes every felony and every misdemeanor, we cite sections 15 and 16 of the Penal Code, the first one of which defines the word 'crime,' and the second one of which divides crimes into felonies and misdemeanors. From these sections we see that as a matter of positive law the term 'any crime' includes every felony and every misdemeanor. * * *

"We turn now to the penal provisions of section 182 of the Penal Code to see which (if either) of the two provide the punishment for conspiracy to violate the provisions of the Corporate Securities Act. The pertinent part of the first penal paragraph reads as follows: 'When they conspire to commit any felony * * * they shall be punishable in the same

manner and to the same extent as in this Code provided for the punishment of the commission of the said felony.' * * *

"The question of whether or not a conspiracy to violate the provisions of the Corporate Securities Act is made punishable by the foregoing provisions of section 182 of the Penal Code depends upon what construction is placed upon the term 'this Code' as used in that provision. It would seem, upon first thought, that the term 'this Code' means the Penal Code as distinct from the other three Codes and the general laws. The dicta of *In re Isch* follows this view. However, section 4480 of the Political Code provides that: 'With relation to each other, the provisions of the four Codes must be construed * * * as though all such Codes had been passed at the same moment of time and were parts of the same statute.' Thus, section 4480 of the Political Code would seem to imply that the term 'this Code' includes at least the four Codes.

"We are inclined to the view that the Legislature used the term 'in this Code provided' as meaning 'as by the law of this state provided.' We reach such conclusion because we are unable to see any reason for distinguishing between conspiracies to commit felonies made punishable by the Penal Code and conspiracies to commit felonies made punishable by any other law of this state."

It is then contended that if a conspiracy to violate the provisions of the Corporate Securities Act is not made punishable by the first penal paragraph of section 182, then it is punishable by the second penal paragraph thereof, as:

"It is a general provision which penalizes all criminal conspiracies prohibited by the five subdivisions of the section, but which were not made punishable by the first penal paragraph."

[1, 2] The parties are correct in their respective statements that a conspiracy to violate the Corporate Securities Act was not, until very recently, and subsequent to the commission of the offense here charged, made punishable by the terms of the act itself, and therefore the offense here charged, if punishable at all, the penalty must be found in section 182 of the Penal Code. Before an interpretation may be attempted of either of the penal paragraphs of section 182, it becomes necessary to determine the scope and meaning of the words "any crime" found in the first subdivision of that section. We are of the opinion it was the legislative intention that the words "any crime" should include all crimes—whether felonies or misdemeanors—which are known to the law of this state, and whether defined and made punishable by the Penal Code or by any other law or statute of the state. That is to say, neither by the term itself nor by implication does the word "crime" import alone offenses defined and made punishable by the Penal Code, as contended by petitioners, but, as indicated, is sufficiently comprehensive to in-

clude all felonies and misdemeanors known to the law of this state. This construction of subdivision 1 would seem to be the only logical one in view of the express terms of sections 15, 16, and 17 of the Penal Code. It is obvious from even the most casual reading of section 15 that the Legislature, by its definition of "crime," intended all acts or omissions in contravention of *any* law of the state, whether included in the Penal Code or not, and to which would attach the prescribed penalties. It must therefore be held, especially in view of the interpretation of the term "crime" in section 16, that the Legislature employed the word in that sense in the first subdivision of section 182. By no rule of interpretation can the word be held to be limited to offenses provided for in the Penal Code.

[3, 4] Nor do we think there is anything in the remainder of section 182 opposed to the construction we have placed upon the word "crime" found in subdivision 1 thereof. Subdivisions 2, 3, 4, and 5 of the section merely prescribe specific acts a conspiracy, to commit any one of which is denounced as an offense. We may next consider whether there is anything in the two penal paragraphs of the section calling for a different construction. The first penal paragraph punishes a conspiracy "to commit *any felony*, or to commit *any act* injurious to the public health, or to public morals, or tending to pervert or obstruct justice, or the due administration of the laws * * * to the same extent as in *this Code provided* for the punishment of the commission of the said felony or act, respectively." In other words, it is evident that this first penal paragraph fixes the penalty upon persons found guilty of conspiring to commit any of the acts enumerated in subdivision 5 of this section, or conspiring to commit any felony comprehended by subdivision 1, defined and made punishable by the Penal Code; the punishment for the conspiracy in each instance being the same as that prescribed by the Penal Code where an individual is guilty of the offense which is the object of the conspiracy. It may be said, then, that the first penal paragraph is meant to cover and punish *only conspiracies to commit felonies punishable under the Penal Code* and conspiracies to commit the acts prohibited under subdivision 5 of section 182. The mere circumstance that some of the offenses created by the first subdivision of section 182—namely, conspiracies to commit felonies defined by the Penal Code—are punishable under the first penal paragraph of the section does not necessarily preclude a construction that the second penal paragraph may, among other things, prescribe the punishment for the remainder of the offenses created under subdivision 1 and not made punishable by the first penal paragraph. It therefore becomes necessary to determine the scope of the second penal paragraph.

[5] This latter penal paragraph commences, "When they conspire to do *any of the other acts* described in this section. * * *" The quoted words are sufficiently broad to include within the purview of the paragraph *all* of the offenses created by the *five* subdivisions of the section, and for which no penalty is imposed by the first penal paragraph. That is to say, the words, "any of the other acts described in this section," were meant to, and do in fact, include all other conspiracies to commit crimes or acts prohibited by the section regardless of whether they are denounced by subdivision 1 or any other subdivision thereof. Therefore, in this second penal paragraph, we find the penalty that is to be imposed upon those conspiring to commit any of the crimes or acts denounced by subdivisions 2, 3, and 4, and that which is to be imposed for a conspiracy to commit any and all misdemeanors, whether defined by the Penal Code or by any other statute, and for conspiracies to commit all felonies which are defined and penalized by some law *other than the Penal Code*. In other words, the second penal paragraph, in addition to prescribing the punishment for conspiracies to commit the crimes or acts specified in subdivisions 2, 3, and 4 of the section, also prescribes the punishment for all offenses denounced by subdivision 1, and for which the first penal paragraph does not prescribe a punishment; namely, conspiracies to commit any and all misdemeanors, not included in those enumerated in subdivision 5, and conspiracies to commit all felonies prescribed by some general law of the state other than the Penal Code.

The construction contended for by petitioners—that the words, "any of the other acts described in this section," were intended to include *only* conspiracies to commit the crimes or acts enumerated and denounced by subdivisions 2, 3, and 4 of the section—is a strained construction, not reasonably justified by the language employed. The second penal paragraph does not, in so many words, attempt to confine itself exclusively to the crimes or acts set forth in subdivisions 2, 3, and 4, and to so hold would, in our opinion, give an erroneous and limited meaning to the language found in the paragraph. Nor do we find any merit in the contention that by section 183 there are no conspiracies punishable criminally other than those "enumerated" in the preceding section (182), for the words "any crime," appearing in subdivision 1 of section 182, having been shown to include felonies and misdemeanors punishable under the law of the state, a conspiracy to violate the Corporate Securities Act, being a crime, would be "enumerated" within the meaning of the terms of section 183.

Our construction of section 182 may be illustrated by placing the several classifications of conspiracies in juxtaposition with the punishment prescribed therefor, thus:

If two or more persons conspire:

(Subd. 1.)

to commit "any crime":

1. felonies

- (a) defined by the Penal Code
(b) defined by other laws

(punishable by Penal Paragraph 1.*)
" " " " 2.**)

2. misdemeanors

- (a) defined by the Penal Code
(b) defined by other laws

" " " " 2.**)
" " " " 2.**)

(Subd. 2.)

to falsely and maliciously charge or indict another for any crime

" " " " 2.**)

(Subd. 3.)

to falsely move or maintain any suit, action or proceeding

" " " " 2.**)

(Subd. 4.)

to cheat and defraud another of property by criminal means or to obtain money or property by false pretenses or promises

" " " " 2.**)

(Subd. 5.)

to commit any act injurious to public health, public morals, to pervert or obstruct justice or the due administration of the laws

" " " " 1.*)

They are punishable as follows:

* (Penal Paragraph 1.) "When they conspire to commit any felony, or to commit any act injurious to the public health, or to public morals, or tending to pervert or obstruct justice, or the due administration of the laws, they shall be punishable in the same manner and to the same extent as in this Code provided for the punishment of the commission of the said felony or act, respectively."

** (Penal Paragraph 2.) "When they conspire to do any of the other acts described in this section they shall be punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both. * * *"

Petitioners seek to fortify their foregoing contentions as to the scope and meaning of section 182 by the historical background of that section, and state that:

"There can be no gainsaying the proposition that, at the time the Penal Code was adopted, subdivision 1 of section 182 referred only to crimes enumerated in the Penal Code, because the only acts or omissions that were criminal or punishable then were those prescribed by the Penal Code. Section 6 of the Penal Code, which was also adopted in 1872, makes this quite evident. It reads: 'No act or omission commenced after twelve o'clock noon of the day on which this Code takes effect as a law, is criminal or punishable, except as prescribed or authorized by this Code, or some of the statutes, which it specifies as continuing in force and as not affected by its provisions. * * *' The statutes that were specified as being continued in force are enumerated in section 23 of the Penal Code.

"The Legislature in 1872, as it were, wiped the slate clean, and set out in the Penal Code all acts or omissions that should be criminal or punishable. It perforce follows, therefore, that the only crimes that subdivision 1 of section 182 could have referred to, at the time of its enactment, were the crimes specifically enumer-

ated and described in the Penal Code. [Petitioners are in error as to this statement. Among the statutes continued in force by section 23 of the Penal Code are several which create crimes of the grade of misdemeanors and prescribe the penalties therefor. See, for example: Subdivision 8 (Stats. 1867-8, p. 604); subdivision 9 (Stats. 1865-6, p. 641); subdivision 11 (Stats. 1865-6, p. 332); and subdivision 12 (Stats. 1865-6, p. 637). It is not true therefore that "the only crimes that subdivision 1 of section 182 could have referred to, at the time of its enactment, were the crimes specifically enumerated and described in the Penal Code."] It also follows that since section 183 limited the conspiracies that were punishable criminally to those enumerated in section 182, and since section 182 was in turn limited, in its reference to crimes, to crimes enumerated in the Penal Code, section 183 limited the conspiracies to commit crimes to those crimes which are specifically enumerated in the Penal Code.

"It is conclusively evident, therefore, that, at the time the Penal Code was adopted, the crimes, a conspiracy to commit which were punishable criminally, were strictly limited to those crimes enumerated in the Penal Code, because there were no other crimes and that such limitation was necessarily the intent of the Legislature.

"The Legislature might have enlarged the scope of section 182 and of subdivision 1 thereof, but it has not done so. Subdivision 1 has never been amended, nor has section 183."

We quote from respondents' brief:

"But even aside from the question of grammatical construction, * * * the history of section 182 of the Penal Code belies the contention that the term 'any crime' means 'any felony made punishable by the Penal Code.' In 1850, the First Legislature passed 'an act concerning crimes and punishments' (Stats. 1850, p. 229). Section 102 of that act (page 242), is the forerunner of section 182 of the Penal Code. It provided in part: 'If two or more

persons shall conspire * * * to commit any offense * * * they shall, on conviction, be punished by imprisonment in the county jail not more than one year or by a fine not exceeding \$1,000.' It should be noted that the Legislature used the generic term 'any offense.' Unfortunately, we have been unable to find any case construing that term; but one thing is sure: It was not limited in meaning to 'felonies made punishable by the Penal Code,' for the very good reason that at that time there was no Penal Code. Nor can it be said that the term 'any offense' applied only to those offenses prescribed by the 'act concerning crimes and punishments,' for the simple reason that that act was not self-sufficient, but depended upon other acts for its efficacy, and therefore, of necessity, would have had to have been construed as being a part and parcel of the general laws of the state. * * *

"In 1872, when the four Codes were first adopted, section 102 of the act concerning crimes and punishments was changed into section 182 of the Penal Code. In the transposition the term 'to commit any offense' was changed to 'to commit any crime'; the word 'offense' and the word 'crime' having the same legal significance. Statutes 1850, p. 275, § 2, and Penal Code, § 15. From 1872 down to the present time, subdivision 1 of section 182 of the Penal Code has read, 'to commit any crime.' In 1872, and until the 1919 amendment to the section, the penal provision was: 'They are punishable by imprisonment in the county jail not exceeding one year or by a fine not exceeding \$1,000, or both.' In other words, prior to the 1919 amendment, all criminal conspiracies were made punishable in the same manner and to the same extent. Bearing this fact in mind, let us construe the meaning which attached to the words 'any crime' prior to the 1919 amendment. The section read in part as follows: 'If two or more persons conspire; * * * to commit any crime * * * they are punishable by imprisonment in the county jail not exceeding one year or by a fine not exceeding \$1,000, or both.' What was, then, the meaning of the term 'any crime'? Was it limited in its meaning to felonies to the exclusion of misdemeanors? Did it mean only such felonies or felonies and misdemeanors as were made punishable by the Penal Code? Manifestly not. It meant any and every crime, whether felony or misdemeanor, whether made punishable by the Penal Code, the Civil Code, the Code of Civil Procedure, the Political Code, or the General Laws. See sections 15, 16, and 17 of the Penal Code.

"Such was the meaning of the term 'any crime' prior to the 1919 amendment. It still has that meaning—the same conspiracies which were prohibited prior to the amendment are prohibited to-day; it is only the penalties which have been changed. As our opponents admit, indeed as they argue, the penalty imposed is a separate and distinct element of a crime from that of its prohibition. The Legislature amended the penal provisions or one element of the crime, but did not amend the prohibitory provision, a separate and distinct element of the crime. Therefore the same conspiracies which were prohibited prior to the 1919 amendment are prohibited to-day, and it is manifest that the term 'any crime' means any and every crime, whether felony or misdemeanor, and

whether made punishable by the Penal Code or by any other law of the state."

It is plain to us that, instead of the historical aspect of the question supporting or fortifying petitioners' contentions, the reply of respondents seems to refute them, for, as pointed out in the reply, the language, "as in this Code provided," was not made a part of the penal provisions of section 182 until the year 1919. Stats. 1919, p. 170. In view of this there can be no question that if the identical point here involved had been raised prior to said amendment petitioners' argument would have been rejected.

[6] The petitioners, in support of the claim that conspiracies to violate the Corporate Securities Act did not, when the alleged violations thereof were committed, come within the purview of section 182, refer to the amendment in 1925 of section 14 of said act (Stats. 1925, c. 447, p. 962), making a conspiracy to violate its provisions punishable, as, in effect, indicating legislative construction that section 182 never had been intended to apply to conspiracies to commit crimes not provided for in the Penal Code. We do not think it can be said that the amendment of section 14 in 1925 reflects an assumption upon the part of the Legislature that, previous to said amendment, a violation of the provisions of the Corporate Securities Act could not be made the basis of a charge of conspiracy under section 182 of the Penal Code. It seems to us it would be as reasonable to conclude that the Legislature intended to eliminate any ambiguities or uncertainties as to the scope and meaning of section 182.

Having decided that a conspiracy to violate the Corporate Securities Act is punishable under the second penal paragraph of section 182, which provides for the infliction of either a felonious or misdemeanor penalty, in the discretion of the trial court, a conclusion which, it is fair to say, if anticipated by the petitioners, would doubtless have been met with the claim made by them under counts 2 to 7 as to the statute of limitations, therefore what we shall say under the next head may be deemed to apply equally to count 1 of the indictment.

[7, 8] Counts 2 to 7. As to counts 2 to 7, inclusive, it is contended by the petitioners that:

"The crime of violating the provisions of the Corporate Securities Act is punishable either as a misdemeanor or as a felony, in the discretion of the court. Section 14, Corporate Securities Act. The prosecution of a misdemeanor is barred if the indictment therefor is not returned within one year after its commission. Section 801, Pen. Code. The indictment in the case at bar was returned more than one year after the commission of the offense alleged in each count. * * *

"It is apparent from the foregoing considerations that, as to counts 2 to 7, inclusive, there is just one question for determination, and that

is: Where a crime is punishable either as a misdemeanor or as a felony, in the discretion of the court, what is the effect of the statute of limitations on the jurisdiction of the trial court where the indictment for the crime is returned more than one year after its commission? This proposition will be conceded by all: The purpose of making a crime punishable, either as a misdemeanor or as a felony, is not to give to a judge unbridled or arbitrary discretion, but to give to him the opportunity to mete out such punishment as, in his opinion, will be commensurate with the gravity of the offense, coupled with a consideration of the age and character of the accused. * * *

"Now, in the instant case, is the court free to exercise that merciful, judicial discretion which has been bestowed upon it by the Legislature in the furtherance of justice and sound public policy? The answer must be 'No!' And, why? Because: (1) Upon the trial and conviction of the accused the trial court must render some judgment and mete out some punishment within the limits prescribed by law, and the court, in the case at bar, cannot impose a misdemeanor punishment. (2) A court, in order to have complete jurisdiction, must have the power to carry its judgment into effect, and unless it has such power it has not jurisdiction at all, and any judgment it may render is a nullity and void. (3) If a court is deprived of its power to exercise the full discretion granted to it by the Legislature in the rendition of its judgment and the imposition of punishment, then the accused affected by such judgment and punishment is denied the equal protection of the laws guaranteed to him by the federal and state Constitutions. * * *

"The court cannot determine and impose a punishment within the limits prescribed by law, because those limits by a failure to return the indictment within one year have been abolished. The court has no jurisdiction to render a judgment as for a misdemeanor, because such a judgment would be a nullity, unenforceable, and void."

It is then contended that:

"Under such circumstances the court is without jurisdiction to render a judgment of sentence as for a felony. Unless this latter proposition is true, an accused would be denied the equal protection of the laws. * * *

On the other hand, the Attorney General contends, as to these several counts, that:

"Under section 17 of the Penal Code, an offense which may be punished either as a misdemeanor or as a felony in the discretion of the trial court, is a felony—at least for all purposes prior to the imposition of a punishment of misdemeanor grade. * * * If we are correct in our contention as to the meaning of the word 'deemed,' then it follows that a crime which is punishable by imprisonment either in the state prison or by fine or imprisonment in the county jail in the discretion of the court, is, and forever remains, a felony, but that if the punishment imposed is other than imprisonment in the state prison, although the nature of the crime is not changed, yet for all purposes *thereafter* arising it is regarded as being a misdemeanor.

"Under such a construction of section 17 of the Penal Code it would follow that the only

statute of limitation which would be applicable to an offense made punishable either by imprisonment in the state prison or by fine or imprisonment in the county jail, in the discretion of the court, would be the statute of limitation applicable to felonies. * * *

Concisely stated, the contention of petitioners is this: Since it affirmatively appears on the face of the indictment that each of the acts complained of was committed more than one year prior to the filing thereof, the misdemeanor phase of each charge, by virtue of the statute of limitations (section 801, Pen. Code), stands eliminated from the case; that it would therefore be futile to proceed with the trial, for if the court should decide that misdemeanor punishment was called for the judgment would be void as resting on a barred charge; and that if a felonious punishment should be deemed appropriate it could not legally be imposed for with the misdemeanor element eliminated there would be no basis for the exercise of the statutory discretion.

It is argued that the misdemeanor element is eliminated because of the provisions of sections 17 and 801 of the Penal Code. Section 17 does provide that in a case where either felonious or misdemeanor punishment may be imposed "it shall be *deemed* a misdemeanor for all purposes after a judgment imposing other than imprisonment in the state prison." It is urged that, when a misdemeanor judgment has been imposed, the offense is a misdemeanor for all purposes, both before and after judgment. *People v. Gray*, 137 Cal. 267, 70 P. 20, upon which petitioners rely, involved a misdemeanor judgment based on a charge of seduction for which the accused was liable to be punished either by imprisonment in the state prison, or by fine, or by both such fine and imprisonment. It appearing that more than a year had elapsed between the commission of the crime and the institution of the charge, the court held that the judgment had the effect of making the crime a misdemeanor *ab initio*. The court declared that the point was definitely decided in *People v. Picetti*, 124 Cal. 361, 57 P. 156. Concerning *People v. Gray*, supra, the Attorney General contends that:

"The cases of *People v. Salorse*, 62 Cal. 139, and *People v. Picetti*, in no wise support the decision in the *Gray* Case, for the reason that in neither case was the offense punishable by imprisonment in the state prison or by fine or imprisonment in the county jail *in the discretion of the court*. That is to say, in the *Picetti* Case the offense was either grand or petit larceny depending upon the value of the goods stolen. * * *

In *People v. Gray*, supra, differing from the case at bar, the trial had been had and judgment pronounced. It is apparent that none of the cases cited is authority on the question presented here, namely, Is prohibition available to prevent the court below

from proceeding with the trial of the general issue where there has been no trial and no judgment and only the misdemeanor phase of the alleged offense is asserted to be barred? But even if it be assumed that *People v. Gray*, supra, is applicable to the situation here, we have reached the conclusion that it should be overruled. In the first place, the decision is inaccurate in the statement that "the question has been definitely decided by this court * * * in the case of *People v. Picetti*, 124 Cal. 361, 57 P. 156." It will be seen by the latter case that section 801 alone was applicable, and that section 17 was in no way involved. In *People v. Picetti*, supra, the appellant was charged with grand larceny and found guilty of petit larceny. It was clear from the evidence that appellant stole less than \$50, and hence he never should have been charged with grand larceny. In other words, it was a misdemeanor *ab initio*, and section 801 was therefore properly applied. The case is therefore only authority for the proposition that, where a defendant is charged with a felony but has only committed a misdemeanor, the statute of limitations for misdemeanors and not that for felonies will govern. However, that case is not authority under the provision of section 17 here involved, for that provision only has application to the judgment where the punishment may be either for a felony or a misdemeanor. It will be noted that in quoting section 17 the opinion in *People v. Gray*, supra, ignores the language, "after a judgment imposing a punishment other than imprisonment in the state prison,"—following the phrase "shall be deemed a misdemeanor for all purposes."

It is true that *People v. Gray*, supra, has not been challenged during the intervening 23 years, but it is also the fact that no other case has held that where a misdemeanor punishment is imposed within the purview of section 17 the judgment has a retroactive effect so as to characterize the offense as a misdemeanor from the time of its commission. But apart from these considerations we think the doctrine laid down in *People v. Gray*, supra, is perversive of the true intent and meaning of section 17. That case does not apparently question the proposition that in cases where discretion is vested in the trial court to impose either a felony or a misdemeanor punishment the charge may be prosecuted as a felony, and that if such form of judgment is rendered it stands throughout as a felony without any of the characteristics of a misdemeanor. This being so, it would follow that in every such case where a misdemeanor punishment is imposed the state had done a vain thing in prosecuting the charge as a felony, notwithstanding the evidence might amply justify a belief that a felonious judgment would be responsive. A fair construction of section 17, in order to give effect to every part thereof, requires us

to hold, and we do so hold, that in prosecutions within the contemplation of that section the charge stands as a felony for every purpose up to judgment, and if the judgment be felonious, in that event, it is a felony after as well as before judgment; but if the judgment is for a misdemeanor it is deemed a misdemeanor for all purposes thereafter—the judgment not to have a retroactive effect so far as the statute of limitations is concerned.

It is hereby ordered that the application for a writ of prohibition be and the same is hereby denied as to all the counts of the indictment.

We concur: MYERS, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; WASTE, J.; LENNON, J.

197 Cal. 799

W. A. DOBLE, Petitioner, v. SUPERIOR COURT of State of California, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, and Hon. Michael J. ROCHE, as Judge Thereof, Respondents. (S. F. 11555.)

(Supreme Court of California. Dec. 2, 1925.
Rehearing Denied Dec. 31, 1925.)

In Bank.

Application for writ of prohibition, prayed to be directed to the Superior Court, City and County of San Francisco, Michael J. Roche, Judge, to prevent further proceedings in the trial of petitioners under indictment for violation of the Corporate Securities Act. Writ denied.

Robbins, Elkins & Van Fleet, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., Robert W. Harrison, Chief Deputy Atty. Gen., William F. Cleary, Deputy Atty. Gen., and Matthew Brady, Dist. Atty., and Robert E. Fitzgerald, Deputy Dist. Atty., both of San Francisco, for respondents.

LAWLOR, J. Application for a writ of prohibition.

This proceeding, brought by W. A. Doble, is a companion proceeding to S. F. No. 11554 (241 P. 852), this day decided. It appears that petitioner was joined as a codefendant in the same indictment with the petitioners in S. F. No. 11554, that issue was joined, and that the present application was made to restrain and prohibit respondents from further proceeding with said criminal action.

The points made in support of the application herein are, in effect, the same as those urged in S. F. No. 11554. Upon the authority of the decision in that proceeding, and for the reasons therein given, which we adopt and make a part hereof, it is hereby ordered that the application for a writ of prohibition be and the same is hereby denied as to all the counts of the indictment.

We concur: MYERS, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; WASTE, J.; LENNON, J.

197 Cal. 577

(241 P.)

O'BRIEN v. O'BRIEN. (S. F. 10600.)

(Supreme Court of California. Dec. 2. 1925.)

1. Equity §66—Meaning of maxim, "He who seeks equity must do equity," stated.

The equitable maxim, "He who seeks equity must do equity," means that court will not confer its equitable relief unless one seeking its aid has acknowledged or will admit and provide for all equitable rights justly belonging to adverse party and growing out of subject-matter of controversy.

2. Equity §66—Maxim, "He who seeks equity must do equity," applicable to action to quiet title.

The equitable maxim, "He who seeks equity must do equity," is applicable to an action to quiet title.

3. Frauds, statute of §75—Agreement to devise property invalid, unless agreement or memorandum thereof in writing and subscribed.

Under Civ. Code, § 1624, subd. 7, and Code Civ. Proc. § 1973, subd. 7, an agreement to devise or bequeath any property or to make any provision for any person by will is invalid, unless the same, or some note or memorandum thereof, be in writing, subscribed by party to be charged or his agent.

4. Frauds, statute of §1—Agreement made in consideration of marriage invalid unless in writing.

An agreement made on consideration of marriage other than mutual promise to marry is invalid unless in writing, as provided by Civ. Code, § 1624, subd. 3, and Code Civ. Proc. § 1973, subd. 3.

5. Frauds, statute of §129(1)—Subsequent marriage or execution of will pursuant to oral antenuptial agreement not part performance.

Neither subsequent marriage nor execution of a will, pursuant to an oral antenuptial agreement to make a will, is such part performance as will relieve contract from operation of Civ. Code, § 1624, subd. 7, and Code Civ. Proc. § 1973, subd. 7.

6. Frauds, statute of §125(3)—Contract in contravention of statute not void but merely voidable.

A contract falling within operation of statute of frauds, but made in contravention thereof, is not invalid in the sense that it is void, but is merely voidable.

7. Frauds, statute of §129(12)—Part performance of oral antenuptial contract must be referable to covenants of contract other than covenants of marital contract.

To take oral contract whereby defendant agreed to marry plaintiff and manage her property and abandon his medical practice, on plaintiff's agreeing to make a will in his favor, out of operation of Civ. Code, § 1624, subd. 7, and Code Civ. Proc. § 1973, subd. 7, part performance must be referable to the covenants of the contract other than the covenants of the marital contract.

8. Frauds, statute of §119(2)—Mere promise to reduce oral contract to writing and failure or refusal to do so does not constitute fraud.

Mere promise of plaintiff to reduce to writing oral contract to bequeath her property to defendant on defendant's agreeing to marry her and manage her property and abandon his medical practice, and her failure or refusal to do so, did not constitute fraud.

9. Specific performance §6—Not granted to defendant, where defendant could not be compelled to specifically perform his part of contract.

Where plaintiff orally agreed to bequeath her property to defendant on latter's agreeing to marry plaintiff and manage her property, specific performance is not available to defendant, since defendant could not be compelled specifically to manage plaintiff's property.

10. Specific performance §6—Not granted where party seeking it cannot be compelled to specifically perform on his part.

Under Civ. Code, §§ 3386 and 3390, equity will not require specific performance of contract, where party seeking its enforcement cannot, from nature of contract, be compelled to specifically perform on his part.

11. Injunction §59(1)—Not granted to prevent breach of contract, performance of which could not be specifically enforced.

Where defendant cannot be compelled to specifically perform his part of contract, under Code Civ. Proc. § 526, and Civ. Code, § 3423, subd. 5, court cannot restrain plaintiff's breach of such contract.

12. Wills §68—Measure of damages to physician giving up medical practice pursuant to contract with plaintiff, which latter breached, stated.

Where defendant abandoned his medical practice and agreed to marry plaintiff on latter's agreeing to execute will bequeathing her property to defendant, on plaintiff's breach thereof, measure of defendant's damages, if any, is compensation for detriment he has suffered because of his change of position, and defendant must allege facts from which, when proved, court may properly fix amount.

13. Wills §68—Answer and cross-complaint held insufficient to sustain claim for damages under agreement to devise.

In suit to quiet title, answer and cross-complaint, alleging agreement by plaintiff to devise property to defendant in consideration of marriage and defendant's abandonment of his medical practice, held insufficient to entitle defendant to recover damages, when not alleging his age, revenues from present practice, or extent of his alleged inability to resume his practice, but only conclusions which would not support charge of perjury under Penal Code, § 118a.

14. Pleading §225(1)—Court justified in rendering judgment against defendant who failed to request leave to further amend after objections to his pleadings sustained.

Where defendant presented six different pleadings to court, to sufficiency of which ob-

jections were successfully made, on his failure to request leave to further amend, court was justified in rendering judgment against him.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action to quiet title by Frances L. O'Brien against E. S. O'Brien, in which defendant filed a cross-complaint. Judgment for plaintiff, and defendant appeals. Affirmed.

James F. Peck and M. C. Chapman, both of Oakland (Peck, Bunker & Cole, of Oakland, of counsel), for appellant.

Clark, Nichols & Eltse, of Berkeley, for respondent.

SHENK, J. Plaintiff brought this action to quiet her title to a parcel of land located at the northwest corner of Twelfth and Jackson streets, in the city of Oakland. Demurrers to the fifth amended answer and cross-complaint were sustained. No request for leave to further amend was made by the defendant. Judgment was accordingly entered against him and in favor of the plaintiff, from which judgment the defendant appeals.

The complaint is in the usual form in an action to quiet title. The answer denies that the defendant's claim of an interest in the property is without right, and alleges, in substance, as follows: That on March 10, 1914, and for more than 20 years prior thereto, the defendant was and had been a duly licensed practitioner of medicine and surgery in the county of Merced and adjoining counties; that he frequently had been employed in a professional way by the plaintiff and by W. H. Hartley, her deceased husband; that for several years prior to 1914 the defendant had received from his medical practice from \$7,000 to \$12,000 net per annum; that his practice was steadily increasing, and because of the nature of the services rendered by him it required his close personal attention; that he had two grown daughters, the issue of a former marriage, one of whom was dependent upon him for her support; that the plaintiff was a childless widow, and was possessed of property of the approximate value of \$250,000, consisting of real and personal property, a portion of the real estate being the property described in the complaint of the estimated value of \$60,000; that the plaintiff was inexperienced in the care of such property as she possessed, and the care thereof was burdensome and troublesome to her, and caused her much anxiety and concern; that within two years prior to the 10th day of March, 1914, the plaintiff and defendant agreed that they would marry; that upon such marriage the defendant would abandon and discontinue his practice of medicine and surgery, and that thereafter they would tour Europe on their honeymoon; that the defendant was to aid the plaintiff to the ex-

tent of his ability in the care and management of her said property; that after such marriage the plaintiff and defendant would be supported by the property of the plaintiff, and that the plaintiff would assist the defendant in the support of the defendant's daughter when such aid became necessary; that the plaintiff then further agreed that she would by her last will and testament devise to the defendant the real estate described in the complaint, and, after making certain designated bequests, aggregating \$79,000, would make the defendant the residuary legatee under said will; that the plaintiff promised and agreed that she would, prior to said marriage, reduce the said contract to writing; that, as the time for the said marriage approached, the defendant urged the plaintiff to reduce the said contract to writing, whereupon she stated to him that, because of her preparation for the approaching marriage and her other engagements, she could not then attend to the preparation and execution of said contract, but promised that immediately upon the consummation of said marriage she would reduce said contract to writing and deliver the same to the defendant; that the marriage took place on March 10, 1914; that shortly thereafter the defendant again urged the plaintiff to reduce the said contract to writing, whereupon the plaintiff, under date of March 27, 1914, executed and delivered to the defendant a will, olographic in form, by the terms of which she devised the property described in the complaint to the defendant and, after making bequests in the sum of \$79,000, made the defendant the residuary legatee and appointed him executor without bonds; that the defendant accepted and retained said will, believing the same to be the irrevocable act of the plaintiff; that at the time of the execution, delivery, and acceptance of said will by the defendant, the plaintiff and the defendant both believed said will would be a substitute in law for the written contract which the plaintiff promised to execute before the marriage; that at the time of the execution of said will the plaintiff agreed that, in consideration of the acceptance by the defendant of said will as a substitute for said written agreement, the plaintiff would not revoke said will, and that the same should be and remain the last will and testament of the said plaintiff in the event that plaintiff should die before the defendant; that the defendant accepted and has retained said will with that understanding; that the defendant's first intimation or suggestion that the plaintiff did not intend to perform said agreement was the filing of the complaint herein, and the assertion in said complaint of rights in plaintiff inconsistent with said promises; that the defendant at all times relied upon the promise of the plaintiff to reduce said contract to writing, and, induced by said promise, and not otherwise,

the defendant did abandon his profession of medicine and surgery, and did enter into the contract of marriage with the plaintiff on March 10, 1914; that if the plaintiff had not promised to reduce said contract to writing, the defendant would not have married her and would not have abandoned or discontinued his practice of medicine and surgery; that after the said marriage the plaintiff and defendant toured Europe and the British Isles, returned to the United States, and, through no fault of the defendant, separated; that in July, 1915, they resumed their marital relations, but separated finally, also through no fault of the defendant, in March, 1916, after which time the plaintiff has refused to live with the defendant and has refused to permit the defendant to aid her in the care of her said property; that at all times since said marriage the defendant has been able, ready, and willing to perform his part of the contract and of said contract of marriage; "that by reason of said marriage of plaintiff and defendant and the discontinuance and abandonment of defendant's attention to his said medical and surgical practice as aforesaid, the defendant's said practice of medicine and surgery became, was, continued to be, and now is, scattered, lost, and destroyed to the defendant, and the said defendant cannot re-establish, has not re-established, and could not have re-established, and never will be able, during the remaining years of his life, to re-establish said practice of medicine and surgery at said Merced county, or the equivalent practice at any other place, or any practice of medicine and surgery except in a very small and very unremunerative practice of medicine and surgery as compared with the practice abandoned in the county of Merced" as hereinbefore alleged; that the plaintiff has not, since the last separation, contributed in any way to the support and maintenance of defendant; "that the only means of livelihood of the defendant, after the said failure of the plaintiff to contribute to the support and maintenance of the defendant, was for the defendant to resume, as best he could, at the place where the practice of medicine and surgery would most likely yield a livelihood for defendant," and the defendant has been compelled by the said failure of the plaintiff to perform the said contract as agreed to resume the practice of medicine and surgery for a living; that the defendant has been greatly injured and damaged by the failure and refusal of the said plaintiff to perform said agreement; that the amount of said injury and damage cannot be computed or estimated, and the said damage and injury cannot be compensated in money; that the defendant has no remedy at law for the said breach of said contract by the said plaintiff.

At the time the answer containing the foregoing allegations was filed, the defendant al-

so filed a cross-complaint repeating therein the allegations of said answer, and in addition thereto alleging that the plaintiff threatens to and will, unless restrained by the court, dispose of the said property without sufficient or adequate consideration, for the purpose of depriving the defendant of his interest in said property. The defendant prays that it be adjudged that the plaintiff holds title to said property subject to said alleged agreement, that the plaintiff be enjoined from making a last will and testament other than in the words and figures of the present will so long as the defendant be living, and that the plaintiff be enjoined from giving away or otherwise disposing of her property except in good faith for a valuable consideration approximating the value of the property disposed of, and for general relief.

Demurrers both general and special were interposed separately to the answer and to the cross-complaint. The sufficiency of the pleadings under attack is therefore the only matter before us for consideration on this appeal. When stripped of what is deemed not essential to a disposition of the case, and when freed from considerable confusion arising by reason of divergent theories discussed in the numerous briefs, the situation of the parties as disclosed by the pleadings is simply this: By the filing of the complaint to quiet title it is the plaintiff's purpose to avoid the consequences of the agreement and will alleged in the defendant's pleadings, to the end, first, that she may have the present full use and enjoyment of the particular property described in the complaint disentangled from any rights which the defendant may now or hereafter assert in the same; and, secondly, that there may be attached to said will by judicial decree the ambulatory feature attending the ordinary will, so that she may thereafter safely revoke the said will without the defendant's consent. To accomplish all this, the plaintiff is appealing to the equitable jurisdiction of the court. On the part of the defendant, he frankly admits and declares:

"The defense alleged in the answer and cross-complaint is defensive entirely. There will be no time before the death of the plaintiff when the defendant will have any right to the property or right of action. If defendant dies before plaintiff, then all his rights will expire with him."

But he insists that, notwithstanding the absence of a present right of action in him, he has the right to set forth such defensive matters in his pleadings as will entitle him to prove and to fully disclose to the court the inequitable and unconscionable attitude which he claims the plaintiff has assumed towards him, to the end that the court may deny her any relief whatsoever and dismiss her complaint, or, if a decree be entered in her favor, that the court may attach such

terms and conditions to the relief so granted as will properly safeguard his interests or make him whole as to the loss he claims to have sustained by reason of his change of position to his detriment, which loss he claims to have sustained through no fault of his own but wholly because of the alleged breach of contract by the plaintiff as evidenced by the commencement of said action.

[1,2] Unquestionably defendant is invoking a well-recognized principle in equity jurisprudence, "He who seeks equity must do equity." This is one of the most familiar maxims of equity. It means that the court will not confer its equitable relief upon one seeking its interposition and aid—

"unless he has acknowledged or conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adverse party, and growing out of or necessarily involved in the subject-matter of the controversy." *Pomeroy's Eq. Jur.* § 386; *Cox v. Hughes*, 10 Cal. App. 553, 102 P. 956; 10 Cal. Jur. 508.

This principle of equity is applicable to an action to quiet title. *Holland v. Hotchkiss*, 162 Cal. 366, 123 P. 258, L. R. A. 1915C, 492, 22 Cal. Jur. 134, and cases cited. A familiar instance of its application is when the court precludes a mortgagor from quieting his title against an outlawed mortgage without payment of the mortgage debt. In such a case, when the debt is not paid or not required to be paid, the court does not decree that the plaintiff has no interest in the property, but dismisses the action for want of equity in the plaintiff's cause. *Boyce v. Fisk*, 110 Cal. 107, 42 P. 473; 17 Cal. Jur. 1005. It is, of course, true that, if the defendant claims an interest in the property, the title to which is sought to be quieted, or if he claims that the plaintiff has placed him in such a position as to render it inequitable to grant to the plaintiff the relief sought, he must set forth his claim or demand in an appropriate pleading. This the defendant has attempted to do by the allegations of his answer and cross-complaint. The important question therefore is: What properly defensive matter has the defendant set forth that would defeat the plaintiff's cause of action or cause the court to leave her where it finds her or impose conditional relief? If he has such an interest in the property, present or prospective, as may be lawfully recognized, or if the plaintiff has been guilty of unconscionable conduct towards the defendant, such interest or conduct or both arose as necessarily incidental to the contract alleged by the defendant and the action of the parties thereunder.

[3,4] It must be taken as the settled law in this state that by the amendment of 1905, adding subdivision 7 to section 1624 of the Civil Code, and by the corresponding provision of subdivision 7 of section 1973 of the

Code of Civil Procedure as amended in 1907, "an agreement * * * to devise or bequeath any property, or to make any provision for any person by will" is invalid unless the same or some note or memorandum thereof be in writing and subscribed by the party to be charged or his agent. Also it has been the law of this state, at least since the adoption of the Codes, that "an agreement made upon consideration of marriage other than a mutual promise to marry" is invalid, unless likewise as provided by subdivision 3 in each of the sections above referred to.

[5-8] Prior to 1905 an oral contract to make a will was enforceable in a court of equity. *Owens v. McNally*, 113 Cal. 444, 45 P. 710, 33 L. R. A. 369; *McCabe v. Healy*, 138 Cal. 81, 70 P. 1008; *Rogers v. Schlotterback*, 167 Cal. 35, 138 P. 728; *Wolfsen v. Smyer*, 178 Cal. 775, 175 P. 10. The reason prompting the amendment of 1905 is aptly stated by the Code commissioner in his note appended to section 1624, as follows:

"The change consists in the addition of subdivision 7. The cases in which it [is] sought to establish by parol evidence alleged agreements to provide for a person by will are becoming so numerous as to warrant the assumption that the reasons inducing the original enactment of the statute of frauds apply with especial force to agreements of this class and that they ought to be brought within that statute."

Since that amendment, the effect of the new subdivision as applied to numerous and varying states of facts has been before the courts, but nowhere has it been decided, so far as we are advised, that the amendment should not be given the same force and effect as other provisions of the statute of frauds. Especially with reference to the new provision it has been held that neither subsequent marriage nor the execution of a will pursuant to an oral antenuptial agreement to make a will is such part performance as will relieve the contract from the operation of the statute. *Hughes v. Hughes*, 49 Cal. App. 206, 193 P. 144; *Trout v. Ogilvie*, 41 Cal. App. 167, 182 P. 333. It is the general rule, however, that a contract falling within the operation of the statute, but made in contravention thereof, is not invalid in the sense that it is void. It is merely voidable. The statute is said to relate to the remedy only and not to affect the validity of the oral contract.

"Such a contract, if otherwise valid, remains so, and the sole effect of the statute is to render it unenforceable by one party against the will of the other who abandons or repudiates it." 27 C. J. 309, 310; *Wardner v. Hutchison* (Cal. App.) 231 Pac. 563.

It may be assumed, for the purposes of this decision, that sufficient part performance of a parol agreement otherwise unenforceable under said subdivision 7 may take the contract out of the statute. But the acts of the

parties alleged to be sufficient part performance must be referable to the covenants of the contract other than the covenants of the marital contract. *Trout v. Ogilvie*, supra. The defendant insists that there was sufficient part performance in this, that, pursuant to the plaintiff's agreement to make a will for the defendant's benefit, the said will was actually executed and delivered to the defendant, with the further agreement that the same should constitute her last will and testament, and would never be revoked; that, in pursuance of said agreement so performed, the defendant did abandon his medical practice. Nothing further was to be done on the part of the plaintiff so far as the execution of the will was concerned. In the absence of some affirmative act on her part in repudiation of the contract as executed, the defendant was willing to bide his time and rest upon the uncertain chance of surviving the plaintiff. Nothing further was to be done by the defendant under said contract in view of the plaintiff's refusal to live with him and to permit him to assist in the management of said property. We shall assume that under these circumstances sufficient part performance to take the contract out of the statute has been shown. No fraud is alleged. The mere promise of the plaintiff to reduce the contract to writing and her failure or refusal to do so did not constitute fraud. *Long v. Long*, 162 Cal. 427, 122 P. 1077. That the subject-matter of the alleged contract was lawful is not questioned. That said contract was unique must be admitted. What may be assumed to be defendant's proposal of marriage was conditioned on the promise on the part of his prospective wife that she would make it possible for him to receive more than two-thirds of her \$250,000 estate and in the meantime he would husband her resources, so to speak. Without such promise on her part he would not have married her. But the parties had the right to make that sort of a contract, and it is assumed the plaintiff had the right to bargain away her power to revoke said will. It may also be assumed that an agreement not to revoke a will is not within the statute of frauds. Finally, it may be assumed that the defendant has, for the purpose of the consideration of the general demurrers, alleged sufficient facts as against the plaintiff as would justify the court in granting to him some kind of relief. What, then, would be the nature of the relief to which the defendant might be entitled?

[9-11] In the present situation of the parties a remedy by way of specific performance is not available to the defendant, for the reason that such a remedy would not be mutual, in that the defendant could not be compelled specifically to perform his part of the contract, to wit, to assist in the care and management of the plaintiff's property, a purely personal service. Equity will not require the

specific performance of a contract where the party seeking its enforcement cannot, from the nature of the contract, be compelled specifically to perform on his part. Civ. Code, §§ 3386, 3390; *Cooper v. Pena*, 21 Cal. 403; *O'Brien v. Perry*, 130 Cal. 526, 62 P. 927; *Berry v. Moulie*, 180 Cal. 137, 179 P. 686; *Poultry Producers, etc., v. Barlow*, 189 Cal. 278, 208 P. 93. Nor would the court be authorized to issue an injunction to restrain the breach of said contract. Section 526, Code of Civil Procedure, provides that an injunction cannot be granted to prevent the breach of a contract, the performance of which could not be specifically enforced. The fifth subdivision of section 3423, Civil Code, is to the same effect. Concerning said subdivision, this court said, in *Poultry Producers, etc., v. Barlow*, supra, at page 287 (208 P. 96):

"In this jurisdiction, however, the express statutory inhibition above referred to—subdivision 5 of section 3423 of the Civ. Code—prohibits the granting of an injunction to prevent the breach of any contract, 'the performance of which would not be specifically enforced.' The result is that in this state the courts may not enter a conditional decree in order to avoid the effect of a lack of that mutuality of remedy which is an essential to the right to specific performance. *Anderson v. Neal Institutes Co.*, 37 Cal. App. 174, 173 Pac. 779."

No point is made that the defendant is entitled to consideration on account of any alleged failure of the plaintiff to assist in the care of the dependent daughter. No claim is made for compensation for services past, present, or future, in caring for the plaintiff's property.

[12] If this were an action by defendant as the survivor against the representatives of his deceased wife's estate, the measure of damages would probably be "the value of the property agreed to be devised or bequeathed." *Roy v. Pos*, 183 Cal. 359, 367, 191 P. 542. But we are here dealing with a controversy *inter vivos*. The defendant may not survive the plaintiff. If he does not, he concedes that "all his rights will expire with him." He is therefore now confined to the relief which the court might impose on the plaintiff by requiring her to compensate him for whatever damages he has suffered by reason of his change of position to his detriment in giving up his medical practice in Merced county and establishing his practice elsewhere. The loss which he claims to have so suffered is such damage as the law may reasonably fix and determine. The fixation of damages in tort actions accruing to a professional man by reason of the interruption of his business is too common to require reference. The value of the business before and after such interruption is necessarily taken into consideration in fixing the damage. *City of Logansport v. Justice*, 74 Ind. 378, 39 Am. Rep. 79;

Stafford v. City of Oskaloosa, 64 Iowa, 251, 20 N. W. 174. The measure of the defendant's damage therefore is an amount which will compensate him for the detriment he has suffered on account of his change of position. In order that the amount thereof be properly ascertainable, it is necessary for the defendant to allege facts from which, when proved, the court may properly fix the amount. We are thus brought to a consideration of the special demurrers.

[13, 14] The allegations of the answer and cross-complaint, as indicated, particularly by the words we have italicized in the foregoing statement of facts, are that the defendant discontinued and abandoned a medical practice in Merced county yielding him from \$7,000 to \$12,000 net per annum (which allegation alone would seem to admit of rather a wide margin of speculation in fixing the value of his former practice); that he will never be able *during the remaining years of his life* to re-establish his practice in Merced county or the *equivalent* practice at any other place or any practice of medicine and surgery except a *very small* and *very unremunerative* practice *as compared with* the abandoned practice, and that, in order to support himself, he has been compelled to resume the practice of medicine and surgery in a locality *most likely* to yield a livelihood to him, and that the amount of his injury cannot be computed in money. The substance of his allegations is that, in reliance upon said contract, he gave up a remunerative practice of medicine and surgery in Merced county for another practice at another place which was less lucrative and agreeable. He failed or refused to allege his age, so that the court might properly receive proof of his expectancy. He has failed utterly to advise the court or the adverse party as to his revenues from his present practice, which practice it may be reasonably inferred has been carried on for many years. Conclusions only and not facts are alleged. If it should transpire that the allegations referred to be not true, it is obvious that the defendant could not be prosecuted for perjury by reason of the uncertainty and immateriality thereof. Section 118a, Pen. Code; 20 Cal. Jur. 1012. In the special demurrer to the said allegations is found the following:

"(1) It cannot be ascertained therefrom how long defendant's medical or surgical practice would have continued. (2) It cannot be ascertained therefrom why the money value thereof or what would have been earned therefrom cannot be ascertained. It cannot be ascertained therefrom what defendant lost by loss of medical practice. * * * (18) Said answer is uncertain in that it cannot be determined therefrom to what extent the defendant was unable to resume medical or surgical practice, or what the yield from his medical or surgical practice as resumed was. * * * (20) Said answer is uncertain in that it cannot be determined therefrom what the defendant means by the statement that he resumed as best he could the practice of medicine and surgery, or what he means by stating that he resumed such practice in the most likely place."

Similar objection is made to the same allegations in the cross-complaint. Further objection is made to both pleadings, on the ground that they are uncertain, in that it cannot be determined therefrom why the defendant's alleged damages cannot be computed or estimated. We are satisfied from an examination of these pleadings that the plaintiff was entitled to allegations of fact which would advise her and the court of something more than mere opinion on matters so vital to the defendant's cause and his alleged loss of business. If he is not in a position to truthfully allege what his revenues have been, either before or after his change of position, his situation in that respect is perhaps unfortunate, but is of no consequence in the consideration of the requirement of sufficient pleadings to set forth the facts. Hoyt v. Thomas, 58 Cal. App. 14, 207 P. 1038. There was certainly no impediment in the way of an allegation as to the age of the defendant, so that the court might under recognized rules and practices determine his expectancy. He presented six different pleadings to the court wherein objections were successfully made to their sufficiency, and upon his failure to request leave to further amend the court was justified in rendering judgment against him. Morrison v. Land, 169 Cal. 580, 591, 147 P. 259.

The judgment is affirmed.

We concur: MYERS, C. J.; RICHARDS, J.; LAWLOR, J.; WASTE, J.; SEAWELL, J.; LENNON, J.

197 Cal. 516

ROBISON v. BRAYTON, Justice of the Peace. (S. F. 11725.)

(Supreme Court of California. Dec. 1, 1925.)

Justices of the peace ⇨2—Justice court of township, partly within and partly without city, establishing municipal court, held to continue.

When city of Long Beach, by Amendment No. 35 to its Charter, established a municipal court under Const. art. 6, § 11, and St. 1925, p. 648, office of justice of the peace in a township lying partly within and partly without the boundaries of city *held* to continue and function, except as to portion of such township lying within the city boundaries, and therefore justice was bound to receive and enter pleadings in a pending case under Code Civ. Proc. § 851 et seq.

In Bank.

Application by Ben. S. Robison for writ of mandate, to be directed to W. S. Brayton, as Justice of the Peace of Long Beach Township, to compel him to enter an oral demurrer and appearance in certain litigation pending before him. Writ granted.

Henry E. Phister, of Los Angeles, for petitioner.

Edward T. Bishop, County Counsel, and Chas. E. R. Fulcher, Deputy County Counsel, both of Los Angeles (Norman E. Malcolm, of Palo Alto, Wm. J. Locke, of San Francisco, Bruce Mason, of Long Beach, Ray L. Morrow, of Glendale, Earl J. Sinclair, of Berkeley, Jess E. Stephens, of Los Angeles, William Guthrie, of San Bernardino, J. H. Howard, of Pasadena, M. A. Fitzgerald, of San Luis Obispo, S. J. Higgins and Frank M. Downer, Jr., both of San Diego, A. W. Sans, of Watsonville, Jerome D. Peters, of Chico, Joseph P. Berry, of Santa Rosa, Archer Bowden, of San Jose, J. L. Johnston, of Santa Cruz, and Jordan L. Martinelli, of San Rafael, amici curiæ), for respondent.

John T. York, of Napa, and George Lull, of San Francisco, amici curiæ.

RICHARDS, J. The petitioner herein applies for a writ of mandate to be directed to the respondent herein in his capacity as a justice of the peace of the township of Long Beach, county of Los Angeles. The particular facts upon which he bases his application and upon which the same is resisted are embraced within the stipulation of the parties as to the facts of the case, and are as follows:

"That W. S. Brayton was, prior to July 24, 1925, the duly elected, qualified, and acting justice of the peace of Long Beach township in the county of Los Angeles, state of California, and still continues to be such justice of the peace, unless affected by the provisions of article 6 of the Constitution of the state of California, chapter 358 of the Laws of 1925 of the

state of California, and Amendment No. 35 to the Charter of the city of Long Beach. Now and at all times in petitioner's petition mentioned Long Beach township lay partly within and partly without the limits of the city of Long Beach. That on July 24, 1925, by virtue of the provisions of article 6 of the Constitution of the state of California, chapter 358 of the Laws of 1925 of the state of California, and Amendment No. 35 to the Charter of the city of Long Beach, there was established in the city of Long Beach a municipal court, if said Amendment No. 35 is valid. That the Western Credit Association is a corporation duly organized and existing under and by virtue of the laws of the state of California. That on or about the 8th day of July, 1925, said Western Credit Association caused a complaint naming petitioner as defendant, to be filed with respondent as justice of the peace of Long Beach township, and caused summons to be issued thereon. That thereafter, and on or about the 16th day of July, 1925, said Western Credit Association, a corporation, caused said summons to be served upon petitioner, together with a copy of the complaint in said action. That on or about the 4th day of August, 1925, petitioner through his attorney, Henry E. Phister, demanded that respondent as justice of the peace of Long Beach township, enter upon his docket without payment of fees an oral general demurrer, and the appearance of petitioner in said action. That respondent refused and still refuses to enter such oral demurrer or appearance. That petitioner is and was at all times herein mentioned a resident of Long Beach township, county of Los Angeles, state of California, and that at no time in said petition mentioned was he residing within the limits of the city of Long Beach. That amendment No. 35 to the Charter of the city of Long Beach (section 249a) was submitted to the qualified voters of the city of Long Beach at a special municipal election held in said city of Long Beach on the 8th day of April, 1925, and at such special municipal election a majority of the qualified voters of said city of Long Beach voting thereon voted in favor of said Amendment No. 35 to the City Charter of the city of Long Beach and duly ratified same. That, at the time said special municipal election was held, the Legislature of the state of California was in session and continued in session for some time subsequent thereto. That said amendment was submitted to the Legislature then in regular session, and the same was approved as a whole, without amendment or alteration by said Legislature on the 18th day of April, 1925. That all other necessary acts precedent to the adoption of Amendment No. 35 to the City Charter of the city of Long Beach were and each of them was performed in pursuance of the provisions of law pertaining thereto."

It being an admitted fact herein that Long Beach township now and at all the times mentioned in the petitioner's application lay and still lies partly within and partly without the city of Long Beach, it follows that the decision of this court, this day filed in the case of Bakkenson v. Superior Court, etc., 241 P. 874, interpreting the scope and mean-

ing of the recent amendment to section 11 of article 6 of the state Constitution, relating to the creation of municipal courts, has application to the situation presented in this proceeding, and hence that, as to the township of Long Beach, which lay, and according to the stipulation of the parties hereto yet lies, partly within and partly without the boundaries of the city of Long Beach, the jurisdiction of the justices' courts within such townships and of the justices of the peace functioning therein remains unaffected by such constitutional amendment and also by the terms of the statute recently enacted (Stats. 1925, p. 648), except as to the portion of such townships lying within the corporate boundaries of cities qualified to establish or actually establishing municipal courts. Under such interpretation the justice's court of Long Beach township continued and still continues to exist and the respondent herein to be and function as its justice of the peace; and, being such, he was bound to receive and enter upon his docket the oral demurrer of the petitioner herein in the case then pending in his said court, wherein the petitioner was a defendant, under the provisions of section 851 et seq. of the Code of Civil Procedure.

Let the writ issue as prayed for.

We concur: MYERS, C. J.; LAWLOR, J.; SHENK, J.; SEAWELL, J.; WASTE, J.; LENNON, J.

197 Cal. 797

WESTERN CREDIT ASS'N (a Corporation), Petitioner, v. **W. S. BRAYTON**, as Justice of the Peace of Long Beach Township, Respondent. (S. F. 11724.)

(Supreme Court of California. Dec. 1, 1925.)

In Bank.

Application for writ of mandate, prayed to be directed to respondent as Justice of the Peace of Long Beach Township, to compel him to receive and file a complaint. Writ granted.

Kimball Fletcher, of Los Angeles (Henry E. Phister, of Los Angeles, of counsel), for petitioner.

Edward T. Bishop, County Counsel, and Chas. E. R. Fulcher, Deputy County Counsel, both of Los Angeles (Norman E. Malcolm, of Palo Alto, Wm. J. Locke, of San Francisco, Bruce Mason, of Long Beach, Ray L. Morrow, of Glendale, Earl J. Sinclair, of Berkeley, Jess E. Stephens, of Los Angeles, William Guthrie, of San Bernardino, J. H. Howard, of Pasadena, M. A. Fitzgerald, of San Luis Obispo, S. J. Higgins and Frank M. Downer, Jr., both of San Diego, A. W. Sans, of Watsonville, Jerome D. Peters, of Chico, Joseph P. Berry, of Santa Rosa, Archer Bowden, of San Jose, J. L. Johnston, of Santa Cruz, and Jordan L. Martinelli, of San Rafael, amici curiae), for respondent.

Leon E. Gray, City Atty., and Markell C. Baer, Asst. City Atty., both of Oakland, amici curiae, for City of Oakland.

John T. York, of Napa, and George Lull, of San Francisco, amici curiae.

RICHARDS, J. The petitioner herein applies for a writ of mandate to be directed to the respondent herein in his capacity as justice of the peace of Long Beach township, county of Los Angeles. The particular facts upon which it bases its application and upon which the same is resisted are embraced within a stipulation of the parties as to the facts of the case, which said stipulation is in the main identical with that presented in the case of Robison v. Brayton (S. F. No. 11725) 241 P. 867, this day decided, with the exception that in the above case the petitioner was seeking to have received and entered upon the docket of the respondent an oral demurrer in a case which was pending before him as a justice of the peace prior to July 24, 1925, while in the instant case the petitioner was, on August 24, 1925, seeking to have the respondent receive and file a complaint in an action not theretofore pending in the justice's court of Long Beach township, of which it is herein contended the respondent was and still is a justice of the peace.

We can perceive no difference in principle between these two cases, nor in the application to them of the conclusions which this court arrived at in the case of Bakkenson v. Superior Court (S. F. No. 11729) 241 P. 874, this day decided.

On the authority of the foregoing cases it is therefore ordered that a writ of mandate issue as prayed for herein.

We concur: MYERS, C. J.; LAWLOR, J.; SEAWELL, J.; SHENK, J.; WASTE, J.; LENNON, J.

197 Cal. 521

BRAYTON v. PAYNE, County Auditor. (S. F. 11727.)

(Supreme Court of California. Dec. 1, 1925.)

Justices of the peace  2—Office of justice of township, partly without and partly within city establishing municipal court, held to continue, and justice ineligible to become municipal judge.

When city of Long Beach established a municipal court under Amendment No. 35, § 249a, of its Charter, Const. art. 6, and Laws 1925, p. 648, justice of the peace of Long Beach township, situated partly within and partly without city of Long Beach, continued as justice of the peace, and he was, therefore, not eligible to become judge of municipal court.

In Bank.

Application by W. S. Brayton for writ of mandate, to be directed to H. A. Payne, as County Auditor of the County of Los Angeles, to compel him to audit and approve the demand of petitioner for salary as Judge of the Municipal Court of Long Beach. Writ denied.

F. & F. M. Linnell and Noland M. Reid, all of Long Beach, for petitioner.

Edward T. Bishop, County Counsel, and Chas. E. R. Fulcher, Deputy County Counsel, both of Los Angeles, for respondent.

RICHARDS, J. The petitioner herein applies for a writ of mandate to be directed to the respondent herein, as county auditor of the county of Los Angeles, requiring the latter to audit and approve the claim and demand of the petitioner for the sum of \$129 alleged to be due as his salary as judge of the municipal court of the city of Long Beach for the period between July 24, 1925, and July 31, 1925, inclusive, and to issue to petitioner a warrant drawn upon the county treasury for said sum. The particular facts upon which the petitioner bases his application herein and upon which the same is resisted are embraced within the stipulation of the parties as to the facts of the case, which reads as follows:

"Petitioner was, prior to July 24, 1925, and still is, unless his status as such is affected by the establishment of the municipal court in the city of Long Beach, the duly elected, qualified, and acting justice of the peace of Long Beach township, county of Los Angeles, state of California. Long Beach township is, and at all times in petitioner's petition mentioned was, situated partly within and partly without the limits of the city of Long Beach. Petitioner is an elector of the city of Long Beach, but has never been admitted to practice law before the Supreme Court of the state of California. In pursuance of amendment No. 35 (section 249a) of the Charter of the city of Long Beach, article 6 of the Constitution of the state of California, and chapter 358 of the Laws of 1925 of the state of California, there was established in the city of Long Beach on the 24th day of July, 1925, a municipal court. On the 24th of July, 1925, petitioner took the oath of office as judge of the municipal court of the city of Long Beach, and entered upon and exercised the duties of the judge of said court. Respondent is, and at all times in petitioner's petition mentioned was, the duly appointed, qualified, and acting county auditor of said county of Los Angeles. On July 31, 1925, petitioner in due form presented his claim and demand for salary as judge of such municipal court in the sum of \$129, but respondent refused, has ever since refused, and still refuses, to pay said sum or any part thereof."

In the two cases of Robison v. Brayton, 241 P. 867, and Western Credit Association v. Brayton, 241 P. 868, this day filed, it was held, upon the authority of Bakkenson v. Superior Court, 241 P. 874, also this day decided, that the petitioner herein was, on July 24, 1925, and thereafter and during all of the times mentioned in his petition herein continued to be, a justice of the peace of Long Beach township in the county of Los Angeles, and that he had not, either by virtue of the constitutional amendment provid-

ing for the creation of municipal courts, or of the recent act of the Legislature providing for the establishment of the same, or of the amendment to the charter of the city of Long Beach with relation to the establishment of such municipal courts within said municipality, or of any action taken by the board of supervisors of the county of Los Angeles relating to the redistricting of the townships thereof, become a judge of the municipal court of said city of Long Beach, or other than a justice of the peace of Long Beach township. It follows necessarily that the petitioner was not in a position to qualify as a judge of the municipal court of the city of Long Beach or to receive the salary appurtenant to such office. The question, therefore, as to whether or not the petitioner had been admitted to practice as an attorney and counselor at law of this state, is an immaterial issue.

The petition for a writ of mandate is denied.

We concur: MYERS, C. J.; LAWLOR, J.; SEAWELL, J.; SHENK, J.; LENNON, J.

197 Cal. 529

DEUPREE v. PAYNE, County Auditor.
(L. A. 8863.)

(Supreme Court of California. Dec. 1, 1925.)

1. Counties ⇐55—Emergency clause of ordinance held to fail, as emergency did not exist.

Where board of supervisors of county of Los Angeles, operating under charter (St. 1913, p. 1484), provided by ordinance under St. 1925, p. 648, for redistricting townships, and abolishing office of justice of peace in certain township, partly within and partly without city of Long Beach, by declaring justices of other townships to have jurisdiction thereof, the emergency clause required under Pol. Code, § 4058, to give ordinance immediate effect, held to fail, where emergency was declared to exist because creation on that date of municipal court for Long Beach would operate to make justice of peace of township in question a municipal judge, and therefore leave township without justice, and said justice did not, in fact, thereby become municipal judge, and therefore ordinance did not take effect until 30 days after adoption.

2. Towns ⇐6—Board of supervisors may change boundaries of townships or abolish them entirely.

In view of St. 1925, p. 648, § 23, board of county supervisors of Los Angeles county has power to change the boundaries of townships within its county as convenience requires, or to entirely abolish a particular township and thereby abolish the justice court formerly existing therein, notwithstanding the former restriction on its powers under Pol. Code, §§ 4015, 4041, as imposed by section 4016.

3. Officers —Incumbent has no property right in office.

An incumbent to an office has no fixed right therein nor any property right paramount to public interest.

In Bank.

Application by Joseph W. Deupree for writ of mandate, to be directed to H. A. Payne, as County Auditor of the County of Los Angeles, to compel him to audit and approve a demand of petitioner for salary as Justice of the Peace of Lankershim Township. Writ granted.

Clarke & Bowker, of Los Angeles, for petitioner.

Edward T. Bishop, County Counsel, and Charles E. R. Fulcher, Deputy County Counsel, both of Los Angeles, for respondent.

RICHARDS, J. The petitioner herein, by his original application, applied for a writ of mandate to be directed to the respondent herein in his capacity as county auditor of the county of Los Angeles, commanding him to audit and approve the petitioner's claim and demand for the sum of \$70, alleged to be the salary due and payable to petitioner as justice of the peace of Lankershim township of the county of Los Angeles for the month of July, 1925, and which said sum the respondent as such auditor has refused to audit, approve, and allow in its entirety. The particular facts upon which said application is based and is resisted are embraced in the stipulation of the parties hereto as to the facts of the case, which reads as follows:

"Prior to July 23, 1925, there existed in the county of Los Angeles, state of California, a judicial township named Lankershim township, and the same now exists unless abolished by Ordinance No. 1320, New Series, or Ordinance No. 1321, New Series, of the board of supervisors of the county of Los Angeles. Prior to July 23, 1925, petitioner was the duly elected, qualified, and acting justice of the peace of said Lankershim township and continued as such during the entire month of July, 1925, unless his status was affected by said ordinances or either of them. That on July 23, 1925, the board of supervisors of Los Angeles county duly and regularly, by a four-fifths vote, adopted Ordinance No. 1320, New Series, and Exhibit A of respondent's return herein is a true copy of said Ordinance No. 1320, New Series. That on July 24, 1925, the board of supervisors of Los Angeles county duly and regularly, by a four-fifths vote, adopted Ordinance No. 1321, New Series, and Exhibit B of respondent's return herein is a true copy of said Ordinance No. 1321, New Series. That each of said ordinances purported to redistrict the county of Los Angeles into judicial townships, and by the terms of each of said ordinances Lankershim township was abolished. On July 24, 1925, there was established in the city of Long Beach a municipal court, at which time the city of Long Beach lay partly within and partly without Los Angeles township and one

or more other judicial townships. The salary of the justice of the peace of Lankershim township was and, if said township is still in existence, is \$70 per month. At all times in petitioner's petition mentioned respondent was the duly appointed, qualified, and acting county auditor of the county of Los Angeles, state of California. On the 3d day of August, 1925, petitioner presented his demand in due form to respondent for his salary during the entire month of July, 1925, and respondent then and there refused, has ever since refused, and still refuses to audit and approve said claim of salary in the full amount, but has audited and approved said claim of salary except as to the sum of \$18.07 as such salary from July 24, 1925, to July 31, 1925, inclusive."

On October 13, 1925, the petitioner herein presented and filed a supplemental petition wherein he also applied for a writ of mandate for the payment of his salary as such justice of the peace of such township for the month of August, 1925, his claim and demand for which the respondent herein had also refused to allow and approve. There is on file a stipulation by the parties hereto that the facts alleged in said supplemental application are true.

[1] Dealing first with the petitioner's original application herein, the first question with which we are confronted concerns the effect to be given to the two ordinances adopted by the board of supervisors of the county of Los Angeles purporting to redistrict the townships of Los Angeles county. These two ordinances are identical in terms, and only differ as to the respective dates of their adoption by said board. We do not deem it necessary to determine in this proceeding any nice question as to whether the first of these two ordinances was in all respects effective by reason of the fact that it was adopted by said board one day before the legislative act of 1925 (Stats. 1925, p. 648) was to go into effect, since, if the first of said two ordinances was subject to any defect on that account, the second of said ordinances in identical terms was not. We shall therefore deal only with the second of said ordinances in dealing with the merits of the instant proceeding in so far, at least, as it relates to the petitioner's original application herein.

The ordinance of the board of supervisors, adopted July 24, 1925, in so far as it refers to Lankershim township, purports to abolish said township, and impliedly, at least, to also abolish the office of the justice of the peace of said former township, by declaring therein that the justices of the peace of Los Angeles township to which the territory of Lankershim township was added should be the successors of the justice of Lankershim township. Said ordinance, as to the nature thereof and as to the time when its provisions should take effect, contained the following declaration:

"Sec. 30. This ordinance shall take effect immediately upon the passage hereof because the

adoption and enforcement thereof is necessary for the immediate preservation of the public peace, health and safety, in that on July 24, 1925, there will be established in the city of Long Beach, county of Los Angeles, state of California, a municipal court, and by virtue of the provisions of the law pertaining to the establishment of such municipal court, the justices of the peace of Los Angeles township will become the judges of the municipal court of Long Beach, thus depriving Los Angeles township of any justice court or justices' courts, or justice of the peace, or justices of the peace."

The first question which the foregoing state of the record presents is as to the time when the said ordinance of the board of supervisors must be held to have gone into effect. The county of Los Angeles is, and ever since the year 1913, has been, operating under a charter form of government adopted by the people thereof and approved by the Legislature in that year. Stats. 1913, p. 1484. The said charter of said county is, however, silent as to the powers of the board of supervisors in the matter of the passage and adoption of emergency ordinances, and the said county is therefore governed in that respect by general law. The general law upon that subject is embraced within the terms of section 4058 of the Political Code as enacted in the year 1911, which reads in part as follows:

"No ordinance passed by the board of supervisors, except when otherwise specially required by the laws of the state, and except an ordinance for the immediate preservation of the public peace, health or safety, which contains a declaration of, * * * its urgency and is passed by a four-fifths vote of the board, and no ordinance granting a franchise shall go into effect before thirty days from its final passage.
* * *

In conformity with the above-quoted provision of the Political Code, the said board of supervisors undertook to adopt their ordinance of July 24, 1925, as an emergency ordinance, and to give the same immediate operation and effect. In order to comply with said provision of the Political Code, the board was required to state in said ordinance the particular emergency, the existence of which was required to enable them to enact said ordinance as an emergency ordinance and to have the same go at once into effect. If such emergency did not in fact or in law exist, it should require no argument to show that the said board would have no power to enact such ordinance so as to have the same become effective prior to the expiration of the 30-day period provided for the taking effect of other than emergency ordinances. It was in fact so held in the case of *In re Hoffman*, 155 Cal. 114, 99 P. 517, 132 Am. St. Rep. 75. The particular emergency which the said board specifies in that portion of their said ordinance, which is above quoted, is this:

"That on July 24, 1925, there will be established in the city of Long Beach, county of Los Angeles, state of California, a municipal

court, and by virtue of the provisions of the law pertaining to the establishment of such municipal court, the justices of the peace of Los Angeles township will become the judges of the municipal court of Long Beach, thus depriving Los Angeles township of any justice court or justices' courts, or justice of the peace or justices of the peace."

This court has held in the case of *Bakkenson v. Superior Court*, 241 P. 874, this day decided, that no such result as a matter of either law or fact has followed or could follow from the establishment of the municipal court of Long Beach so as to affect those townships which upon the date referred to lay partly within and partly without the city of Long Beach, at least as to such portions thereof which lay without the boundaries of such municipality, and that as to such latter portions thereof the offices and jurisdiction of the justices of the peace thereof still continued to persist. This being so, the particular emergency which the said board of supervisors specified in their said ordinance as comprising the emergency feature thereof was nonexistent upon the date of the passage and approval of said ordinance, and, being so, it could not furnish the basis upon which alone an emergency ordinance having immediate operation and effect could be enacted under the foregoing provision of the Political Code. Not therefore being the subject of enactment as an emergency ordinance upon the ground stated therein, such ordinance could not become effective until the expiration of the 30-day period fixed by said provision of the Code, and, this being so, it follows that the petitioner was in no wise affected by the terms of said ordinance during the period of 30 days intervening between the date of its enactment and the statutory date when it became effective; and from this it follows that the petitioner herein was entitled to the whole of his salary as justice of the peace for Lankershim township for the month of July, 1925, and is now entitled to have a writ issue in accordance with the prayer of his original application.

[2, 3] When we come to consider the supplemental application of the petitioner filed herein on October 13, 1925, a number of much more serious problems are presented. Assuming that the ordinance of the board of supervisors of Los Angeles county adopted on July 24, 1925, became effective 30 days thereafter, it follows that such ordinance was in full force and effect on August 23, 1925, and continued to be in force and effect thereafter. If the effect of said ordinance is to be that stated therein, viz. the abolition of Lankershim township as of the date when said ordinance became effective, it would follow that Lankershim township and hence the justice court of Lankershim township ceased to exist upon the said date when such ordinance took effect. It may not be doubted that the board of supervisors of Los Angeles county possess the power to change the boundaries of townships

within their county as convenience requires. Section 4041 of the Political Code, which has relation to the general jurisdiction and powers of boards of supervisors, grants the said board that power. Subdivision 2 of said section, granting such power, reads as follows:

"2. To divide the counties into townships, election, school, road supervisor, sanitary, and other districts required by law, change the same, and create others, as convenience requires."

Section 4015 of the Political Code, which has relation to township officers, contains the same grant of power, reading as follows:

"The board of supervisors of each county, as public convenience may require, shall divide their respective counties into townships for the purpose of electing justices of the peace and constables; provided, however, that in the establishment of townships that may be hereafter established, no incorporated city shall be divided so as to lie partly within one township and partly within another."

In the same article, however, in which the foregoing section appears, and immediately following it, is section 4016, which reads as follows:

"The provisions of this article shall not affect any incumbent of the office of justice of the peace or constable."

That the foregoing two sections of the Political Code are to be read together, and that so read the latter section places a definite limitation upon the power of boards of supervisors to so change the boundaries of townships as to affect the incumbency of the justice of the peace of any township, the boundaries of which have been changed, would seem too plain for argument. As these sections of the Political Code stood, therefore, prior to July 24, 1925, and had they remained unaffected by any legislation having effect on and after said day, the office and hence the salary of the petitioner herein would have been unaffected thereby. On the 24th day of July, 1925, however, the act of the Legislature (Stats. 1925, p. 648) went into effect. The purpose of this act was unquestionably to comply with the mandate of the recent constitutional amendment providing for the creation of municipal courts and directing the Legislature to provide by general law for the establishment, constitution, regulation, government, and procedure of municipal courts. Both the constitutional amendment and the act in question provide for radical changes in those townships and township justices courts in counties wherein one or more municipalities exist which are qualified by population to establish municipal courts and which shall proceed to establish the same as to townships lying wholly within such municipalities. Justices courts cease to exist, and the justices thereof either become judges of the municipal courts, or, if disqualified to so become, cease to be and function as justices

of the peace. As to townships lying partly within and partly without the boundaries of such municipalities, the territorial jurisdiction of the justices of the peace thereof is, or is likely to be, materially affected by the assertion of the jurisdiction of such municipal courts over that portion of the territory of such townships as may lie within such municipalities. *Bakkenson v. Superior Court*, supra. A condition was or was likely to be thus created which would require an extensive exercise of the powers of boards of supervisors over the subject of the changing and readjustment of the boundaries of townships within such counties as were to be affected by the going into effect of said constitutional amendment and of the said act passed for the purpose of putting the same into full operation and effect. It would seem that the powers of the governing body of the county should be plenary in the foregoing regard in order to give such full effect thereto as the exigencies of the particular situation might require, and that such was the purpose of the Legislature in placing in said legislative act section 23 thereof, we entertain no doubt. Said section reads as follows:

"Whenever a municipal court is established for any city which lies partly within and partly without one or more judicial townships, the board of supervisors of the county within which the municipal court is established shall immediately by ordinance divide such county into judicial townships are [as] public convenience may require."

While it is true that the act of which the foregoing section forms a part does not in express terms purport to repeal any particular portions or sections of the Political Code, it is obvious that such is the effect wherever the provisions thereof are operative to effectuate changes in townships and township justices courts and the justices of the peace who are the incumbents thereof in all counties within the city or cities and counties of which municipal courts may be established. The provision of the Political Code above quoted, relating to justices courts and the incumbents thereof, are obviously abrogated by the general provisions of the act of 1925, in so far as they affect justices of the peace in townships lying wholly within the boundaries of such municipalities, for as to such townships the office and the officer both cease to exist. If the general provisions of said act are thus far operative we can see no reason why the particular provisions of section 23 of said act should not also be operative as to all townships and township justices courts and the justices thereof which may be affected to a greater or less degree by the putting into effect of the provisions of the entire act. The present case furnishes an apt illustration of the very matter under review. Lankershim township has apparently been so far affected by the present or impending changes in the township boundaries and the territorial and

MARCHETTI v. PAYNE, County Auditor.
(S. F. 11728.)

(Supreme Court of California. Dec. 1, 1925.)

Justices of the peace ⇐2—**Justice of peace for township partly within and partly without city establishing municipal court continued in office, and could not become municipal judge.**

When city of Long Beach established a municipal court, a justice of the peace for Los Angeles township, lying partly within and partly without city, held to continue as such, and therefore he could not become a municipal judge; action of county board of supervisors in rearranging township boundaries being immaterial.

In Bank.

Application by Joseph Marchetti for writ of mandate, against H. A. Payne, as County Auditor of the County of Los Angeles, to compel him to issue a warrant to petitioner for salary as Judge of the Municipal Court of Long Beach. Writ denied.

Leslie Hewitt and Hewitt, Crump & Penn, all of Los Angeles (Kimball Fletcher, of Los Angeles, of counsel), for petitioner.

Edward T. Bishop, County Counsel, and Chas. E. R. Fulcher, Deputy County Counsel, both of Los Angeles, for respondent.

RICHARDS, J. The petitioner herein applies for a writ of mandate directed to the respondent as county auditor of the county of Los Angeles, requiring the latter to issue to petitioner a warrant drawn upon the county treasury for the sum of \$129, alleged to be due and payable to the petitioner as his salary as judge of the municipal court of the city of Long Beach for the period between July 24, 1925, and July 31, 1925. The single question presented by this application is as to whether the petitioner became or was a judge of the said municipal court during said period or at all. From the stipulated statement of facts filed herein, it appears that prior to July 24, 1925, the petitioner was a duly appointed, qualified, and acting justice of the peace in and for Los Angeles township in said county of Los Angeles, a portion of which lay partly within and partly without the corporate limits of the city of Long Beach; that by virtue of the provisions of law and of Amendment No. 35 to the Charter of the city of Long Beach, there was, on July 24, 1925, established in said city of Long Beach a municipal court. There is also set forth in said stipulated statement of facts a statement to the effect that on July 23, 1925, and also on July 24, 1925, the board of supervisors passed and adopted certain ordinances identical in form, purporting to rearrange the boundaries of the townships of Los Angeles county, the text of which ordinances is appended to the return

other jurisdiction of the justices of the peace of those other townships of Los Angeles county which lie in whole or in part within the boundaries of the cities of Long Beach and Los Angeles as to render it no longer expedient or practicable that said Lankershim township should exist as a separate entity in the government of Los Angeles county. These consequences have been the direct result of the establishment of municipal courts in the two municipalities above referred to, and, such being so, we must assume that the occurrence of just such results was within the contemplation of the Legislature in the adoption of the legislative act in question, and that it was therefore the intent of the Legislature in the insertion therein of section 23 thereof to provide for such contingencies by reposing in the board of supervisors of counties thus affected such plenary power to deal with township and township justices courts therein and the officers thereof as to render fully effective the extensive readjustments contemplated by the constitutional amendment and the act passed in pursuance thereof. That such boards of supervisors in so dealing with such a situation could entirely abolish a particular township we have no doubt, and that by so doing they could also do away with the justice court formerly existing therein, we have also no doubt, and, if in so doing the effect thereof was to put out of being both the office of justice of the peace and the incumbent of such office in his official capacity, we can perceive no obstacle in the way of such a consequence, since it is well settled that there is no vested right in an incumbent to an office, nor any property right therein paramount to the public interest. *Miner v. Solano County*, 26 Cal. 116; *McKannay v. Horton*, 151 Cal. 711, 719, 91 P. 598, 13 L. R. A. (N. S.) 661, 121 Am. St. Rep. 146; *Boyd v. Pendegast*, 57 Cal. App. 504, 207 P. 713.

We do not deem it necessary to consider any other points discussed by respective counsel in their briefs presented herein, since the following is our conclusion from the foregoing considerations, viz.: That as to the salary of the petitioner herein for the entire period of the month of July, 1925, he is entitled to a writ as prayed for in his original petition herein; and that the petitioner is further entitled to his salary as prayed for in his supplementary petition herein for such portion of the month of August, 1925, as lay within the period between the passage of the aforesaid ordinance of the board of supervisors adopted on July 24, 1925, and up to the time when such ordinance is herein held to have gone into effect.

Let a writ issue in conformity with the views expressed in this opinion.

We concur: MYERS, C. J.; Lawlor, J.; SHENK, J.; LENNON, J.; SEAWELL, J.; WASTE, J.

of the respondent to the alternative writ issued herein. The main question presented by this application is, we think, sufficiently answered by our decision in the case of *Bakken-son v. Superior Court*, 241 P. 874, this day filed, wherein it is held that as to townships partly within and partly without the boundaries of municipalities qualified to establish municipal courts within their territorial limits and establishing the same, the existence and jurisdiction of the justice's courts within such townships and of the justices of the peace functioning therein are each unaffected thereby except in so far as the territory embraced within such municipalities is concerned. Such being our conclusion in that case, it follows that the petitioner in this proceeding still continues to be a justice of the peace of Los Angeles township, notwithstanding the establishment of a municipal court in the city of Long Beach, and has not, by the act of such establishment or otherwise, become a judge of such municipal court. It further follows that the action of the board of supervisors of the county of Los Angeles, taken in the passing and immediate putting into effect of the ordinances above referred to or either of them, is an immaterial factor in the disposition of this case, since it appears upon the face thereof that the township of Los Angeles, of which this petitioner is a justice of the peace, still continues in being, and that the justice's court thereof, of which the petitioner is such justice of the peace, also still continues to exist and function.

It follows that the application of the petitioner herein for a writ of mandate must be, and the same is hereby, denied.

We concur: MYERS, C. J.; LAWLOR, J.; SHENK, J.; SEAWELL, J.; WASTE, J.; LENNON, J.

197 Cal. 504

BAKKENSON v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.
(S. F. 11729.)

(Supreme Court of California. Dec. 1, 1925.)

1. Constitutional law ¶15—Entire scope and purpose of amendment must be given effect in construing portion.

In determining meaning of language employed in a portion of a constitutional amendment, the entire scope and purpose of amendment as expressed when read as a whole must be looked to and given effect.

2. Constitutional law ¶12—Of alternative constructions of amendment, one consisting of sense and wisdom will be adopted.

Where a constitutional amendment is susceptible of two constructions, one leading to mischief or absurdity, and the other consisting

of sound sense and wise policy, the former will be rejected and the latter adopted.

3. Justices of the peace ¶2—Municipal court amendment held not to oust justices of peace of townships partly within and partly without municipalities from jurisdiction over portions not within cities.

Municipal court amendment to Const. art. 6, § 11a, St. 1925, p. 648, §§ 4, 5, and Amendment No. 35 to Charter of City of Long Beach (St. 1925, p. 1349), held not to abolish justice courts in townships lying partly within and partly without cities or cities and counties wherein municipal court has been established, in respect to jurisdiction over those portions of townships lying outside of cities.

4. Criminal law ¶90(4)—Justice court held to have jurisdiction over offense, notwithstanding subsequent redistricting ordinance.

Justice of the peace held to have jurisdiction of misdemeanor within Pen. Code, § 1425, subd. 3, irrespective of ordinances purporting to redistrict townships in such a manner that the district in which offense was committed was no longer included in township presided over by justice before whom complaint was brought.

5. Prohibition ¶27—Jurisdiction of superior court over appeal from refusal of justice to exercise jurisdiction presumed.

Jurisdiction of superior court over an appeal by the state from an order of justice court having jurisdiction of misdemeanor of class described in Pen. Code, § 1425, subd. 3, will, on application for writ of prohibition to prevent the superior court from exercising jurisdiction over the case, be presumed, where appeal was regularly taken and perfected and motion to dismiss appeal was not based on grounds that order was not appealable.

In Bank.

Application by A. G. Bakken-son for writ of prohibition against the Superior Court of Los Angeles County and another. Writ denied.

Ivan Kelso, John R. Berryman, Jr., and Louis C. Spiess, Jr., all of Los Angeles, for petitioner.

Edward T. Bishop, Co. Counsel, and Chas. E. R. Fulcher, Deputy Co. Counsel, both of Los Angeles, for respondents.

RICHARDS, J. The petitioner herein applies for a writ of prohibition directed against the respondents, superior court in and for the county of Los Angeles and Walter C. Guerin, one of the judges thereof, forbidding said respondents to take and exercise jurisdiction over a certain case entitled *People v. Bakken-son* on appeal from the justice's court of Los Angeles township, in which case the petitioner herein is charged with the commission of a misdemeanor alleged to have been committed on the 28th day of July, 1925, within the said township of Los Angeles county, but outside of the portion thereof which lies within the corpo-

rate limits of the city of Los Angeles and also outside of the portion thereof which lies or at least formerly lay within the corporate limits of the city of Long Beach. The questions involved in this proceeding relate to the interpretation to be given to what is known as the municipal court amendment to section 11a of article 6 of the state Constitution and to the legislation adopted by the Legislature of 1925 for the purpose of giving effect to said amendment to the Constitution, and also as to the validity and application of certain amendments to the charter of the city of Long Beach and of certain ordinances of the board of supervisors of the county of Los Angeles with relation to township boundaries within said county.

The particular facts upon which this proceeding is founded, and which the parties hereto have stipulated to be true are these: The petitioner was on July 28, 1925, arrested upon the charge of driving an automobile on and along Whittier boulevard near Belden avenue in the township of Los Angeles, and in that portion thereof which lay and yet lies outside of the corporate boundaries of either the city of Los Angeles or the city of Long Beach, and was and is unincorporated territory; and upon his said arrest was brought before the court which was then purporting to act as the justice's court of said Los Angeles township and before Robert Scott, who was then purporting to be and act as the justice of the peace thereof. The petitioner upon his arraignment demurred to the jurisdiction of said court and of the justice thereof to hear and determine his case, and, this demurrer being overruled, entered a plea of not guilty, but, upon the cause being set for trial, appeared upon the date fixed therefor, and, withdrawing his plea of not guilty, entered a plea of guilty and moved in arrest of judgment upon the sole ground that the said justice's court and the said justice thereof were without jurisdiction to pass sentence or render judgment in his case. The justice granted said motion, whereupon an appeal was taken by the district attorney to the superior court, which appeal being perfected and being assigned to department 10 thereof, the petitioner herein moved said court and Hon. W. G. Guerin, the judge thereof, to dismiss said appeal upon the ground that the said superior court had no jurisdiction to entertain or to do other than to dismiss the same for the reason that the justice's court from which said appeal had been taken was not at the times mentioned a lawfully constituted court and was not in fact in existence, and that said Robert Scott, claiming to be and acting as the justice of the peace of said justice's court, had been without jurisdiction to hear and determine said case. The superior court and the said judge thereof denied petitioner's said motion and proceeded to set said cause for trial, and will, unless prohibited

by this court, entertain, try, and determine said cause upon said appeal.

It is further stipulated by the parties hereto that the city of Long Beach, county of Los Angeles, is governed under a charter framed and adopted under the authority of the Constitution of the state of California, and that said city has attained a population of more than 40,000 inhabitants, as ascertained by the last census, taken under the authority of the Congress of the United States. That certain amendments to the charter of the said city of Long Beach were duly ratified by the electors of said city and said amendments were submitted to the Legislature of the state of California, for approval or rejection without alteration or amendment, at the forty-sixth session thereof, and that the said session of said Legislature, acting through the senate and assembly thereof, by joint resolution, the majority of both houses voting therefor, did approve said amendments to said charter as a whole and without alteration or amendment. That amendment No. 35 of said Charter (St. 1925, p. 1349), adopted as aforesaid, provides that, upon the taking effect of certain acts of said Legislature in conformity to sections 1, 5, 11, 12, 14, 18, 23, and 24 of article 6 of the Constitution of the state of California, as amended in 1924, relative to the creation, regulation, government, and procedure of municipal courts and for the establishment thereof in cities governed under a charter framed and adopted under the authority of said Constitution it should ipso facto become effective, and there should thereby be established in the city of Long Beach a municipal court as contemplated by said sections of the California Constitution herein referred to.

It further appears from the stipulation of the parties hereto as to the facts that prior to July 23, 1925, Los Angeles township lay partly within and partly without the city of Long Beach; that on July 23, 1925, the board of supervisors of the county of Los Angeles, by a four-fifths vote, adopted an ordinance purporting to redistrict the county of Los Angeles into judicial townships, by the terms of which ordinance Los Angeles township was so described as to lie wholly without the limits of the city of Long Beach; that on July 24, 1925, the said board of supervisors again passed and adopted this identical ordinance, each of which said ordinances is appended to the return of the respondents herein as Exhibits A and B; that immediately after the adoption of each of said ordinances, and on the dates, respectively thereof, the said board of supervisors regularly adopted an order that the justices of the peace who, under the terms of each of said foregoing ordinances would succeed themselves, were thereby appointed justices of the peace of their respective townships as redistricted under said ordinances respectively.

[1, 2] The basis of the petitioner's contention herein rests upon the interpretation and effect which he insists shall be given to the constitutional amendment, the statutory provisions, the charter amendments, and the ordinances to which reference has above been made. The particular passage in the constitutional amendment relied upon in support of the petitioner's position is the portion of section 11a of article 6 thereof, which reads as follows:

"In any city or in any city and county where such municipal court has been established, and in townships situated in whole or in part in such city or city and county, there shall be no other court inferior to the superior court except as herein provided; and pending actions, trials, and all pending business of inferior courts within such city or city and county or township, upon the establishment of any such municipal court, shall unless otherwise provided by law be transferred to and become pending in such municipal court, and all records of such inferior courts be transferred to and thereafter be and become records of such municipal court. Upon the establishment of any such municipal court, and until the first election and the qualification of the judge or judges thereof and the first appointment and the qualification of the clerks and other attachés thereof, the judges or justices and the clerks and other attachés of any existing inferior courts in such city or city and county or township shall become and act as the judges, clerks and attachés respectively of such municipal court."

The petitioner contends that by the phrase in the foregoing portion of said constitutional amendment reading, "In any city or in any city and county where such municipal court has been established, and *in townships situated in whole or in part in such city or city and county*, there shall be no other court inferior to the superior court except as herein provided," justice's courts were abolished in all townships which lay partly within and partly without cities or cities and counties wherein a municipal court has been established; and that, since a municipal court has been established in the city of Long Beach by amendment to its charter, the justice's court wherein his case arose had ceased to be, and the justice thereof ceased to function as such at the time of his arrest and attempted trial therein. We cannot agree with the petitioner's contention as to the interpretation to be placed upon the foregoing language in the constitutional amendment under review. In order to determine what the framers of said amendment intended by the language employed in the foregoing portion thereof, the entire scope and purpose of said amendment as expressed in the terms thereof when read as a whole must be looked to and given effect. Reading said constitutional amendment as a whole, it is manifest that its purpose was to provide for the organization and functioning of so-called municipal courts within the ter-

ritorial limits of such cities and cities and counties as possessed the requisite population therefor and as should by the ways provided therein conclude to embrace its benefits, the municipal courts to be thus established to be confined in some respects as to their jurisdiction and functions to the territorial limits of the municipalities thus resolving to establish the same. It was a matter of public political record and history, of which the framers of this amendment apparently took notice, that in the course of establishing such municipal courts in such municipalities cases would arise where townships with their already established justice's courts would be found to lie partly within and partly without the prescribed limits of such municipalities, and which would, as to that portion of the area of such townships as lay within the boundaries of such municipalities, be affected by the action of the latter in resolving to bind themselves within the terms of said amendment, and that as to such portions of such townships thus to be affected the provisions of said amendment should be operative. But it nowhere appears from said amendment, when considered as a whole, that it was the intent of those who framed it to disturb to the extent of destroying the judicial organization within those portions of such affected townships as lay outside of the limits of those municipalities which had decided to set up municipal courts within their said limits. To so interpret the particular language of the portion of said amendment upon which the petitioner relies, and which is above excerpted, would be to give to the amendment as a whole the effect of either taking away from the inhabitants of the portion of such townships as lay without the bounds of such municipalities their already established justice's courts, leaving them without tribunals for the institution and trial of causes within the jurisdiction of such court, or of *extending the jurisdiction* of the municipal courts of contiguous cities over such outlying territory, neither of which results is thinkable as within the intent of the framers of this amendment to the Constitution, since to give it such an interpretation would be to take away from the inhabitants of such outlying territory their already established system of justice's courts and township officers by the vote of the electorate of an incorporated municipality of which they form no part, and to substitute in place thereof a system of municipal courts in the establishment of which and in the selection of the judges and other officers of which they would have no vote or voice. It is a cardinal principle of construction, applicable to constitutional amendments, as was well said by this court in the case of *San Joaquin, etc., Canal & Irr. Co. v. Stevinson*, 164 Cal. 221-229, 128 P. 924, 927, with reference to the interpretation of statutes that:

"Where a statute 'is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity, and the other consisting of sound sense and wise policy, the former should be rejected and the latter adopted.' In *re Mitchell*, 120 Cal. 386 [52 P. 800]. 'A construction should not be given a statute, if it can be avoided, which will lead to absurd results, or to a conclusion plainly not contemplated by the Legislature.' *Merced Bank v. Casaccia*, 103 Cal. 645 [37 P. 649]."

In *Black on Interpretation of Laws* (2d Ed.) § 8, p. 20, the rule is thus stated:

"It is a cardinal rule in the interpretation of Constitutions that the instrument must be so construed as to give effect to the intention of the people who adopted it. This intention is to be sought in the Constitution itself, and the apparent meaning of the words employed is to be taken as expressed, except in cases where that assumption would lead to an absurdity, ambiguity, or contradiction."

In the case of *Signal Hill v. County of Los Angeles*, 236 P. 304, this court quoted with approval the following language from 2 *Lewis' Sutherland, Statutory Construction*, §§ 347-376, viz.:

"It is indispensable to a correct understanding of a statute to inquire first what is the subject of it, what object is intended to be accomplished by it. When the subject-matter is once clearly ascertained and its general intent, a key is found to all its intricacies—general words may be restrained to it, and those of narrower import may be expanded to embrace it to effectuate that intent. When the intention can be collected from the statute, words may be modified, altered, or supplied so as to obviate any repugnancy or inconsistency with such intention. * * * Words or clauses may be enlarged or restricted to effectuate the intention or to harmonize them with other expressed provisions. * * * The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense they were intended to be used as they are found in the act. The sense in which they were intended to be used furnishes the rule of interpretation, and this is to be collected from the context; and a narrower or more extended meaning is to be given according to the intention thus indicated."

In the case of *In re Haines*, 234 P. 883, this court again quoting from the author last above cited said:

"The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the Legislature apparent by the statute; and, if the words are sufficiently flexible to admit of some other construction, it is to be adopted to effectuate that intention. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. 'While the intention of the Legislature must be ascertained from the words used to express it, the manifest reason and the obvious purpose of the law should not be sacrificed to a literal interpretation of such words.' Words or clauses may be enlarged or restricted to effectuate the intention or to

harmonize them with other expressed provisions. Where general language construed in a board sense would lead to absurdity, it may be restrained. The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense they were intended to be used as they are found in the act.' *Lewis' Sutherland, Statutory Construction*, (2d Ed.) § 376, p. 721."

[3] Having in mind these principles, and applying them to the amendment as a whole and to the particular language in the portion thereof above quoted, and upon which the petitioner places his main reliance, we are of the opinion that the phrase therein reading, "in townships situated in * * * part in such city or city and county, there shall be no other court," etc., should be interpreted to mean that it was the intent of the framers of said amendment to provide that in such part of such townships as would be found to be situated within such city or cities establishing such municipal court there should be no other inferior courts than such municipal courts as were to be provided therefor under the terms of said amendment. Such an interpretation would leave said amendment entirely free from the absurdity and confusion which would result from placing the meaning upon said clause for which the petitioner contends.

The foregoing conclusion is further enforced by the provisions found in another portion of said amendment to the Constitution, reading as follows:

"The Legislature shall determine the number of each of the inferior courts in incorporated towns, and in townships or counties, or in incorporated cities or cities and counties, where there is no municipal court, * * * and until such inferior courts are otherwise so determined and provided for, such inferior courts now existing shall, until otherwise provided by law, continue in all respects as established at the time of the adoption of this amendment. * * *"

The obvious purpose of the foregoing provision was to empower the Legislature to adjust whatever disturbances should arise in cities or counties or townships outside of those in or over which or parts of which municipal courts had been set up and to provide that, until such adjustments had been made by appropriate legislation, the status quo as to existing inferior courts within the affected territory should continue. We are aided, though not controlled, in our interpretation of the constitutional amendment in question, by the contemporaneous interpretation placed thereon by the Legislature. The amendment in terms provided that the Legislature should enact such legislation as was required to carry the provisions of the amendment into effect with special references to "the powers, jurisdiction, duties, and responsibilities" of inferior courts in townships where there is no municipal court. In

obedience to this direction the Legislature of 1925 enacted what is known as the "Municipal Court Law" (Stats. 1925, p. 648), and in so doing undertook to deal with townships which would be affected by the establishment of municipal courts within cities of which such townships territorially formed a part, and in so doing, and in sections 4 and 5 of said act, provided as follows:

"Sec. 4. In each city or city and county, in which a municipal court is established as herein provided, there shall be no other court inferior to the superior court unless it be a court having jurisdiction in cases in which the claim or demand is fifty dollars or less. Upon the establishment of a municipal court as herein provided all existing inferior courts, except as above provided, in the city or city and county wherein such municipal court is established and in a township situated wholly within such city or city and county shall be superseded by the municipal court, and the judges, justices, clerks and other attachés of such inferior court or courts shall become and be the judges, clerks and other attachés of the municipal court, in the manner and until such time as their successors are elected or appointed as hereinafter provided. All actions pending and all records of every court inferior to the superior court, the jurisdiction of which lies wholly within a city or city and county within which a municipal court is to be established, shall upon the day fixed for the establishment of such municipal court become actions pending in and records of such municipal court. All actions pending in, and records of courts, the jurisdiction of which falls partly within and partly without a city or city and county in which a municipal court is to be established, shall after the establishment of such municipal court continue in such inferior court; provided, however, that thereafter any actions then pending, together with the records thereof which could or should have been brought in such municipal court, if such municipal court had been established at the time such action was brought, shall upon motion of any party thereto be transferred to and become a case pending in and records of such municipal court.

"Sec. 5. In the event that there is annexed to a city having a municipal court, territory comprising all of the jurisdiction of an inferior court, the records of and cases pending in such inferior court shall become the records of and cases pending in the municipal court.

"In the event that there is annexed to a city having a municipal court, territory comprising part of the jurisdiction of an inferior court, the part of the township or other judicial subdivision not annexed shall continue as a judicial subdivision, but that annexed to the city shall be within the jurisdiction of the municipal court."

It thus appears that the Legislature, by the foregoing provisions in said act, has placed upon the constitutional amendment in question, precisely the interpretation which in our opinion should be given to its terms. It would seem to follow from the foregoing considerations that within that portion of Los Angeles township lying outside of incorporated territory and wherein the original

case against said petitioner arose, the justice's court of said township still continued to exist and function. It is true that it did so within restricted territory, in view of the action of the city of Long Beach in electing to organize a system of municipal courts within its own territorial limits, but the original jurisdiction of said justice's court remained otherwise unimpaired. And, if this conclusion be correct, it would seem to further follow that the fact, if it be a fact, that the city of Long Beach had or had not succeeded by amendment of its charter in bringing itself within the terms of the constitutional amendment and in thus establishing a system of municipal courts within its territorial limits, would be immaterial to the determination of this cause, since the offense with which the petitioner stands charged was committed in a portion of Los Angeles township which was never within the territorial limits of said city of Long Beach.

[4, 5] In the answer and return made by the respondents to the alternative writ issued herein they have set forth the fact that on July 23, 1925, and again on July 24, 1925, the board of supervisors undertook to pass two certain identical ordinances purporting to redistrict the townships of the county of Los Angeles and to give to each of said ordinances immediate effect. These two ordinances are appended to the respondents' said answer and return as exhibits, and it appears therefrom that Los Angeles township was thereby so reorganized as to its boundaries that no portion thereof was to longer lie within the limits of the city of Long Beach, and that no portion thereof was to extend beyond the boundaries of the city of Los Angeles. The result of this readjustment of the territorial boundaries of Los Angeles township, if immediately effectual, would be to exclude that particular portion of the township of Los Angeles within which the offense of the petitioner was committed from the boundaries of Los Angeles township as of the time of the commission of his offense. This fact, however, would be of no particular avail to the petitioner herein, since the offense with which he stands charged was a misdemeanor within the class described in subdivision 3 of section 1425 of the Penal Code, and hence was within the jurisdiction of the justice's court of any of the townships within the county of Los Angeles. It thus becomes immaterial to a determination of this case whether the aforesaid ordinances of the board of supervisors were or were not to be immediately effectual or in fact were to be valid or effectual at all, since this petitioner's case could in no wise be affected thereby. The city of Los Angeles has not as yet put into effect any law or ordinance establishing municipal courts within its boundaries, and hence the justice of the peace of Los Angeles township continues to function within that portion of

said township lying within said city; and hence, as we have seen, had and has jurisdiction over such offenses as that with which the petitioner stands charged. Having had such jurisdiction at the time of the commission of such offense and at the time of the petitioner's arrest and arraignment, the trial court erred in its refusal to exercise it. Whether its order made in so doing was an appealable order is not discussed by the parties hereto, and, the motion to dismiss said appeal not being based upon that ground, we shall assume, for the purposes of this decision, that the petitioner's case was the proper subject of an appeal by the people to the superior court; and, such appeal having been regularly taken and perfected, it follows that the said superior court had and has jurisdiction over said case upon appeal and may properly proceed with the consideration of the same.

It follows that the petitioner's application for a writ of prohibition must be, and the same is hereby, denied.

We concur: MYERS, C. J.; LAWLOR, J.; SHENK, J.; SEAWELL, J.; WASTE, J.; LENNON, J.

197 Cal. 539

WALLACE v. PAYNE, County Auditor.
(L. A. 8888.)

(Supreme Court of California. Dec. 1, 1925.)

1. Constitutional law ⚡15—**Statutes** ⚡205—**Words, phrases, or clauses of statutes or Constitutions must be interpreted in relation to scope and purpose of entire provision.**

In the interpretation of particular words, phrases, or clauses in a statute or Constitution, entire substance of the instrument, or that portion of it relating to subject under review, should be looked to in order to determine the scope of the particular provision of which the words, phrases, or clauses under consideration form a part, and determine the particular intent of the framers of the instrument.

2. Courts ⚡42(5)—**Charter amendment providing for municipal court, approved by Legislature, held effective.**

Amendment No. 35 of the Charter of the City of Long Beach, § 249a (St. 1925, p. 1349), providing for municipal court within the provisions of Const. art. 6, §§ 1, 5, 11, 12, 14, 18, 23, 24, as amended in 1924, which was approved by the Legislature in session at time of ratification by voters of charter amendment, held regularly adopted and duly ratified under Const. art. 11, § 8.

3. Judges ⚡2—**City of Long Beach entitled to five municipal judges.**

The city of Long Beach, a city of the second and a half class, is entitled to five municipal court judges under St. 1925, pp. 648-652.

4. Judges ⚡8—**Governor's appointment of municipal judge to fill "vacancy" of newly created office held valid.**

Where Long Beach, a city of the second and a half class, entitled to five municipal judges under St. 1925, pp. 648-652, established municipal court, and had several vacancies for that office because of inability of all the justices to qualify as judges under Const. art. 6, § 11a, Governor could appoint judges to fill such vacancies under Act of 1925, § 17, notwithstanding Pol. Code, §§ 996, 999; "vacancy" being an unoccupied or unfilled post, position, or office, and occurring whenever such position is without an incumbent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Vacancy—Vacant—Vacate (Of Office).]

In Bank.

Application by Charles D. Wallace for writ of mandate, prayed to be directed to H. A. Payne, as County Auditor of Los Angeles County, to compel him to audit and approve a demand of petitioner as Judge of the Municipal Court of the City of Long Beach. Writ granted.

Wm. M. Morse, Jr., of Los Angeles, for petitioner.

Edward T. Bishop, Co. Counsel, R. C. McAllaster, Deputy Co. Counsel, and W. Sumner Holbrook, Jr., Deputy Co. Counsel, all of Los Angeles, for respondent.

RICHARDS, J. The petitioner herein applies for a writ of mandate to be directed to the respondent in his capacity as county auditor of the county of Los Angeles commanding him to audit and approve the petitioner's claim and demand for the sum of \$451.61, alleged to be due petitioner as his salary as judge of the municipal court of the city of Long Beach for the period between August 3, 1925, and August 31, 1925, inclusive. The particular facts upon which said application is based and is resisted are embraced in the stipulation of the parties hereto as to the facts of the case which is, in substance, as follows:

On the 1st day of August, 1925, the Governor of the state of California appointed and commissioned the petitioner herein a judge of the municipal court of the city of Long Beach, who, on August 3, 1925, took the oath of office as such judge of said court and thereupon assumed to be and act as such judge. That the city of Long Beach is a municipal corporation, duly organized and existing in the county of Los Angeles, state of California, and that said municipal corporation is governed under and by a charter duly formed and effected in accordance with the provisions of the Constitution of the state of California. That said municipal corporation had a population, at the taking of the last federal census, of 55,593 inhabitants. That Amendment No. 35 of the Char-

ter of the city of Long Beach, § 249a (St. 1925, p. 1349), was submitted to the qualified voters of the city of Long Beach, at a special municipal election held in the city of Long Beach on the 8th day of April, 1925, and at such special municipal election a majority of the qualified voters of the said city of Long Beach voted thereon in favor of said Amendment No. 35 of the Charter of the said city of Long Beach, and duly ratified the same. That at the time said municipal election was held the Legislature of the state of California was in session, and continued in session some time subsequent thereto, and that said amendment was submitted to the Legislature then in regular session, and the same was approved as a whole, without amendment or alteration by said Legislature on the 18th day of April, 1925, and that all other necessary acts precedent to the adoption of Amendment No. 35 of the said Charter of the said city of Long Beach, were, and each of them was, performed in pursuance of the provisions of law pertaining thereto. That the charter of the said city of Long Beach, as thus amended on the 18th day of April, 1925, provides as follows:

"Municipal Court, section 249a.

"When this amendment takes effect, as hereinafter provided, there shall be established, ipso facto, in the city of Long Beach, a municipal court, as contemplated by sections 1, 5, 11, 12, 14, 18, 23 and 24 of article VI of the Constitution of the state of California as amended in 1924, to exist and be maintained under and in accordance with the provisions of the act of the Legislature of the state of California hereinafter referred to. If the Legislature of the state of California, in its 46th session adopted an act, applicable to the city of Long Beach, in accordance with the said constitutional provision, providing by general law for the constitution, regulation, government and procedure of municipal courts, for the jurisdiction thereof, and for the establishment of municipal courts in cities or cities and counties governed under charters framed and adopted under the authority of said constitution, and such act becomes effective, then, upon the effective date of such act, this amendment shall take effect; otherwise this amendment shall not become operative or become effective for any purpose."

That the city of Long Beach is a city of the second and a half class. That the salary of the judges of the municipal court of a city of the second and a half class is fixed by law at the sum of \$6,000 per annum, payable in equal monthly installments, and that the salary of a judge, duly appointed and sitting in said court on the 3d of August, 1925, to and including the 31st day of August, 1925, would be the sum of \$451.61. That respondent H. A. Payne is the duly appointed, qualified, and acting county auditor of the county of Los Angeles.

The two questions which are thus presented to this court for decision, are these: First. Was a municipal court created and es-

tablished on July 24, 1925, in the city of Long Beach through the adoption and ratification of the aforesaid amendment to its charter in the manner above set forth? Second. Assuming that said municipal court was thus duly created and established within said city of Long Beach, did a vacancy exist in the office of judge of said municipal court which the Governor of the state of California was on August 1, 1925, empowered to fill by the appointment of the petitioner to such judicial office?

The Constitution of the state of California provides the method whereby chartered municipalities may accomplish the amendment of their charters. Section 8 of article 11 of the Constitution, after providing the method by which cities and cities and counties may create and procure the ratification by the Legislature of their charters, proceeds to designate how such charters may be amended. That portion thereof which so provides reads, in part, as follows:

"The charter of any city or city and county may be amended by proposals therefor submitted by the legislative body of the city on its own motion or on petition signed by fifteen per cent. of the registered electors, or both. Such proposals shall be submitted to the electors only during the six months next preceding a regular session of the Legislature or thereafter and before the final adjournment of that session and at either a special election called for that purpose or at any general or special election."

The section then proceeds to specify the method for the preparation and submission of the proposed amendment to the voters of the municipality and for the election to be held therein for the adoption or rejection thereof. The section then proceeds as follows:

"If a majority of the qualified voters voting on any such amendment vote in favor thereof it shall be deemed ratified, and shall be submitted to the Legislature at the regular session next following such election; and approved or rejected without power of alteration in the same manner as herein provided for the approval or rejection of a charter."

[1, 2] The first question presented for our determination in this case revolves around the interpretation to be given to the last above-quoted provision in said section of the Constitution. It is the contention of the respondent herein that the clause therein providing that such amendment when ratified by the voters of the municipality "shall be submitted to the Legislature at the regular session next following such election" must be held to refer, not to a session of the Legislature which may be pending during the period provided for the formulation and adoption of such amendment by the municipality and the voters thereof, but be held to refer to the next subsequent regular session of the Legislature to convene and to be held at a

time after the occurrence of the municipal election at which such amendment was presented for ratification by the voters thereat. We are unable to give to said clause in said section of the Constitution the interpretation contended for by the respondent herein. It is a cardinal rule, to be applied to the interpretation of particular words, phrases, or clauses in a statute or a Constitution, that the entire substance of the instrument or of that portion thereof which has relation to the subject under review should be looked to in order to determine the scope and purpose of the particular provision therein of which such words, phrases, or clauses form a part, and in order also to determine the particular intent of the framers of the instrument in that portion thereof wherein such words, phrases, or clauses appear. Applying this rule of interpretation, first, to the entire substance of section 8 of article 11 of the Constitution, it would seem to have been the purpose of the framers thereof that the procedure to be followed by cities or cities and counties in the formulation and final approval of their charters was one embracing particular limitations as to the time within which the various steps were to be taken in the course of the preparation and submission of such original charters to the voters of the municipality and to the Legislature for final ratification. When a proper petition is presented by the electors of a city or city and county desiring to have a board of freeholders chosen for the framing of such charter, the section requires that the election for the choice of such freeholders shall be called and held not less than 30 nor more than 60 days from the filing of such petition; and, when such board of freeholders have been thus chosen, it is provided that they shall prepare and propose such charter within 120 days after the result of their election is declared; and, when such proposed charter is presented and filed, the legislative body of such municipality must submit the same to its electors at the next special or general election; and, if the majority of such electors then vote for its adoption, such charter shall be submitted to the Legislature, *if then in session*, or at the next regular or special session thereof; and, if ratified thereat, it shall forthwith become the organic law of the city or city and county adopting the same. These several provisions of the section at large are evidently aimed at requiring a degree of expedition in the preparation and adoption of original charters, to the end that, when the electors of a municipality conclude to be governed by a charter, their resolution so to do may become speedily effective. When we come to consider the succeeding portions of said section relative to the amendment of charters, we find the same plan and purpose persisting. It is therein provided that proposals for such amendments can only be submitted to the electors

of the municipality "*during the six months next preceding a regular session of the Legislature, or thereafter and before the final adjournment of that session*"; that the procedure for the adoption of the amendment by the electors shall have the same expedition as that required in the adoption of original charters. Then follows the provision that, when a majority of the qualified voters voting upon such amendment shall have favored the same, it "shall be submitted to the Legislature at the regular session next following such election." When this last-quoted provision is read in the light of the general plan and purpose as disclosed in the section read as a whole, to the effect that charters and amendments to charters shall move from their inception to their approval with defined expedition, and when we consider said last-quoted provision in connection with the preceding clause in said section which provides for the period within the limitations of which charter amendments must be submitted to and voted upon by the electors, viz. "*during the six months next preceding a regular session of the Legislature or thereafter and before the final adjournment of that session*," it becomes reasonably apparent that it was the intent of the framers of these portions of said section of the Constitution that charter amendments, if framed and adopted by the electors of a city or city and county during a pending regular session of the Legislature, might be submitted to that portion of said session thereof which next followed after the said amendments, permissively adopted during such session, were ready for presentation for ratification before such regular session of the Legislature adjourned. Such an interpretation would be in entire harmony with the spirit and purpose of the entire section, which evidently contemplated that, when charters and charter amendments had reached the point of adoption by the electors of a municipality, they should not lie inoperative and ineffective for the two years intervening between successive sessions of the Legislature. Such an interpretation would also be in accord with the statutory policy, that, when cities and cities and counties have once adopted charters, and when they discover that such charters are defective in any particular or are inadequate for the present needs or growth of the municipality, and should be amended, such amendment, in order to be remedial, should be facilitated rather than unreasonably delayed in its adoption.

We can perceive no reason why the framers of this section of the Constitution should have provided that original charters might be submitted for ratification to the Legislature in session at the time of their adoption by the electors of the municipality, but that amendments thereto must lie over until a later session of the Legislature should come into being. If the foregoing views with re-

spect to the meaning to be given to section 8 of article 11 of the Constitution require the aid of cotemporaneous interpretation, it will find such support in the legislative history of charter amendments presented, adopted, and ratified during the 12 years which have elapsed since said section in its present form became a part of the Constitution, many of which amendments have been prepared and submitted to the electors of a goodly number of the municipalities of this state during the progress of legislative sessions, and have been presented to and ratified by then pending sessions of the Legislature. It would work infinite injury to now adopt a different interpretation than that which has been so uniformly accepted and given effect by the leading municipalities of this commonwealth during the past 10 years. We are therefore of the opinion that the amendment to the charter of the city of Long Beach above quoted, and which provided for the establishment of a municipal court in said city of even date with the going into effect of the act of the Legislature providing for the establishment of municipal courts in cities of its population, was regularly adopted and duly ratified by the Legislature, and that the same has been, since July 24, 1925, and still is, in full force and effect, and that, in pursuance thereof, a municipal court was duly established in the said city of Long Beach upon and after said date.

[3] The second question presented by this proceeding is as to whether such a vacancy existed in the office of judge of said municipal court on and after said July 24, 1925, as the Governor of this state was empowered to fill by the appointment of the petitioner herein to such office on the 1st day of August, 1925. This question involves, first, a determination as to whether the several positions of judge of said municipal court provided for cities of the class in which Long Beach comes by virtue of its population had already been filled by operation of law. The city of Long Beach is a city of the second and a half class, and as such, under the provisions of the act of the Legislature of 1925 (Stats. 1925, pp. 648-652) is entitled to five judges of its municipal court. The effect of the decision of this court in the case of *Bakkenson v. Superior Court*, 241 P. 874, this day filed, is to so interpret the constitutional amendment providing for the creation of municipal courts as to hold that justices of the peace in townships lying partly within and partly without chartered cities entitled to establish and establishing municipal courts retain their offices and jurisdiction in and over those portions of such townships as lie without the territorial boundaries of such cities at the time of the establishment of such courts therein, and hence do not become, by virtue of such amendment or of the statute above referred to, judges of such municipal courts. In the case of *Helwig v. Payne*, 241

P. 884, also this day decided, we have held the petitioner therein disqualified to become, as of the date of July 24, 1925, a judge of the municipal court of Long Beach. By this process of elimination there remained, if we are rightly advised, at least two of the five positions of judge of the municipal courts of the city of Long Beach for which no qualified occupants had been provided by operation of said amendment or of the statute giving effect to the same. Did this state of the law and facts cause to exist as to either or both of these positions a vacancy in office which the Governor of California might legally fill by appointment?

[4] The first contention of the respondent to the effect that such vacancy does not exist is based upon his interpretation of the clause in the portion of the amendment to section 11a of article 6 of the Constitution reading:

"Upon the establishment of any such municipal court, and until the first election and the qualification of the judge or judges thereof and the first appointment and the qualification of the clerks and other attachés thereof, the judges or justices and the clerks and other attachés of any existing inferior courts in such city or city and county or township *shall become and act as the judges, clerks and attachés respectively of such municipal court.*"

In making this contention, the respondent lays especial stress upon the use of the article "the" before the word "judges" in the above-emphasized portion thereof, arguing that by the use of the word "the" in this immediate connection the framers of the amendment intended to provide that the judges of the inferior courts who were qualified to become and act as the judges of the municipal court upon the establishment thereof should constitute all of the judges thereof until the occurrence of the first election at which judges of such court could be elected. We are of the opinion that this contention, not only requires altogether too much emphasis to be placed upon the employment of the article "the" in its aforesaid connection, but that to give it such importance and to interpret the clause in which it occurs conformably to the respondent's contention would lead to consequences entirely out of harmony with the apparent design of the framers of this amendment in providing for a system of municipal courts. To illustrate, it is a matter of common knowledge that the purpose lying behind the creation and establishment of these courts in the larger cities of our commonwealth was that of relieving the existing congestion of litigation in these populous centers by providing for the immediate functioning of this new system of courts therein. But, if the respondent is correct in his foregoing contention, and if we are correct in our conclusion as to the number of judges of inferior courts presently qualified to become judges of the municipal court of Long Beach, such court would

enter upon its activities, hampered by the fact that, while five judicial positions are provided for it two or possibly more of these must remain vacant until an election can occur at which such vacancies can be filled, or, in other words, for a year and a half after such court should begin to function, or, to carry the illustration still further, if perchance none of the judges of such inferior courts as held the relation to the city of Long Beach essential to his becoming a judge of the municipal court was qualified to act as such, nevertheless no vacancy would exist therein which the Governor would have the right by appointment to fill. The cases which the respondent cites from other jurisdictions as supporting his aforesaid contention as to the importance of the article "the" in certain situations bear no analogy to the situation presented in the instant case.

The next contention of the respondent is that the term "vacancy," as used in section 17 of the Act of 1925, supra, has no application to the office of judge of the municipal court as to which there has been as yet no incumbency. In support of this contention we are referred to section 996 of the Political Code, which prescribes a series of contingencies upon the happening of which an office "*becomes vacant*" and to section 999 of the Political Code which prescribes that:

"When an office becomes vacant, and no mode is provided by law for filling such vacancy, the Governor must fill such vacancy by granting a commission, to expire at the next session of the Legislature or at the next election by the people."

We are inclined to the opinion that these sections of the Political Code, while they evidently have reference to vacancies which occur in civil offices through the cessation, for the several causes specified therein, of incumbencies in such offices, were not intended to include offices which from the time of their creation are without incumbents until such need is supplied by the election or appointment of qualified persons to fill such offices. The term "vacancy" has a broader meaning than merely that of a hiatus in incumbency. It means, with relation to an office, a state of being unoccupied. In Bouvier's Law Dictionary the word "vacancy" as applied to an office is defined: "A place which is empty. The term is principally applied to cases where an office is not filled." The Century Dictionary defines the term "vacancy" as "an unoccupied or unfilled post, position or office." In the case of *People ex rel., etc., v. Hylan*, 212 N. Y. 236, 106 N. E. 89, Ann. Cas. 1915D, 122, the Governor of New York undertook to fill by appointment the offices of certain county judgeships which had just been created by an amendment to the New York constitution, upon the theory that vacancies in such offices existed as soon as the offices came into being, and which as

Governor he was authorized to fill. His action in so doing was upheld by the New York Court of Appeals in an exhaustive opinion wherein the decisions of the courts of many other jurisdictions are reviewed, and in which, as a result of such review, said court declares that "the general rule is that when a law establishing an office takes effect, a vacancy in the office at once exists, unless the language of the law imports futurity of selection"; and said court further quotes approvingly the definition of the term "vacancy" as given by the Supreme Court of Tennessee in the case of *State ex rel., etc., v. Maloney*, 92 Tenn. 62, 72, 20 S. W. 419, 422, as follows:

"There is a vacancy in every instance in which there is an office without an incumbent. Every office without an officer is vacant. Therefore, every new office created must of necessity be vacant from the time of its creation until it is filled by appointment or election."

See, also, *Cline v. Greenwood*, 10 Or. 230, 240; *State ex rel., etc., v. County Court*, 50 Mo. 317, 11 Am. Rep. 415; *State ex rel., etc., v. McMillan*, 108 Mo. 153, 18 S. W. 784; *In re Fourth Judicial Dist.*, 4 Wyo. 133, 32 P. 850; *Smith v. Askew*, 48 Ark. 82, 2 S. W. 349; *Gormley v. Taylor*, 44 Ga. 76; *State, etc., v. Irwin*, 5 Nev. 111; *Knight v. Trigg*, 16 Idaho, 256, 100 P. 1060; *State ex rel., etc., v. Breckinridge*, 34 Okl. 649, 126 P. 806. A persuasive decision touching this subject is the decision of this court in the case of *Harrison v. Colgan*, 148 Cal. 69, 82 P. 674, which had reference to the appointment and salaries of justices of District Court of Appeal of this state upon the first organization thereof in the year 1905, and wherein this court used the following language:

"We are further of the opinion that the preliminary term of the office of justice of the District Court of Appeal began to run as soon as that office was created by the adoption of the amendment of 1904 to the Constitution. Immediately upon the taking effect of the amendment, and without any regard whatever to the appointment of any person as justice thereof, the District Courts of Appeal became existing courts to which appeals could be taken, and the offices of justices thereof became existing offices to which persons could be appointed. A preliminary term extending to January 7, 1907, immediately began to run, and vacancies in the offices were at once created. These vacancies might have been filled at any time thereafter by the appointment of persons to hold the respective offices for the unexpired part of the preliminary terms then running."

We are therefore of the opinion that immediately upon the establishment of the municipal court in the city of Long Beach and of the occurrence of a condition whereby there were not a sufficient number of judges of inferior courts therein qualified to fill the five positions provided for cities of the class of the city of Long Beach, a vacancy arose and existed in the office of judge of the mu-

municipal court of Long Beach which the Governor of this state was authorized to fill by appointment under section 17 of the Act of 1925, which reads as follows:

"Any vacancy in the office of a judge of a municipal court shall be filled by appointment by the Governor, and any person so appointed shall hold office until the expiration of the term of the office to which he was appointed, and until his successor is elected and qualified."

It being conceded herein that the petitioner as such appointee of the Governor is otherwise qualified to fill such office, and has properly taken the oath of office, and has also made the proper affidavit and demand for the amount of the salary of such office for the payment of which he seeks this writ, it is our conclusion that the writ should issue as prayed for herein. It is so ordered.

We concur: MYERS, C. J.; WASTE, J.; SHENK, J.; LENNON, J.; SEAWELL, J.; LAWLOR, J.

197 Cal. 524

HELWIG v. PAYNE, County Auditor.
(S. F. 11726.)

(Supreme Court of California. Dec. 1, 1925.)

Judges 4—Police court judge, in office at time of municipal court amendment, but not having practiced five years in state, not "eligible" as municipal judge.

A police court judge, in office at time of municipal court amendment to Const. art. 6, Amendment No. 35, § 249a, of Charter of City of Long Beach (St. 1925, p. 1349), and Laws 1925, p. 648, but who had not been practicing law in state for five years prior to taking effect of amendment as required by Const. art. 6, § 23, as to eligibility as municipal judge, *held* not eligible; "eligible" meaning the qualification to hold as well as to be elected to.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Eligible.]

In Bank.

Application by Fred E. Helwig for writ of mandate, to be directed to H. A. Payne, as County Auditor of the County of Los Angeles, to compel him to audit and approve the demand of petitioner for salary as Judge of the Municipal Court of the City of Long Beach. Writ denied.

N. M. Reid and Frank M. Linnell, both of Long Beach, for petitioner.

Edward T. Bishop, Co. Counsel, and Chas. E. R. Fulcher, Deputy Co. Counsel, both of Los Angeles, for respondent.

RICHARDS, J. The petitioner herein applies for a writ of mandate to be directed to the respondent herein in his capacity as

county auditor of the county of Los Angeles, commanding him to audit and approve the petitioner's claim and demand for the sum of \$129, alleged to be due to petitioner as his salary as judge of the municipal court of the city of Long Beach for the period between July 24, 1925, and July 31, 1925, inclusive. The particular facts upon which his said application is based and is resisted are embraced in the stipulation of the parties hereto as to the facts of the case, which reads as follows:

Petitioner was, prior to July 24, 1925, and still is, unless his status as such is affected by the establishment of the municipal court in the city of Long Beach, the duly elected, qualified, and acting police judge of the city of Long Beach. The territorial limits of the city of Long Beach are coextensive with the territorial limits of the police court of the city of Long Beach. Petitioner is an elector of the city of Long Beach, was admitted to practice law before the Supreme Court of Michigan October 5, 1901, and ever since has continuously practiced law. Petitioner was admitted to practice law before the Supreme Court of the state of California on the 19th day of April, 1922. The next municipal election of the city of Long Beach will be held in the month of May, 1927. In pursuance of Amendment No. 35 (section 249a) of the Charter of the City of Long Beach (St. 1925, p. 1349), article 6 of the Constitution of the state of California, and chapter 358, Laws of 1925 of the state of California, there was established in the city of Long Beach, on the 24th day of July, 1925, a municipal court. On the 24th day of July, 1925, petitioner took the oath of office as judge of the municipal court of the city of Long Beach and entered upon and exercised the duties of the judge of said court. On July 31, 1925, petitioner in due form presented his claim for salary as such judge in the sum \$129, but respondent refused, has ever since refused, and still refuses, to pay said sum or any part thereof."

The primary question which stands upon the threshold of this proceeding is this: Assuming, as the parties hereto assume, that the proper interpretation of the recent constitutional amendment relating to the creation of municipal courts and of the recent statute adopted in conformity therewith permits the establishment of a system of municipal courts in the city of Long Beach; and assuming that the said municipality has by proper amendment to its charter established such system of municipal courts, has the petitioner herein become by virtue thereof a judge of said municipal court, and as such entitled to the salary of such office, notwithstanding the fact that he has not been an admitted practitioner before the Supreme Court of this state for the period of 5 years immediately prior to the period during which he claims to have been a judge of the municipal court of the city of Long Beach and as such entitled to the salary of such office?

The provisions of the recent amendment to

certain sections of article 6 of the Constitution of California relative to the qualifications of judges of municipal courts are two. The portion of section 11 thereof, which relates thereto, reads as follows:

"Upon the establishment of any such municipal court, and until the first election and the qualification of the judge or judges thereof and the first appointment and the qualification of the clerks and other attachés thereof, the judges or justices and the clerks and other attachés of any existing inferior courts in such city or city and county or township shall become and act as the judges, clerks and attachés respectively of such municipal court."

The other provision in said constitutional amendment relative thereto is section 23 thereof, which reads as follows:

"No person shall be eligible to the office of a justice of the Supreme Court, or of a District Court of Appeal, or of a judge of a superior court, or of a municipal court, unless he shall have been admitted to practice before the Supreme Court of the state for a period of at least five years immediately preceding his election or appointment to such office."

It is the contention of the petitioner herein that, by the use of the phrase in the former of the two above excerpts from the constitutional amendment reading, "the judges or justices * * * of any existing inferior courts * * * shall become and act as the judges * * * of such municipal court," the then qualified police judges and city or township justices within the municipality establishing such municipal court should continue in office until the next municipal election, with merely the change of title to that of judges of the municipal court, and with the added jurisdiction given to such courts; and that the provisions embraced in section 23 of said amendment can only have been intended to have application to those judges of municipal courts who were to be subjects of election thereafter, or of appointment in the event of vacancies in such office. This contention, while it has much of plausibility to support it, is one to which we are unable to give our adherence. The foregoing provisions of the constitutional amendment are to be read together as though they were embraced in one and the same section thereof, and are to be interpreted consistently, if possible, with each other. So interpreted, it seems to us that section 23 of said amendment was intended to define and state an essential qualification of those persons who were to become and be and act as judges of municipal courts. This view gains added force when it is noted that section 23 of said constitutional amendment is not in its entirety a new section imported into our Constitution by such amendment, but that in the main it is the original section thereof as adopted in 1879 and as applicable to the judges and justices of all courts of record then and thereby called into being; that the

phrase "or of a District Court of Appeal" was added thereto when such courts came into existence; that the phrase "or of a municipal court" was introduced therein by the recent amendment; that the concluding clause in said amendment relating to the period of time during which the judges and justices referred to in said section shall have been practitioners before the Supreme Court prior to their election or appointment to their respective offices has reference not merely to judges of the municipal court, but to the judges and justices of all courts of record. With this analysis of section 23 of said amendment in mind, it would seem to be clear that the phrase therein, "preceding his election or appointment to such office," is not to be given the narrow application for which the petitioner herein contends, nor to have reference merely to the particular situation arising out of the establishment of municipal courts, but that on the contrary the provisions of said section, taken as a whole, were intended originally, and as from time to time amended, to set forth an essential qualification of all occupants of the office of judge or justice of any and all courts of record within this state.

The petitioner, in support of his aforesaid contention, urges that we should give to the term "eligible," as used in section 23 of said amendment, a meaning synonymous with "electible" and thus confine the scope of said section so as to exclude the sort of succession to the office of judge of the municipal court provided for in the preceding portion of said amendment, and cites *Ward v. Crowell*, 142 Cal. 587, 76 P. 491, as supporting his said contention. We do not so read that decision, nor do we find that it was intended to in any way overrule or depart from the definition of the term "eligible" as given in the case of *People v. Leonard*, 73 Cal. 230, 14 P. 853, wherein this court held that said term, when found in the Constitution, must be construed to mean "the qualification to hold as well as to be elected to" the particular office. We approve the foregoing definition of that term as applicable to its use in section 23 of said amendment to the Constitution, especially since the same expression appears in said section in its original form.

The petitioner further argues that, if the interpretation of the foregoing provisions of the constitutional amendment for which he contends is not adopted, a serious condition will arise with relation to municipal courts and their judges, for the reason that neither the amendment in question nor the statute recently enacted for the purpose of giving effect to its provisions contemplate the appointment by the Governor of any person or persons to the office of judge of the municipal court until a vacancy has occurred in such office, and that such vacancy can occur only through cessation of a prior incumbency. This question, however, is fully discussed in

the case of *Wallace v. Payne*, 241 P. 879, this day decided, and to which reference is hereby made for a determination of this question.

It is our conclusion from the foregoing considerations that the application of the petitioner herein for a writ of mandate should be, and the same is hereby, denied.

We concur: MYERS, C. J.; SEAWELL, J.; SHENK, J.; WASTE, J.; LAWLOR, J.; LENNON, J.

Joseph H. Watts for writ of habeas corpus prayed to be directed to the Warden of San Quentin to secure return of petitioner to custody of Sheriff of San Bernardino County pending appeal from a judgment of conviction of murder in first degree with sentence of death. Writ granted.

Fred A. Wilson, of San Bernardino, for petitioner.

Wm. F. Cleary, Deputy Atty. Gen., for respondent.

197 Cal. 611

Ex parte WATTS. (Cr. 2836.)

(Supreme Court of California. Dec. 15, 1925.)

1. Criminal law ☞1219—Confinement in state prison pending execution is in addition to other punishment for capital crime.

Requirement of Pen. Code, § 1217, that a defendant upon whom sentence of death has been imposed be confined in state prison pending execution thereof, is a part of punishment for crime and is in addition to punishment provided for prior to 1891.

2. Criminal law ☞1084—Appeal from conviction in capital case stays execution of death penalty alone.

Under amendment of 1874 to Pen. Code, § 1243, providing that appeal from judgment of conviction stays execution in all capital cases, it is intended that taking of an appeal should automatically stay execution of death penalty alone without granting of certificate of probable cause under section 1243.

3. Criminal law ☞1084—Portion of judgment requiring detention in state prison pending infliction of death penalty stayed only on issuance of certificate of probable cause.

Under Pen. Code, § 1243, providing that appeal from judgment of conviction stays execution in capital cases and in all other cases on filing of certificate of probable cause, such portion of punishment, on conviction of murder, as requires detention in state prison pending infliction of death penalty, is comprised within phrase "in all other cases" in section 1243 and is stayed only on issuance of certificate of probable cause.

4. Criminal law ☞1084—Granting or denial of certificate of probable cause within sound discretion of trial court.

The granting or denial of certificate of probable cause on appeal from conviction in criminal case under Pen. Code, §§ 1243-1245, so as to stay execution of so much of punishment as requires imprisonment of defendant in state prison pending hearing of appeal, is within sound discretion of judge to whom application therefor is made.

Lawlor, J., dissenting.

In Bank.

In the matter of the application of Joseph H. Watts for a writ of habeas corpus. Appli-

MYERS, C. J. Watts was convicted in the superior court of San Bernardino county of murder in the first degree, without recommendation, and judgment was duly rendered imposing the death penalty. He gave oral notice of appeal in open court at the time of the rendition of judgment and thereafter filed his written notice of appeal therefrom. A warrant of execution was duly signed, attested, issued, and delivered to the sheriff in accordance with the provisions of Penal Code, § 1217, pursuant to which Watts was taken by the sheriff to San Quentin and there delivered to the custody of the warden of the state prison. Thereafter, upon application of the defendant, the trial judge issued a certificate of probable cause pursuant to the provisions of Penal Code, § 1243, and the same was thereupon duly served upon the sheriff of San Bernardino county and also upon the warden of the state prison at San Quentin, coupled with a demand that the defendant be redelivered to the sheriff of San Bernardino county and returned to the county jail of that county to be there kept pending the hearing and determination of his appeal. These demands being refused, application was made to this court for a writ of habeas corpus to compel the return of the defendant to the custody of the sheriff of San Bernardino county. At the conclusion of the hearing before this court upon the return to the writ, it was the opinion of the majority of the justices that the application should be granted, and an order to this effect was thereupon made from the bench.

Section 1243 of the Penal Code provides as follows:

"An appeal to the Supreme Court from a judgment of conviction stays the execution of the judgment in all capital cases, and in all other cases, upon filing with the clerk of the court in which the conviction was had, a certificate of the judge of such court, or of a justice of the Supreme Court, that, in his opinion, there is probable cause for the appeal, but not otherwise."

Section 1244 of the Penal Code, provides:

"If the certificate provided for in the preceding section is filed, the sheriff must, if the defendant be in his custody, upon being served with a copy thereof, keep the defendant in his

custody without executing the judgment, and detain him to abide the judgment on appeal."

Section 1245 of the Penal Code provides:

"If before the granting of the certificate, the execution of the judgment has commenced, the further execution thereof is suspended, and upon service of a copy of such certificate the defendant must be restored, by the officer in whose custody he is, to his original custody."

[1-3] The requirement of Penal Code, § 1217, that a defendant upon whom sentence of death has been imposed shall be confined in a state prison pending the execution thereof, is a part of the punishment for the crime and is in addition to the punishment therefor which was provided prior to 1891. *Ex parte Medley*, 134 U. S. 160, 10 S. Ct. 384, 33 L. Ed. 835; *People v. McNulty*, 3 Cal. Unrep. 441, 28 P. 816; *Id.*, 93 Cal. 427, 26 P. 597, 29 P. 61; *People v. Durrant*, 119 Cal. 201, 208, 51 P. 185. We are of the opinion, however, that by the amendment of 1874 to the Penal Code, § 1243, whereby it was provided that an appeal from a judgment of conviction stays the execution of the judgment in all capital cases, the Legislature intended that the taking of an appeal should automatically stay the execution of the death penalty alone. *Ex parte Fredericks*, 104 Cal. 400, 38 P. 51. Obviously, the execution of the defendant pending his appeal would render the appeal utterly valueless, and the Legislature intended that such a result should not be dependent upon the hazard of granting or failing to grant a certificate of probable cause. This consideration, however, presents no reason why the taking of an appeal from the judgment of conviction should automatically stay the execution of that portion of the death warrant which requires the detention of the defendant in a state prison pending the infliction of the death penalty. We are of the opinion that this portion of the punishment is comprised within the phrase "in all other cases," and is not stayed therefore except upon the issuance of a certificate of probable cause. This view is suggested by what was said in *Ex parte Fredericks*, *supra*, wherein this court said:

"Even if this imprisonment is to be regarded as a part of the penalty it stands upon the same grounds as other judgments of imprisonment. It is not stayed without a certificate of probable cause for the appeal. * * *"

That a certificate of probable cause may issue in a capital case is the implication which arises out of what was said or done by this court, or by the justices thereof, in the following cases: *People v. McNulty*, 95 Cal. 594, 597, 30 P. 963; *People v. Fredericks*, *supra*; *People v. Durrant*, *supra*; *People v. Durrant*, 119 Cal. 54, 50 p. 1070; *People v. Ebanks* (not reported, but referred to in *People v. Durrant*, 119 Cal. 210, 51 p. 185); *People v. Sliscovitch* (an order of this court

made October 6, 1923, not reported); *People v. Arnold and Sayer* (an order of this court made March 12, 1925, not reported). The only suggestion to the contrary to be found in our reports, so far as we are advised, is in the opinion of Chief Justice Beatty in *People v. Ross*, 135 Cal. 59, 67 p. 13. That is not an opinion of the court and has never been expressly approved or disapproved by the court. The principal ground upon which the Chief Justice based his conclusion in that case has since been eliminated by the 1905 amendment to section 1227 of the Penal Code, taking away the right to appeal from an order fixing the time for the execution of the death penalty.

[4] Our conclusion is that upon an appeal from a judgment imposing the death penalty a certificate of probable cause may be issued by the judge of the trial court or a justice of this court, the effect of which is to stay the execution of so much of the judgment as requires the imprisonment of the defendant in a state prison pending the hearing and determination of his appeal. The granting or denial of such certificate is a matter within the sound discretion of the judge or justice to whom application therefor is made.

We concur: WASTE, J.; LENNON, J.; RICHARDS, J.; SHENK, J.

LAWLOR, J. I dissent. The precise question presented by this proceeding is whether the custody of a defendant in a capital case pending appeal is with the sheriff of the jurisdiction or the warden of the state prison.

Three propositions appear clear: First, that the subject-matter is exclusively within the control of the Legislature; second, that the legislative policy contemplates that the custody shall be with the warden pending appeal; and, third, that not a single reasoned case can be said to be opposed to the legislative rule.

1. It will not be questioned that the entire subject involved by this proceeding is within the competence of the Legislature.

2. Section 1243 of the Penal Code deals exclusively with stays of execution of the judgment of conviction in all cases appealed from the superior court and divides them into two classes: (a) Capital cases, and (b) all other cases.

It will be noted that under section 1243 the appeal from the judgment *ipso facto* stays the execution in capital cases, but that "in all other cases" a certificate of probable cause is requisite and is the exclusive mode of staying the execution of the judgment. The practice in capital cases is to serve on the warden a certified copy of the notice of appeal whether the appeal is from the judgment or an appealable order entered after final judgment. See, for instance, *Ex parte Fredericks*, 104 Cal. 400, 38 P. 51. The conclusion follows that under the statute law a

certificate of probable cause has no application to a capital case and that the appeal, of itself, by the terms of section 1243, stays the execution. Prior to the amendment of section 1217 in 1891 (Stats. 1891, p. 272), the execution of the judgment in capital cases was carried out by the sheriff in the county jail where the prisoner was at all times confined following conviction and pending the execution, and therefore the question here presented could not, prior to said amendment, arise during the pendency of an appeal from the judgment. By the terms of said amendment all executions were required to take place in the penitentiary, the amendatory language of section 1217 reading, in part:

"And must direct the sheriff to deliver the defendant, within ten days from the time of judgment, to the warden * * * for execution.
* * *

A similar requirement is made a part of the proceedings under section 1227 where the execution has not taken place on the day fixed by the warrant of execution or any subsequent order. Hence there are two provisions (sections 1217 and 1227) expressing the legislative policy that the custody of a capital prisoner shall be in the warden pending appeal from the judgment or pending execution of the judgment, after it has become final, upon an order fixing the final day for carrying it into effect.

In view of the plain term of sections 1217 and 1227, it is proper to hold that if the Legislature had contemplated any departure from the prescribed statutory policy thus declared, it would have expressly so provided. From the foregoing I conclude that by sections 1217 and 1227 the Legislature intended that from the time of the delivery of the prisoner to the warden and until his execution he must be in the custody of the warden, except when his presence is required in judicial proceedings. Section 1217 provides that the prisoner and the warrant for the execution of the judgment of death shall be delivered to the warden at the same time, thus enabling the executing officer to be prepared to carry the judgment into effect at the time fixed in the warrant. The stay of the execution beyond the time specified in the warrant, the judgment remaining in force, brings into operation the provisions of section 1227 requiring the trial court to enter an order fixing another day upon which the judgment shall be executed and providing that "a certified copy of such order * * * be transmitted * * * to the warden * * * having the custody of the defendant." Here, again, the warden having the prisoner in his custody is prepared to execute the judgment on the day fixed in such order without any further authority or direction. It is therefore plainly the legislative purpose that the defendant shall, from the time of delivery to the war-

den with the warrant and until the execution of the judgment, be in the custody of the executing officer, so that whether the execution be carried into effect on the day indicated in the warrant or in subsequent order the prisoner is required to be always available to the executing officer. This conclusion finds support in the italicized language of the above-quoted expression.

3. It may be confidently affirmed under this head that no opinion has declared that the custody of a capital prisoner pending execution is not with the warden of the penitentiary.

In *People v. McNulty*, 95 Cal. 594, 30 P. 963, the judgment of conviction had become final on appeal. The defendant thereafter took an appeal from the order fixing the final day of execution within the meaning of section 1227 and subdivision 3 of section 1237. After quoting section 1243, the court said:

"It is clear from the reading of this section that it is only the appeal from the judgment of conviction * * * that stays the execution *proprio vigore*. In case of any other appeal, such, for instance, as this appeal from an order after judgment, the mere appeal has no effect in staying execution, unless the judge of the superior court or a justice of this court will grant a certificate of probable cause for the appeal."

That case did not involve the question of the proper custody of the condemned pending appeal, and what was said touching the necessity of a certificate of probable cause was stated only in response to the argument of the Attorney General that if the appeal from such order operated in one case to stay the execution, it would have the same effect on successive appeals, and therefore the judgment of conviction would never be executed.

Ex parte Fredericks, 104 Cal. 400, 38 P. 51, involved an appeal by the defendant from the judgment of death. Before taking the appeal, his custody had been transferred by the sheriff to the warden of the penitentiary. A certified copy of the notice of appeal was served upon the warden coupled with a demand for the return of the defendant to the custody of the sheriff, which demand was refused. In the proceeding a writ of habeas corpus was sought to effect a transfer of his custody to the sheriff. The court in denying the issuance of the writ declared:

"The imprisonment of the petitioner is not unlawful. It is true that, by section 1243 of the Penal Code, it is provided that an appeal to the Supreme Court from a judgment of conviction stays the execution of the judgment in all capital cases. But the intention of the Legislature in adopting this provision was merely to prevent the infliction of the death penalty pending the appeal, and it has not acquired any different meaning or effect since, or by reason of the change of the law by which in capital cases the prisoner is confined in the state prison pending the execution of the sentence of death."

The only question concerned in that proceeding was whether or not the appeal from the judgment of conviction operated, of itself, to stay the custody of the defendant in the warden. After answering the question in the negative, the opinion concluded with this suggestion:

"Even if this imprisonment is to be regarded as a part of the penalty it stands upon the same grounds as other judgments of imprisonment. It is not stayed without a certificate of probable cause for the appeal, and no such certificate has been granted in this case."

People v. Durrant, 119 Cal. 54, 50 P. 1070; *Id.*, 119 Cal. 201, 51 P. 185, embraced two appeals from two orders of the superior court fixing a day for the execution of the judgment of death after it became final on appeal. Following the making of the first order, the sheriff, in conformity with section 1227 of the Penal Code, was ordered to deliver the defendant to the warden at San Quentin within ten days. The transcript of the record which was to be considered on the first appeal was filed too late to admit of a submission and decision under the rules of the court before the day appointed for the execution. Neither of the parties asked for an order to expedite the hearing, but the defendant applied to the justices for a certificate of probable cause for his appeal, which, it was stated in the opinion, would have the effect of staying the execution. It appears that no justice of the court was willing to certify there was any probable cause for the appeal, and the execution would have taken place except for a habeas corpus proceeding instituted in the Circuit Court of the United States in behalf of the defendant. His petition for the writ of habeas corpus was denied by the United States Circuit Court, but his appeal to the Supreme Court of the United States was allowed, the effect of which was to stay all proceedings under the judgment and order of the state court. Pending the proceedings in the federal courts, the hearing of the appeal in this court from the order fixing the final day of execution was continued from time to time, until word was received by telegraph that the Supreme Court of the United States had dismissed the appeal in the habeas corpus proceeding when an order was made in the superior court requiring the sheriff to produce the body of the defendant in open court on the following day to enable said superior court to determine whether any legal reasons existed why the judgment of death should not be executed.

In response to said demand upon the sheriff, the defendant made a showing that no remittitur, mandate, or order had been received from the Supreme Court of the United States showing any disposition of the appeal in the habeas corpus proceeding. To this showing by the defendant no counter

showing whatever was made on the part of the people. The superior court overruled these and other objections and made an order directing the execution of the judgment of death two days later.

From this, the second order fixing the final day of execution, the defendant immediately appealed, but his bill of exceptions was not settled and allowed until either six or ten days after the order commanded the execution of the judgment of death. Upon a petition for a certificate of probable cause addressed to the Supreme Court, supported by a showing of some of the proceedings in the superior court, certified by the county clerk, such certificate was immediately granted by the concurrence of six of the seven justices and certified to the warden at San Quentin in time to stay the execution. A transcript of the record on this appeal was duly filed in the Supreme Court, upon which a certificate of probable cause was issued.

The court stated that in a capital case an appeal from an order after final judgment does not operate, of itself, to stay the execution, but that a certificate of probable cause is necessary. It was also stated "that imprisonment in the penitentiary pending execution does add something to the punishment prescribed * * * for the crime of murder prior to the amendments of 1891," citing *People v. McNulty*, 93 Cal. 427, 26 P. 597, 29 P. 61, and *Ex parte Medley*, 134 U. S. 160, 10 S. Ct. 384, 33 L. Ed. 835. The court then concluded:

"It is therefore a point settled, so far as the deliberate opinion of this court can settle it, that imprisonment in the penitentiary pending execution is a distinct part of the punishment for murder prescribed by our law."

However, it was conceded by the court that—

"There is no restriction upon the power of the Legislature to prescribe double, treble, or any number of punishments for an offense, except that they must not be cruel and unusual, and must not be applied *ex post facto*."

All the defendant sought in the *Durrant* Cases, and necessarily all that was granted, was a stay of the execution. The question was not presented, nor did the court decide, whether or not the custody of the defendant in the warden would be stayed, as well as the execution, in the event a certificate of probable cause should issue.

I may pause here to point out that the decision in *Ex parte Medley*, *supra*, by a divided court, held that the Colorado statute there in question violated the federal guaranty against the enactment of *ex post facto* laws. The statute of Colorado, differing from the California law, required, among other things, that the condemned should be kept in solitary confinement, and the court held that this was punishment additional to that provided

at the time the crime was committed. It is open to question whether *Ex parte Medley*, supra, is authority in a case not involving solitary confinement pending execution. I am of the opinion that confinement in the state prison is not a part of the judgment any more than is the issuance and the delivery to the warden of the warrant; each being merely an incident to the carrying of the judgment into effect. Logically, if confinement in the state prison constitutes additional punishment, then detention in the county jail would also have that quality.

In *People v. Ross*, 135 Cal. 59, 67 P. 13, the defendant applied to the Chief Justice for a certificate of probable cause staying his execution after the judgment had become final and pending an appeal from an order fixing another day for carrying the judgment into effect, the judge of the superior court having declined to grant the stay. While this was not a decision by the court, I deem it worth while to quote the following from the opinion of the Chief Justice as bearing on the proper interpretation of section 1243 and the general subject of a stay of proceedings in a capital case:

"The statutory provision relating to certificates of probable cause is found in section 1243 of the Penal Code, which in terms embraces only appeals from judgments, and does not embrace appeals from orders after judgment. It has sometimes been assumed in the discussion of other matters that the provision would be construed as applying to appeals such as the present (*People v. McNulty*, 95 Cal. 594 [30 P. 963]); but the proper construction of the law has never been settled by a decision of the court, and, of course, cannot be settled by any decision or order that I might make without the concurrence of my associates. In *People v. McNulty*, 95 Cal. 594 [30 P. 963], all that was decided was that an appeal from an order fixing the date for executing a capital sentence, does not, proprio vigore, stay the execution. In making this decision, it was said, arguendo, that a certificate of probable cause from the trial judge, or from a justice of this court, would be necessary, but the case did not call for a decision that such a certificate would be sufficient to operate a stay, and the question was therefore not decided. In *People v. Durrant*, 119 Cal. 54 [50 P. 1070, Id., 119 Cal. 203, 51 P. 185], the application was made to and acted upon by all the justices. It was in fact an application to the court for a *supersedeas* in aid of its appellate jurisdiction, and was dealt with as such. I think the proceedings in that case indicate the opinion of the court as to the proper practice in all similar cases, and I shall conform to it, not only because it is a proper and commendable practice, but more especially because, while my power in the premises is doubtful, that of the court is beyond question.

"I may add that, in my opinion, there are substantial grounds upon which the legislature may be supposed to have intended to make a different rule as to the stay of proceedings upon an appeal of this character and an appeal from a final judgment. On appeals from the judgment a stay of proceedings may be safely and

properly granted by the trial judge or by a single justice of the Supreme Court, because no serious inconvenience can result from his mistake, if it turns out that in the opinion of the court the judgment is free from error. But on appeals from orders such as that in question here, where the effect of a stay would generally be to make another order of the same kind necessary, from which a new appeal could be taken, the mere doubts of a single judge, if he could act alone, might result in the indefinite postponement, or even the ultimate prevention, of the execution of a capital sentence in a case where the court on the hearing would find no ground for questioning the propriety of the order or orders appealed from. In such a case the granting of the stay must depend upon some apparent merit in the appeal, and that is a matter which the court alone is competent to decide. The decision should be made by the tribunal upon which the responsibility rests.

"For these reasons I shall decline to act upon the petition, leaving the appellant at liberty to apply to the court for a *supersedeas*, according to the practice in *People v. Durrant*, 119 Cal. 54 [50 P. 1070]. (Italics added.)

The *McNulty Case*, the *Fredericks Case*, the two *Durrant Cases*, and the *Ross Case* are the only ones since the amendment of 1891 I have found that have discussed the question of a stay in capital cases, and, with the exception of the *Fredericks Case*, none of these has dealt with the question of custody pending appeal, but were concerned alone with a stay of execution. Furthermore, *Ex parte Fredericks*, supra, is the only one in which, as here, the appeal was from the judgment; the others involved appeals from orders made after final judgment.

If the statement of the late Chief Justice Beatty in the *Ross Case*, who was also the author of the opinions in the *McNulty Case*, 95 Cal. 594, 30 P. 963, the *Fredericks Case*, supra, and the final opinion in the *Durrant Case*, 119 Cal. 201, 51 P. 185, is to be accepted, and it was never questioned by the other justices, none of the above cases ever decided that a certificate of probable cause was necessary for any purpose in a capital case and any intimation to the contrary in the above *McNulty Case* "was said arguendo." It has been shown that the reference in *Ex parte Fredericks*, supra, to a certificate of probable cause to stay the custody was merely by suggestion, and that the only point decided was that under section 1243 the appeal from the judgment in a capital case stayed the execution alone. Whatever significance may attach to the circumstance that the two *Durrant Cases*, in terms, characterized the relief granted as certificates of probable cause, there would seem to be warrant for the statement of Chief Justice Beatty in the *Ross Case* that *supersedeas* and not certificates of probable cause was what was sought and granted for in both cases the action was taken by the court as distinguished from an individual justice. It may be stated

that section 1243 contains the only provision relating to a certificate of probable cause. That section provides that the application must be made to the judge of the superior court, who tried the case, or in the event he declines to grant the certificate of probable cause then to a justice of the Supreme Court. And while the relief under either mode would have the same legal effect (8 Cal. Jur. p. 552, § 555), of course, an individual judge or justice could not grant supersedeas, nor a court a certificate of probable cause.

It is clear from what Chief Justice Beatty said in the Ross Case that his mind was fixed on three propositions—and no statement to the contrary appears in any of our decisions since that time—first, that section 1243 deals alone with appeals from the judgment; second, in capital cases the appeal from the judgment, of itself, operates to stay the execution thereof, whereas “in all other cases” on appeal from the judgment a certificate of probable cause is necessary to stay its operation; and, third, where, in any case, the appeal is from an order made after final judgment, section 1243 has no application, and in order to effect a stay of the judgment supersedeas alone, as an aid to the complete exercise of appellate jurisdiction (Const. art. 6, § 4), is the remedy.

I have pointed out that a certificate of probable cause is no part of the procedure prescribed by the first classification of appeals from the judgment—capital cases—in section 1243 and there is no other provision of law contemplating such a practice. Moreover, the statutory stay of the judgment in capital cases by virtue of the appeal therefrom renders unnecessary a certificate of probable cause in such cases. For the reasons already advanced the stay of the judgment in capital cases does not affect the custody of the defendant in the warden pending execution.

A certificate of probable cause is provided for in cases coming within the second classification of appeals from the judgment in section 1243, and in such cases a record must be presented upon which the judge or justice, as the case may be, may determine whether there is probable cause for the appeal under the rule. In *re Adams*, 81 Cal. 163, 166, 22 P. 547; *People v. Gallanar*, 144 Cal. 656, 79 P. 378. In the event the certificate of probable cause is granted, it operates to stay the execution of the judgment and the custody (sections 1244 and 1245). The construction I have given to section 1243 would confine the two succeeding sections (1244 and 1245) exclusively to appeals other than in capital cases. On an appeal from an order after final judgment, in any case, a record is also required and the same test will be applied in determining whether supersedeas shall be granted. There is no provision of law for a certificate of probable cause to stay the operation of the judgment in this latter group

of cases, and this no doubt prompted Chief Justice Beatty to declare in the Ross Case that the proper remedy is supersedeas.

Where the appeal in a capital case is from an order after final judgment and supersedeas is granted, the execution alone, and not the custody, as on an appeal from the judgment of death, is stayed.

I find that since the Ross Case only two applications have been made to this court to stay the custody of a capital prisoner pending the preparation of the record upon which application would subsequently be made for a certificate of probable cause to stay the custody in the warden pending appeal from the judgment. The first of these cases is *People v. Sliscovitch*, Criminal No. 2613, and the second, *People v. Arnold and Sayer*, Criminal No. 2773. In the *Sliscovitch* Case, application was made by the defendant for a stay, both of the execution and custody, pending the preparation of the record on appeal upon which he intended to seek a certificate of probable cause to affect a transfer of his custody from the warden to the sheriff pending appeal. The Attorney General objected to granting the application, claiming that in capital cases the certificate of probable cause had no proper place and that the only stay involved in such cases was the stay of the execution—the stay being effected merely by the taking of the appeal. The court made an order, without opinion, staying the execution and directing the transfer of the defendant from the penitentiary to the custody of the sheriff pending the hearing and determining of such application for a certificate of probable cause. The terms of the application indicate the defendant's appreciation of the rule that the appeal from the judgment alone stayed the execution itself.

In the *Arnold and Sayer* Case the application is identical with that of the *Sliscovitch* Case, but it was denied, without opinion, the order reading: “The within application for a stay of execution is denied.” It seems to me that these rulings are inconsistent, for if it would be proper in the one case to stay the custody until an application for a certificate of probable cause to stay the custody pending the appeal from the judgment of conviction had been presented and determined, it would be equally proper in the other.

Succinctly stated, the situation is this: It is the legislative policy that the condemned prisoner awaiting execution is to be kept in the custody of the warden (sections 1217 and 1227); the requirement is no more subject to judicial intervention than is the mode of punishment prescribed by the Legislature. The safe custody of a person condemned to death is second only in importance to the execution itself. It is as necessary to the performance of the duty of the warden as is the warrant for the execution of the

judgment. Once condemned every presumption and intentment is in favor of guilt. It is idle to hold that a different rule should not apply to prisoners condemned to death than to those awaiting imprisonment for less grave crimes. The desire to cling to life is an inherent quality in human nature. Hence, with death facing a condemned prisoner, there would be every inducement to plot, to confederate with persons on the outside, to attempt to escape from a county jail lacking the safeguards of a penitentiary, or to accomplish self-destruction.

The question of custody being one of legislative control, and sections 1217 and 1227 prescribing that the warden shall have the custody of the condemned, in the absence of a plain provision that pending proceedings after judgment and before execution the custody must be transferred to the sheriff, there is no warrant for judicial intervention in this regard. Conceivably, the Legislature could have provided for a stay of custody as it did for a stay of execution, but as it has not done so the requirement of sections 1217 and 1227 must be deemed mandatory pending execution.

While the only question presented for decision here is whether the custody of a condemned prisoner in the penitentiary may be stayed pending execution, it may be appropriate to briefly consider whether in the absence of statutory provision there may be a stay of execution pending an appeal from an order before judgment denying a defendant's motion for a new trial. As already indicated, section 1243 would not authorize a stay other than by an appeal from a judgment of conviction. Ordinarily the appeal from the order denying a motion for a new trial and the appeal from the judgment are taken together and determined at the same time. But if, for any reason, the appeals were presented separately, possibly after the judgment had become final, and the appeal from the order could not be seasonably determined, the propriety of granting supersedeas would necessarily arise. There is no statutory provision for staying the execution pending an appeal from an order denying a motion for a new trial, and in such a situation the procedure, already described, would be similar to that applicable to appeals from orders after final judgment, and, as in the latter class of cases, should supersedeas be granted the writ would stay the execution alone.

The conclusion in the majority opinion rests primarily upon the assumption that the imprisonment in the penitentiary pending execution "is a part of the punishment for the crime and is in addition to the punishment therefor." Even if this be conceded, for present purposes, it will not be questioned that the Legislature is competent to

provide that a capital prisoner shall be confined in the penitentiary pending execution, and that the propriety of such a provision would be beyond judicial review. It was stated in the second Durrant Case, 119 Cal. 201, 208, 51 P. 185, that the Legislature might impose any number of punishments for a crime provided they were not cruel and unusual or applied *ex post facto*. Therefore, the determinative question here is not whether imprisonment in the penitentiary pending execution is additional punishment, but rather whether the Legislature, acting within its powers, has provided that the custody of a capital prisoner shall be in the warden pending execution. I see no escape from the conclusion, already announced, that the Legislature has so deliberately provided.

In my opinion the writ of habeas corpus should be discharged and petitioner remanded to the custody of the warden.

75 Cal. App. 38

PEOPLE v. RAPLEE. (Cr. 1260.)

(District Court of Appeal, First District, Division 1, California. Nov. 3, 1925. Rehearing Denied Dec. 2, 1925. Hearing Denied by Supreme Court Dec. 31, 1925.)

1. False pretenses — 31, 32—Allegations of facts in information sufficient to allege public offense, under statute.

Information for obtaining money by false pretenses, held sufficient to state a public offense, under Pen. Code, § 532, as against contention that it did not show ownership of money in prosecuting witness or causal connection between pretenses and effect on prosecuting witness.

2. False pretenses — 38—Where defendant represented to prosecuting witness that promissory note was receipt, there was no fatal variance between information and evidence.

In a prosecution for obtaining money by false pretenses, there was no fatal variance between information alleging money was obtained for worthless stock and evidence showing defendant gave prosecuting witness his promissory note, which was later exchanged for stock, where defendant represented to the prosecuting witness that note was mere receipt for money paid.

3. False pretenses — 49(1)—Defendant's making of false pretenses held sufficiently corroborated by the evidence.

In a prosecution for obtaining money by false pretenses consisting of representation as to ownership of stock in mine, and worth of mine, and stock, corroboration as to the making of false representations, required by Pen. Code, § 1110, held sufficient.

4. False pretenses — 48—Evidence of profits from operation of adjoining mine inadmissible.

In a prosecution for obtaining money under false pretenses as to ownership of stock sold

and worth of mine, *held*, that evidence of profits made by adjoining mine was inadmissible.

5. False pretenses ⚡48—Evidence as to value of mine subsequent to making of representations, and at time company had lost rights therein, properly rejected.

In a prosecution for obtaining money under false pretenses as to ownership of stock and worth of stock and property, *held*, that evidence as to value of mine subsequent to the making of the representations, and at a time when company had lost rights thereto, was properly rejected.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Wm. H. Raplee, was convicted of obtaining money by false pretenses. He appeals. Affirmed.

Myron Harris, of Oakland, Timothy Healy, of San Francisco, and Henry G. Tardy, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

TYLER, P. J. Appellant was charged by information with a violation of section 532 of the Penal Code in having obtained by false pretenses the sum of \$2,225 from the prosecuting witness, the alleged false pretenses consisting in the misrepresentations that he was the owner of certain shares of stock in a mining company; that the mine was a good, prosperous working one, the shares of which were worth \$1 each. He was tried and convicted and this is an appeal from the judgment and order denying a new trial and a motion in arrest of judgment. Various grounds of error are assigned, which it is claimed justify the setting aside of the judgment of conviction.

[1] It is first contended that the information is fatally defective in substance as it fails to allege a public offense. In this contention it is claimed that it omits to allege the ownership of the money obtained from the prosecuting witness; that it fails to show any causal connection between the alleged false pretenses and their effect on the prosecuting witness; and that it likewise fails to show any causal connection between the alleged false pretenses and any purpose or object of defendant in making them. We see no merit in this contention.

The information in substance charges defendant on or about the 23d day of April, 1923, at the county of Alameda, Cal., with then and there devising and intending by unlawful ways and means and by false and fraudulent pretenses and representations to obtain and get into his custody and possession the personal property of one Leonora E. Faulkner with intent to cheat and then and thereby cheat and defraud her by stating that

he was the owner of 14,000 shares in a certain unincorporated common-law mining company organized and existing under the laws of the state of Nevada, and that the said shares were worth \$1 per share; that it was a good, prosperous working mine, whereas, in truth and in fact, each and all of said pretenses and representations so made by defendant were false and fraudulent in the following particulars: That defendant was not the owner of such shares, nor were they worth \$1 a share, but, on the contrary, they were without any value whatsoever, and that the mining company was not a good and prosperous one, and that each and all of said pretenses and representations so made by defendant were made for the purpose of inducing the prosecuting witness to pay over to defendant the sum of \$2,225; that defendant knew the pretenses and representations so made by him were untrue and fraudulent.

The information proceeding charges that the prosecuting witness believing the false and fraudulent representations, and being deceived thereby, was induced by defendant to enter into an agreement under which she paid to him the sum mentioned for the said shares of stock; that defendant falsely and fraudulently received said sum of money with intent then and there to cheat and defraud the prosecuting witness out of the same.

It is clearly apparent that the information does contain definite recitals showing the ownership of the money in the prosecuting witness which negative any idea that the funds were the property of the defendant or any other person, and that it also shows a causal connection between the alleged false pretenses and their effect on the prosecuting witness, as it specifically recites, she believing the representations, and being deceived thereby, was induced to part with her funds. *People v. Hines*, 5 Cal. App. 122, 89 P. 858.

It is likewise apparent that the information shows a causal connection between the alleged false pretenses and the object of defendant in making them, as it further recites that they were made for the purpose of inducing the prosecuting witness to pay over to defendant the sum alleged. The allegations of fact, therefore, are amply sufficient to describe and charge a public offense under the statute. Pen. Code, § 532.

[2, 3] It is next claimed that a fatal variance exists between the information and the evidence. This contention is based upon the fact that the record contains testimony to show that defendant at the time he received the money from the prosecuting witness gave to her his promissory note for the sum of \$2,500, which note was later given up for the stock. Other evidence, however, shows that the money parted with was paid for the shares of stock, and that defendant represented to

the prosecuting witness, who, the record shows, was unfamiliar with business transactions, that the note was a mere receipt to be retained by her until such time as defendant could procure the shares of stock. There is, therefore, no merit in this contention. Lack of corroboration of the making by defendant of the false representations, as required by section 1110 of the Penal Code, is also urged as a ground for reversal. This contention is equally without merit.

As indicated above, three distinct false representations are set forth in the information, namely, that defendant represented himself to be the owner of the stock in question; that the mine was a good and prosperous working one; and that the shares thereof were worth \$1 each. The record is a voluminous one, but in our opinion the case does not call for an extensive review of the evidence. Suffice it to say that it shows that defendant did state and represent to the prosecuting witness that the shares of stock in question were worth \$1 each. It also appears therefrom that this representation was made in the presence of her sister, who testified fully upon the subject. There was also testimony to show that this statement was untrue and that defendant himself knew it to be so as he had made declarations, at or about the time of the sale of the stock, that it had no value. In regard to the false representation of ownership, there is evidence to show that while defendant claimed to be the owner, as a matter of fact, he had never owned any shares of stock in the company, but had procured the same from its offices at a time when the shares were considered worthless by reason of the company having forfeited its rights in the property, with the avowed purpose of using them as samples for other stock to be issued upon a possible incorporation of a company to be formed by him in the event that he could acquire control of the mining lands. It further appeared that his representation as to the mine being a prosperous and good working one was false, as the company had, at the time the sale was made, forfeited its rights in the property, and did not possess any property whatsoever. There is, therefore, no merit in the contention that the false representations were not corroborated in accordance with the statutory requirement.

[4, 5] The rejection of certain testimony offered for the purpose of showing that a large amount of money had been made in the operation of an adjoining mine is complained of. The offered evidence was properly refused, as it was manifestly incompetent. Other evidence as to the opinion of a witness concerning the character of the property at the time of the trial was rejected and this ruling is complained of. The opinion of the witness as to its value at a time subsequent to the mak-

ing of the representations and when the company had lost all rights thereto was properly rejected.

Refusal of the trial court to instruct the jury that mere representations of value constitute a mere opinion is assigned as error justifying a reversal of the judgment. The jury was fully and fairly instructed upon this subject.

The judgment is affirmed.

We concur: CASHIN, J; KNIGHT, J.

75 Cal. App. 19

BEYERLE v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.
(Civ. 5106.)

(District Court of Appeal, Second District, Division 1, California. Oct. 31, 1925.)

1. Admiralty. ⇐20—Contract of employment held to be of maritime nature, calling for admiralty jurisdiction.

Contract between employee and lumber company, where labor to be performed in running engine and working on raft anchored in navigable waters, *held* to include matter of a maritime nature; hence admiralty jurisdiction would prevail in action for injuries, and the State Industrial Accident Commission properly dismissed proceedings before it.

2. Admiralty ⇐20—Jurisdiction for injuries sustained held to be in admiralty.

Injuries to employee while engaged in running engine in navigable waters towing logs, and while working on log raft anchored in navigable waters, *held* to assume aspects comparable with a tort committed in navigable waters; hence jurisdiction would be in admiralty, and not in State Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act for injuries by F. C. Beyerle, claimant, opposed by the Benson Lumber Company, and the Federal Mutual Liability Insurance Company, insurer. From an order of the Industrial Accident Commission dismissing proceeding for want of jurisdiction, claimant brings certiorari. Affirmed.

A. T. Johnson and Richard M. Kew, both of San Diego, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondent Industrial Accident Commission.

Willis I. Morrison, H. R. Kelly, and E. R. Young, all of Los Angeles, for respondents Benson Lumber Co. and Federal Mut. Liability Ins. Co.

HOUSER, J. This is a proceeding brought for the purpose of reviewing an order made by the respondent Industrial Accident Commission in connection with a claim for compensation made by the petitioner, Beyerle, against the respondent Benson Lumber Company on account of alleged injuries received

by the petitioner while in the employ of said company.

On the hearing of petitioner's application before the commission it was shown that the respondent Benson Lumber Company maintains a lumber mill at the harbor of San Diego, Cal.; that this mill is located upon land which faces the navigable waters of San Diego Bay; that extending into the navigable waters of the bay immediately in front of its property the said respondent company maintains a log boom for the purpose of impounding logs, which consists of an area of water inclosed by a chain of floating logs anchored to piling; that during each summer season the respondent company assembles large rafts of logs on the Columbia river in Oregon; that these rafts, each of which is approximately 960 feet long and is bound together by heavy chains are towed by tugs from the Columbia river to the harbor at San Diego, where they are anchored in the navigable waters of San Diego Bay, adjacent to but outside of said log boom; that the first raft of the season is anchored by shoving one end upon the mud flats along the beach, with the other end extending out into deep water, and the succeeding rafts are moored outside of the first raft and anchored to dolphins by means of chains; that these rafts are then broken up, and the logs are either placed within the said boom area or are towed to the respondent company's wharf, and then lifted from the water to cars for shipment by rail; that the work of breaking up the rafts and handling the logs is performed by means of a floating derrick scow and a gasoline power boat, both of which are operated by the respondent employer; that the derrick scow is about 30 feet wide and 60 feet long, upon which is mounted a large derrick or crane; that this derrick scow is towed around from place to place on the waters of the bay by a boat, which is propelled by gasoline motor; that the aforesaid operations were all performed upon navigable waters by a special crew employed by respondent employer, and of which petitioner is a member; that the petitioner's duties consisted of operating the engine of the motorboat while towing the raft, logs, and derrick barge, and in working upon the derrick scow and log rafts, assisting in the handling and breaking up of the latter; that while thus employed petitioner, on three separate occasions, sustained injuries to his right hip and leg, on account of which injuries a claim for compensation was filed with respondent commission; that the first of the injuries referred to occurred on May 10, 1924, when, as a result of a strong wind, rough water, and a slack towline, the aforesaid motorboat, which petitioner was operating at the time, and which was engaged in towing the scow outside the boom in deep water, struck a piling, causing the motorboat to rock, and petitioner to receive a severe blow on his hip;

that the second injury occurred on May 15, 1924, while petitioner was at work on one of said floating log rafts, from which logs were being removed by means of the derrick on the scow lying alongside a raft, when he was struck below the right knee by the grab hooks of the derrick as he was attempting to catch these hooks, in order to guide them and fasten them to one of the logs; that the third injury occurred on May 24, 1924, while petitioner was again at work on the same raft, and while he was standing on the raft, anchoring the scow in the proper place alongside the raft, in order to remove logs therefrom, at which time he slipped down between two logs on the raft and again struck his right hip.

Following the hearing on petitioner's said application, an order was made by the commission dismissing the said proceeding, on the ground that the commission was without jurisdiction therein, for the reason that at the time petitioner sustained the injuries of which he complained he was working on navigable waters and was engaged in maritime employment. For the purpose of testing the question of jurisdiction in the Industrial Accident Commission to determine the rights of the respective parties to the proceeding, the matter is brought to this court.

The case principally relied upon by the petitioner herein is that of *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321, 25 A. L. R. 1008, wherein the facts were that a carpenter, who was employed upon a launched, but incomplete, vessel, sustained an injury. It was held that the state law, known as the Workmen's Compensation Act, applied. The court, however, pointed out that the contract for constructing the vessel "was nonmaritime, and, although the incomplete structure upon which the accident occurred was lying in navigable waters, neither Rohde's general employment, nor his activities at the time, had any direct relation to navigation or commerce." In the case of *State Industrial Commission v. Nordenholt Corporation*, 259 U. S. 263, 42 S. Ct. 473, 66 L. Ed. 933, 25 A. L. R. 1013, a longshoreman was injured on a dock while he was assisting in the unloading of a cargo from a vessel. It was held that the dock was an extension of the land, and that the state statute could be made effective without material prejudice to the general maritime law.

While, in addition to the foregoing cases, a long list of authorities has been submitted in support of the several contentions of the parties to the controversy, for the reason that, in similar proceedings recently had before the Supreme Court of this state, like questions on analogous facts, with identical authorities, were fully considered, it becomes necessary to determine herein only the applicability in principle of the cases heretofore decided by the Supreme Court of California

to the facts of the instant case, and therefrom to deduce a conclusion as to the questions submitted in this proceeding.

The first case is that of *Alaska Packers' Ass'n v. Industrial Accident Commission*, 191 Cal. 763, 218 P. 561. Therein it was shown that for a number of years preceding the happening of the accident the petitioner had been a seaman and fisherman on annual voyages made from the city of San Francisco to Alaska waters by a bark known as *Star of England*. On one of its return trips to the bay of San Francisco, and while the vessel was lying afloat in navigable waters of said bay, the petitioner therein was engaged in working upon the said boat as a rigger, to make it ready again for sea travel. His duties at that time consisted in going over the ropes attached to the yards of the vessel, looking for defective equipment. When a defective rope was found, he took it ashore for the purpose of repairing same. He was injured while removing a rotten foot rope from the yardarm of the vessel. It thus appears that the employment of the rigger was similar to that of the petitioner in the instant case, in that a part thereof was to be done on board a boat afloat in navigable waters, and the remainder of his work was to be performed by him on shore. The court held that, the employment being maritime in its nature, the rights and liabilities connected therewith were within admiralty jurisdiction.

The next case to which attention is directed is that entitled *Zurich General Accident, etc., Co. v. Industrial Accident Commission*, 191 Cal. 770, 218 P. 563. The facts in that case were that one Denny was employed as a dredger deckhand and launch operator. His work was performed mainly upon a dredger operating on navigable waters. He was drowned while engaged upon an errand in connection with his employment in attempting to proceed from the dredger to the shore in a motor launch, which was afloat in navigable waters. The principal authorities relied upon by the employee for the purpose of establishing the jurisdiction of the Industrial Accident Commission were reviewed by the Supreme Court, and the conclusion reached that such commission was without jurisdiction.

In the case of *James Rolph Co. v. Industrial Accident Commission*, 192 Cal. 398, 220 P. 669, it appears that one Hayes was em-

ployed and was engaged in the capacity of stevedore upon a vessel which was discharging its cargo at a dock. On the morning of the accident, before going to the hold of the vessel where he was required to work, Hayes secured an iron plate used in the unloading process of the vessel, and in attempting to throw the plate below, overbalanced and fell into the hold of the vessel, sustaining injuries from which he died. It was held that the Industrial Accident Commission was without jurisdiction therein.

In *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321, 25 A. L. R. 1008, the general rule is announced that "in contract matters, admiralty jurisdiction depends upon the nature of the transaction, and in tort matters upon the locality." In our present case petitioner's employment apparently was of a mixed variety. Part of his duties occupied his time in a lumber mill located on the land, and a considerable portion of his work consisted in operating, or assisting in the operation, of a launch and in breaking up of log rafts. Petitioner's injuries occurred while engaged in the latter employment; that is to say, his first injury occurred while he was operating the launch and in towing a derrick scow on navigable waters, and he sustained his second and his third injury while performing services as a member of the crew of the derrick scow, but while actually standing on a log raft—all in navigable waters.

[1, 2] If the question of "contract" as between the petitioner and the lumber company may be said to enter into the correct determination of the controversy, it is clear that the contract included a matter of a maritime nature, and hence that admiralty jurisdiction would prevail. On the other hand, if for the sole purpose of determining jurisdiction, the relationship of the employer and the employee be left out of consideration, the injuries sustained by the petitioner might then assume an aspect comparable with a tort committed in navigable waters, and from such a standpoint the jurisdiction would be in admiralty.

It follows that the order of the Industrial Accident Commission should be affirmed. It is so ordered.

We concur: CONREY, P. J.; CURTIS, J.

74 Cal. App. 790

PEOPLE v. ALLAN. (Cr. 1296.)

(District Court of Appeal, First District, Division 1, California. Oct. 30, 1925.)

Criminal law ⇨1084—Writ of probable cause granted, where appeal is not clearly and palpably frivolous.

Writ of probable cause to stay judgment should be granted, where appeal is not clearly frivolous, but presents questions on which there may be honest difference of opinion as to existence of prejudicial error in proceedings leading to conviction.

Harry Allan was convicted of passing a fictitious check in violation of Pen. Code, § 476. On application for writ of probable cause to stay judgment of conviction pending appeal. Writ granted.

Raine Ewell, of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., and Wm. W. Murphy, Asst. Dist. Atty., both of San Francisco, for the People.

KNIGHT, J. The defendant, after trial and conviction upon a charge of making, uttering, publishing, and passing a fictitious check in violation of section 476 of the Penal Code, moved the trial court for an arrest of judgment and for a new trial. Said motions were denied, whereupon defendant was sentenced to imprisonment in the state prison at Folsom. Notice of appeal was given, and since then defendant has complied with the necessary legal requirements to perfect said appeal. He also applied to the trial court for a writ of probable cause, which application was denied. A similar application is now presented to this court. The law is well settled that where an appeal is not clearly and palpably frivolous and vexatious, but presents debatable questions upon which there may be honest difference of opinion in regard to the existence of prejudicial error in the proceedings leading to the conviction a writ of probable cause should be granted. *People v. Gallanar*, 144 Cal. 656, 79 P. 378; *In re Adams*, 81 Cal. 163, 22 P. 547; *People v. Valencia*, 45 Cal. 304; *People v. Ramirez*, 63 Cal. App. 510, 219 P. 73; *In the Matter of Mayen*, 49 Cal. App. 531, 193 P. 813; *People v. Clinton et al.* (Cal. App.) 236 P. 929.

The record here reveals the exclusion of certain evidence sought to be adduced by the defendant, which, it was claimed, had a bearing upon the question of the genuineness of the check upon which the charge was based. Irrespective of the question of whether the rulings of the trial court in connection with the exclusion of such evidence amount to probable cause for a reversal of the judgment, the rejection of said evidence does, in our opinion, constitute probable cause for ap-

peal. It follows that the application for the writ of probable cause should be granted and the execution of the judgment stayed until a final determination of said appeal.

It is so ordered.

We concur: TYLER, P. J.; CASHIN, J.

74 Cal. App. 591

McNEILL v. PAPPAS. (Civ. 5251.)

(District Court of Appeal, First District, Division 2, California. Oct. 16, 1925. Hearing Denied by Supreme Court Dec. 14, 1925.)

1. Customs and usages ⇨17—Evidence cannot be introduced concerning customs of escrow companies, where writings were silent as to time of performance.

Where escrow agreement for sale of real estate contained no time limit, evidence could not be introduced concerning customs of escrow companies, in view of Code Civ. Proc. § 1870, subd. 12, as Civ. Code, § 1657, allowing reasonable time, became part of contract.

2. Appeal and error ⇨1008(1)—Contention that purchaser had performed too late has no standing in appellate court.

Contention that performance by purchaser under escrow and executory contract to buy and sell real estate was not within reasonable time held to have no standing in appellate court, when trial court had all the evidence before it and had power to determine point.

3. Pleading ⇨121(2)—Denial of allegation because of lack of sufficient knowledge upon which to base a belief held insufficient.

Where purchaser alleged in pleadings that he had given notice to vendor of acceptance of terms of contract, a denial because of insufficient knowledge upon which to base a belief held insufficient to meet purchaser's allegation.

4. Escrows ⇨1—Escrow agreement held to have become mutual and binding contract after purchaser's acceptance.

Escrow agreement, containing provisions that purchaser might examine certain restrictions on property, held to have become mutual and binding contract after purchaser gave notice of acceptance.

5. Contracts ⇨164—Several contracts, relating to same matters, between same parties, and made as part of substantially one transaction are to be taken together.

Several contracts, relating to same matters, between same parties, and made as part of substantially one transaction, are to be taken together.

6. Escrows ⇨9—Performance of purchaser under escrow agreement held full and substantial.

Performance under escrow agreement, containing provision that purchaser might examine certain restrictions, held to have been full and substantial, purchaser having delivered to escrow holder moneys, notes, and mortgages called for under contract.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by D. R. McNeill against John S. Pappas, also known as Jan Pappas. From a judgment for plaintiff, defendant appeals. Affirmed.

J. H. De La Monte and Walter W. Little, both of Los Angeles, for appellant.

Pierce Works, Alex W. Davis, and Kemp, Mitchell, Silberberg & Davis, all of Los Angeles, for respondent.

STURTEVANT, J. This is an action brought by the plaintiff to compel the specific performance of an alleged contract to sell and buy a piece of real estate. The case was tried in the lower court without the intervention of a jury, the judgment went for the plaintiff, and the defendant has appealed under section 953a of the Code of Civil Procedure.

Prior to November 23, 1921, the defendant was the owner of the real estate. Some of the deeds executed by his grantors contained certain restrictions. Some of the real estate consisted of improved property that was leased to one George Kolovos. Generally speaking, the plaintiff had some information regarding the existence of the restrictions mentioned and of the existence of the lease mentioned, but he was not fully informed regarding the facts and the law. With the circumstances so existing, certain negotiations were had between the plaintiff and the defendant. Writings were executed which constituted, firstly, an escrow; and, secondly, an executory contract to buy and sell the real estate. Taking the second theory, the plaintiff pleaded meticulously the alleged contract to buy and sell. In so doing he pleaded in *hæc verba* a writing signed by himself on the 23d day of November, 1921, and also a writing signed by the defendant on the same date. Furthermore, he pleaded a writing dated January 14, 1922, in which he tendered the cash payment and the note and mortgage, the consideration designated in the executory contract. The first two papers were addressed by the makers to the Bank of Italy. At the same time the Bank of Italy issued to the defendant a receipt for: (1) The defendant's title certificate; (2) the defendant's copy of the lease above mentioned; and (3) an insurance policy. The defendant answered, and after the trial was had the trial court made findings in favor of the plaintiff, which followed closely the language contained in the plaintiff's complaint, and which found every issue in favor of the plaintiff.

[1] During the trial the defendant contended that any performance or tendered performance on the part of the plaintiff came too late; that the plaintiff should have completed his performance within 30 days after November 23, 1921. In presenting this con-

tention the defendant attempted to show that it is the universal custom with all escrow companies to fix a time limit; that that time limit is ordinarily 15 days, and, in rush periods, 30 days; and that it is the universal custom to permit the parties to draw down their papers upon demand after the expiration of such time. There is no claim that in any writing signed by either of the parties a time limit of 15 days, 30 days, or any other length of time for the consummation of the executed contract was inserted. Under these facts the defendant was not authorized to introduce evidence concerning a custom. Code Civ. Proc. § 1870, subd. 12. As the writings were silent as to the time of performance, the statute on that subject entered into and became a part of the contract. Civ. Code, § 1657; Standard Box Co. v. Mutual Biscuit Co., 10 Cal. App. 746, 103 P. 938. The trial court did not err in refusing the evidence regarding the existence of the custom mentioned.

[2] The defendant contends that if we assume that the plaintiff should have done and performed all things by him to be done and performed within a reasonable time, nevertheless, his performance was too late because he did not act within a reasonable time. Whatever merit that point might have had in the trial court it has no standing in this court, because the trial court had all of the evidence before it, and had the power to determine the point. It did so, and, among other things, it found the amount of the payments, the date of the payments, and each other item of performance, and then it made a finding:

"That said payments and performance were made by the plaintiff within a reasonable time. That plaintiff has duly performed all of the conditions of said contract on his part to be performed."

The writing which the plaintiff signed and delivered to the Bank of Italy contained a passage as follows:

"The undersigned hereby hands you \$500.00, and upon completion of search will hand you \$5,500.00 together with a mortgage covering the hereinafter mentioned property for \$5,500.00 dated Dec. 1, 1921, due on or before two years from date, with interest at 7 per cent. payable quarterly, all of which you are to deliver to John S. Pappas when you can procure for me a continuation guarantee of title covering (describing property)."

"I am to be allowed a reasonable time in which to determine the validity of a certain restriction existing against said property and also whether I will accept said property subject to the store lease now existing against same."

"I agree to pay new owner fee, fee for showing mortgage, fee for recording mortgage, fee for recording deed, \$1.10 internal revenue stamps on note, mtgee. clause on insurance, pro rate insurance, rents and taxes to date of filing deed. Indorse on note interest as having been paid to date of filing of deed."

The writing which the defendant signed and delivered to the Bank of Italy contained a passage as follows:

"The undersigned hereby hands you grant deed from John S. Pappas in favor of D. R. McNeill covering (describing same property) which you are authorized to deliver to said grantee when you can procure for me the sum of six thousand (\$6,000.00) dollars in cash and a mortgage covering the above mentioned property securing a note for five thousand five hundred (\$5,500.00) dollars, dated December 1, 1921, due on or before two years from date with interest at seven per cent. payable quarterly.

"I agree to deliver the above mentioned property, free and clear of all incumbrances except second half taxes for 1921-22, conditions, restrictions and reservations of mortgage.

"It is understood and agreed that D. R. McNeill shall be allowed a reasonable time in which to determine the validity of the restrictions recorded in Book 2133, page 207 of deeds and also to determine whether he desires to accept the property subject to the store lease existing between John S. Pappas and Geo. Kolovos.

"From money due me in this escrow you are authorized to pay the following fees:

"Fee for certificate of title. \$11.50 internal revenue stamp on deed. Fee for drawing deed. Insurance transfer fee and your escrow fee. Pay D. M. Anderson of 1902 Sunset Blvd. \$575.00 commission.

[3] The appellant calls to our attention these passages, and asserts that the contract was not mutual. The point at first seems to be well made, but when it is considered in the light of the record it is entirely without merit. On November 23, 1921, we may assume that the parties did not intend to be bound as contracting to buy and sell until the plaintiff could examine the restrictions and lease above mentioned. However, the plaintiff made that examination, and within 15 days notified the defendant in writing that he would accept a conveyance notwithstanding the restrictions and the lease. That notice was in the form of a letter dated December 8, 1921. In his complaint the plaintiff pleaded the giving of said notice of acceptance. In his answer the defendant denied that allegation in the following words:

"Defendant further alleges that he has not sufficient knowledge upon which to base a belief, and basing his denial on that ground denies that plaintiff notified defendant or any person for him that he accepted the contract, subject to restrictions and subject to store lease."

That denial was insufficient to meet the plaintiff's allegation. Moreover, Mr. Davis, who was acting as the plaintiff's attorney, orally notified Mr. Stannard, the escrow agent of the Bank of Italy, that the plaintiff had examined the restrictions and lease and accepted the same. That conversation was held on the 15th day of December, 1921. And, as shown above, the trial court made a finding that these notices were given within a reasonable time.

[4, 5] Points 3, 5, and 6 are different methods of attacking the contract to buy and sell on the ground that the contract was not mutual. Conceding that it was not mutual as a binding contract on both parties on November 23, 1921, nevertheless, when the notice of acceptance was given by the plaintiff on December 8, 1921, from that date on the contract became and was binding on both the plaintiff and the defendant. *Spires v. Urbahn*, 124 Cal. 110, 111, 56 P. 794. The appellant also contends that the alleged contract is void for uncertainty, indefiniteness, and incompleteness. Under this head the appellant argues that the deed was not executed until after November 23, 1921, and therefore was not delivered to Mr. Stannard on that day. That argument might be material if we were considering the case as an escrow, but we are not. The appellant further contends that the defendant had not agreed to do anything, and in this behalf appellant emphasizes the language "hereby hands," and argues that the defendant's writing addressed to the Bank of Italy meant nothing. In construing contracts it is a fundamental rule that several contracts, relating to the same matters, between the same parties, and made as part of substantially one transaction, are to be taken together. Applying that rule to the facts of this case, the court is not at all in doubt as to what the parties were attempting to state in their contract.

[6] The appellant makes the further point that "mutuality must exist at the inception of the contract. But want of mutuality may be and is only removed by full and substantial performance of the contract." The plaintiff executed the note and mortgage, which the contract required him to execute, on December 23, 1921. On the same date he delivered to the Bank of Italy a check for the moneys called for under the contract. That check was not paid, but, on December 30, another check was delivered that was paid on January 2. As stated above, the trial court found that all acts done and performed by the plaintiff were done within a reasonable time. In presenting the point now under discussion, the appellant places much emphasis upon the fact that the plaintiff's performance must be full and substantial, but the answer is that the record before us shows that said performance was full and substantial. Even though the check delivered on December 23, 1921, had never been delivered, and even though the check delivered on December 30 had not been delivered at that time, but cash in a sack had been delivered and was on deposit on January 2, 1922, we cannot see wherein the appellant would have been injured or that the trial court would have worded the finding regarding reasonable time any differently.

The last point made by the appellant is closely akin. The appellant states "necessity

of strict compliance with conditions of escrow." As we have stated above, we find nothing in the record indicating noncompliance in any respect whatsoever.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

74 Cal. App. 674

EGAN v. CROWTHER. (Civ. 5007.)

(District Court of Appeal, First District, Division 2, California. Oct. 26, 1925.)

1. Trial — Court held not to have committed error in trying issue of accord and satisfaction first.

Trial court may change ordinary methods of procedure when time of court and parties will be conserved, and no error was committed in trying issue of accord and satisfaction first and then taking up other issues, where if accord and satisfaction had been had controversy would be terminated.

2. Appeal and error — Assumed that trial court considered all facts and gave each circumstance importance it was entitled to.

Where trial court made findings sustaining plea of accord and satisfaction, but no findings as to allegations of complaint, court must assume that trial court considered all facts and gave each circumstance such importance as it was entitled to.

3. Contracts — Neither performance nor promise to perform duty sufficient consideration to support new contract.

Neither a promise to perform a duty nor the performance of a duty constitutes sufficient consideration to support a new contract.

4. Accord and satisfaction — Compromise and settlement — Acceptance of check by principal from agent, in duty bound to give it to principal, held not accord and satisfaction.

Where relation of principal and agent existed, and defendant was bound by terms of contract to pay every cent which he paid plaintiff, *held*, that retention and cashing of check sent in full settlement, accompanied by refusal to consider it full settlement, did not constitute an accord and satisfaction.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by William H. Egan against Ralph W. Crowther. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

James D. Whalen, of San Francisco, for appellant.

David C. Dutton, of Oakland, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to

recover a judgment for moneys alleged to be due and owing to the plaintiff pursuant to the terms of an oral contract. The defendant appeared and filed an answer denying the material averments of the complaint and pleading an accord and satisfaction. Judgment went for the defendant, and the plaintiff has appealed.

In August, 1922, the defendant bought for the plaintiff a lot of hay from one Scott. It was estimated that the lot contained 500 tons, but later it transpired that the quantity had been overestimated. The plaintiff informed the defendant that the actual quantity as shown by the weights was 375 tons, and that he was attempting to negotiate an adjustment with Scott. Nevertheless the plaintiff paid the defendant \$125. Later in the year the defendant and the plaintiff entered into an oral contract, by the terms of which the defendant undertook to go into the country and purchase hay, and, after the market price had increased as the parties expected, then the defendant would sell the hay and the parties would divide the profits equally. The plaintiff undertook to finance the enterprise. So far we have stated the facts that are not in dispute. It was claimed by the plaintiff that the defendant was, under the terms of the agreement, to pay his own expenses for board, lodging and transportation, and was to pay one-half of the losses if any were incurred. On the other hand, it was claimed by the defendant that his expenses for board, lodging, and transportation were to be paid out of the proceeds first, and then that the profits would be divided. It was further contended by the defendant that he did not agree to share losses if any were incurred.

The defendant went into the field and made the purchases. Shortly thereafter the market commenced to fall instead of rising as the parties had anticipated. By mutual consent the hay purchased was sold by the defendant, and in January the parties commenced to adjust their accounts. The defendant prepared an account including the purchase of the Scott hay as well as the hay purchased in November, and in the account he inserted a charge for his expenses and gave credit for moneys received. That account showed that he had been overpaid \$106.60. On February 1st, he wrote to the plaintiff a letter and inclosed therewith the statement of the account and his check for \$106.60. The first paragraph of the letter is: "Inclosed find statement covering our account to date also check in the sum of \$106.60, same being in settlement of this account." After the plaintiff received the defendant's letter and inclosures he had a telephone call from the defendant. In the telephone conversation the plaintiff asked the defendant to call. The defendant promised to do so on the following Monday. He did not do so, and thereupon the plaintiff prepared a statement of the ac

count as he contended it should be. In the account so prepared by him he computed the loss on each of the lots of hay purchased, which losses totaled \$1,051.10. He charged the defendant with one-half of the losses, he charged him with moneys received from sales, and gave him credit for the check on account, and thus struck a balance of \$981.05. Thereafter he took the account so prepared by himself and the check that had been forwarded by the defendant to his attorney, James D. Whalen, Esq.

On February 15, 1923, Mr. Whalen wrote the defendant a letter asking him to call. About ten days later the defendant called, and in the conversation held between Mr. Whalen and the defendant the defendant stated the terms of the contract between himself and the plaintiff, and Mr. Whalen stated the terms of the contract as the plaintiff contended the terms were. The conversation resulted in no agreement, and the defendant left Mr. Whalen's office saying that he would confer with his own attorney, and that Mr. Whalen would later hear from him or his attorney. In that conversation the defendant made it clear that he had not agreed to pay part of the expenses or to share in the losses. Mr. Whalen made it clear that the plaintiff claimed the right to retain the check for \$106.60, but that the plaintiff would sue for the balance claimed by him to be due. In reply to that statement the defendant did not recede from his original position to the effect that the account as rendered by him was in all respects true and correct. In that conversation Mr. Whalen claims that he handed the check back to Mr. Crowther; nevertheless it is not even disputed that when Mr. Crowther left Mr. Whalen's office the check was still in Mr. Whalen's office, and was thereafter retained by him and was later cashed by the plaintiff.

On February 26th, David C. Dutton, Esq., acting as attorney for the defendant, wrote Mr. Whalen that the defendant had stated the facts to him, and that the position of the defendant was that the account which he had rendered was true and correct. No further correspondence was had, and no other conversations were had. On March 24, 1923, the plaintiff cashed the check for \$106.60, and, on March 29, 1923, this action was commenced.

[1] When the case was called for trial and the issues were stated, the trial court stated that if an accord and satisfaction had been had that would terminate the controversy and therefore the trial court would take up that issue first. Neither party made any objection, and the court proceeded accordingly. When that issue had been tried, without any objection from either party, the court immediately proceeded to hear the evidence of the parties on the other issues presented by the pleadings. The appellant claims that the trial court erred in the procedure adopt-

ed. In this contention we think he is mistaken. The trial court is at liberty to change the ordinary methods of procedure when by so doing the time of the court and the parties will be conserved rather than wasted. *Whittier v. Stege*, 61 Cal. 238; 38 Cyc. 1305 and 1352.

[2-4] After the trial had been completed and all of the evidence had been introduced, the trial court made findings sustaining the plea of accord and satisfaction, and did not make any findings regarding the allegations of plaintiff's complaint. In ruling on the defendant's plea the appellant contends that the trial court should have considered the facts stated in the plaintiff's complaint. As we understand him, he contends that the trial court should have given consideration to all of the circumstances of the case as adduced at the trial. The answer is that the record does not show that the trial court did not do so, and, in the absence of anything in the record to the contrary, we must assume that the trial court did consider all of the facts and gave each circumstance such importance as it was entitled to. The appellant also contends that the trial court erred in making the finding sustaining the defendant's plea of an accord and satisfaction. The respondent controverts that contention, and relies upon *Lapp-Gifford Co. v. Muscoy Water Co.*, 166 Cal. 25, 134 P. 989, and cases there cited. The appellant does not question the soundness of the doctrine stated in the foregoing authorities, but contends that the facts developed at the trial of this case do not show an accord and satisfaction, and in making this contention he claims that there was no new consideration to support an accord and satisfaction because this appellant, in any event, was entitled to all he received. He specially stresses the fact that the relation existing between the parties in the instant action during the time that the matters occurred which gave rise to this litigation was the relation of principal and agent and not that of debtor and creditor. Thereupon he makes the contention that the authorities cited by the respondent do not apply, are not in point, and that the authorities which are in point are such cases as *Eames Vacuum Brake Co. v. Prosser*, 157 N. Y. 289, 51 N. E. 986, *General Fireproof Const. Co. v. Butterfield*, 143 App. Div. 708, 128 N. Y. S. 407, and *Wolfe v. Mack*, 81 Misc. Rep. 185, 142 N. Y. S. 433. The point has not been passed on in this state. It was within the issues but was not presented to, nor ruled on, by the court in *Johnston v. Burnett*, 17 Cal. App. 497, 120 P. 436. In the case of *General Fireproof Const. Co. v. Butterfield*, supra, the Supreme Court of New York said:

"The money collected by the defendant belonged to the plaintiff. The defendant, at most, had a lien upon it for his services, and could retain what he was legally entitled to for such services. When the defendant sent the check

for a part of the money, he limited his right to compensation to the amount retained by him, and conceded that the amount sent belonged to the plaintiff. Under these circumstances, the plaintiff was not bound to return his own money to defendant under penalty of acknowledging defendant's right to the balance retained. Plaintiff had a right to retain the money paid to it, and sue for and recover any portion of the balance to which it was entitled. It was not a case for the application of the rule of accord and satisfaction. It would not be quite fair for the defendant to say, 'I send you an amount which I concede is yours, but, if you take it, you must acknowledge you are not entitled to any part of the moneys I have retained.' *Eames v. B. Co. v. Prosser*, 157 N. Y. 301, 51 N. E. 986. In that case, as in this one, the moneys collected belonged to the plaintiff, subject to any legal claims of defendant for commissions existing, and the court held the plaintiff was not bound to return the moneys actually paid over or be precluded from recovering any of the balance under the rule of accord and satisfaction.

"The distinction between the Gribble and other like cases and the Prosser Case and this one is that claims were made in the former case for moneys due under contracts. The parties disagreed as to the amount to which the plaintiffs were entitled. The defendants sent checks for certain amounts to be accepted, if at all, in full payment and satisfaction of their claims. The checks were retained and suits afterwards brought to recover the balances claimed. There was no question, as in the latter cases, of title to the moneys sent. The rule of accord and satisfaction was improperly applied in view of the Prosser Case."

Every cent that the defendant paid to the plaintiff he was in duty bound by the terms of the contract to have paid. It is well settled that neither a promise to perform a duty nor the performance of a duty constitutes a consideration sufficient to support a new contract. *Marinovich v. Kilburn*, 153 Cal. 638, 96 P. 303; 1 Williston on Contracts, § 120. Resting its argument on the principle just referred to, the Supreme Court of Massachusetts reaches the same conclusion as the Supreme Court of New York. *Whittaker Chain Tread Co. v. Standard Auto Supply Co.*, 216 Mass. 204, 103 N. E. 695, 51 L. R. A. (N. S.) 315, Ann. Cas. 1915A, 949, and note.

The foregoing authorities rule the point. In view of the fact that the relation of principal and agent existed between the plaintiff and the defendant, the evidence was insufficient to sustain the finding of an accord and satisfaction. As we have already indicated, the trial court heard all of the evidence offered as to all of the issues made by the pleadings, but did not make findings on any issue excepting that of accord and satisfaction.

The judgment is reversed, but in view of the peculiar condition of the record the trial court is directed to make findings in accordance with the views herein expressed, and

to also make findings on the other issues which were tried but on which no findings were made, and thereafter to enter judgment in accordance with the findings so made.

We concur: LANGDON, P. J.; NOURSE, J.

75 Cal. App. 96

STANWARD et al. v. YELLOW TAXICAB CO. OF LOS ANGELES (two cases).
(Civ. 5259.)

(District Court of Appeal, First District, Division 2, California. Nov. 4, 1925. Hearing Denied by Supreme Court Dec. 31, 1925.)

1. Municipal corporations ☞706(5)—Finding of negligence because of inadequate lights on automobile sustained.

In action for injuries, where it appeared defendant's automobile had in front only two dash lights, enabling driver to see 10 or 15 feet ahead of car, and a spotlight enabling him to see 23 feet ahead on right side only, *held* trial court was justified in finding defendant negligent because of inadequate lights.

2. Municipal corporations ☞706(5)—Finding of excessive speed of automobile justified.

Where taxicab traveled 20 miles an hour over street crossing in closely built-up section of city on foggy night with insufficient lights, trial court was justified in finding speed such as to endanger life or limb, and hence greater than that prescribed in Motor Vehicle Act of 1915, § 22(a), as amended by St. 1919, p. 220, § 13.

3. Appeal and error ☞1011(1)—Finding of trial court as to contributory negligence held conclusive.

In action against taxicab company for personal injuries, where evidence that plaintiff did not cross street at intersection, and failed to look for cars, which might establish contributory negligence, was in wide conflict, it was incumbent upon trial court to determine true facts, and such finding was conclusive when based upon substantial evidence.

4. Appeal and error ☞193(6)—Defendant held not prejudiced by form of complaint where issues fairly tried.

In action for personal injuries received in automobile accident, where defendant on appeal for first time presents fact that complaint failed to specify particulars in which automobile was negligently operated, *held* that defendant was not prejudiced by form of complaint, since issues were fairly and understandingly tried.

5. Trial ☞404(2)—That issues were included in conclusions of law rather than findings of fact held not reversible error.

In action for personal injuries, *held* there was no merit in objection to court's action in including issues of proximate cause and contributory negligence under head of conclusions of law rather than findings of fact.

6. Damages ☞130(2)—\$6,000 for personal injuries in automobile accident held not excessive.

Where, in action for personal injuries, received in automobile accident, evidence showed that plaintiff received broken leg, cuts and bruises on face and head, body, arms, and legs, was confined to bed after accident, and still suffered from effects after 18 months, held judgment of \$6,000 could not be set aside as excessive.

7. Appeal and error ☞1004(1)—When judgment awarding damages may be set aside as excessive stated.

Unless it appears that judgment awarding damages is result of passion or prejudice of trial court or jury, it cannot be set aside merely because appellate court might feel that award was too high.

Appeals from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Separate actions by Marie Stanward and another and by Albert E. Stanward against the Yellow Taxicab Company of Los Angeles. Judgments for plaintiffs, and defendant appeals. Affirmed in each case.

W. I. Gilbert, B. P. Gibbs, and Walter W. Little, all of Los Angeles, for appellant.

Muhleman & Crump, and H. S. Laughlin, all of Los Angeles, for respondents.

NOURSE, J. In the above-entitled actions the plaintiffs sought damages for injuries which they suffered when struck by an automobile operated by an employee of the defendant. The two actions were tried together, under stipulation, before the court sitting without a jury. Two judgments for \$6,172.13 and \$11,508.13, respectively, were awarded plaintiffs, from which the defendant appeals upon a joint bill of exceptions under stipulation of counsel.

The material facts of each case appear in the findings of the trial court, from which we quote:

"That on the 31st day of December, 1920, at about 10 o'clock p. m., plaintiff, accompanied by his wife, Marie Stanward, attempted to cross Eighth street at the intersection thereof with Union avenues. That plaintiff stopped at the northeast corner of said streets upon the sidewalk and looked to the left, saw an automobile approaching from the east along Eighth street, and waited for said automobile to pass. After it had passed, he again looked to the left, saw no vehicle approaching, and started across the street, proceeding southerly towards the southeast corner of said Union avenue and Eighth street. That in the center of said street he stopped, looked to the right, and saw approaching him an automobile, to wit, taxicab No. 97. That he stood still and waited for said taxicab to pass him, which it did, proceeding east along Eighth street south of the center line thereof. That thereupon plaintiff again looked to the right and saw nothing. That

the night was then and there dark and foggy. That thereupon plaintiff again started upon his way, together with his wife across Eighth street southerly towards the southeast corner of said Eighth street and said Union avenue. That at said time and place defendant, by its servant, agent, and employee operated, ran and conducted one of its taxicabs, to wit, taxicab No. 98, over and along said Eighth street in an easterly direction, in a careless, negligent, reckless, wrongful, and unlawful manner, so that said taxicab at said time and place ran into and upon, struck and collided with plaintiff. That said taxicab No. 98 had then and there insufficient headlights. That there were no reflectors to said headlights. That said taxicab No. 98 was then and there driven and operated by defendant, by its agent, servant, and employee, in a careless manner, without due regard for the safety or convenience of pedestrians upon such highway, and particularly of plaintiff herein. That said taxicab No. 98 was then and there operated and driven by defendant, by its agent, servant, and employee, in a careless and imprudent manner, and at a rate of speed greater than was reasonable or proper, having regard to the traffic and use of the highway, and at such a rate of speed as to endanger the life and limb of persons on said highway, particularly plaintiff herein. That said taxicab No. 98 was operated and driven by defendant, by its agent, servant, and employee, at a greater rate of speed than 15 miles per hour, and, to wit, at the rate of at least 20 miles per hour, in approaching and traversing the intersecting highways aforesaid and at the point and time of said collision. That the territory contiguous to said crossing on the 31st day of December, 1920, was closely built up within the meaning of the Motor Vehicle Act of 1915 (St. 1915, p. 397), as amended and in effect on the 31st day of December, 1920 (St. 1919, p. 191). That the operator's view of the road and traffic at said intersection was then and there obstructed by fog and mist. That the street at the point of collision was wet and slippery."

[1] On this appeal the appellant insists that the evidence was insufficient to warrant the finding of negligence on its part, and that it was of such a nature as to have required a finding that the plaintiffs were guilty of contributory negligence as a matter of law. An examination of the record discloses that the accident resulted from the failure of the appellant to equip its automobile with sufficient lights and from the operation of the car at an unlawful rate of speed. On the subject of the character of lights used by the appellant, we find from the testimony of appellant's driver that "the lights were no good for straight driving," and that "you could see with them if it was an extraordinarily clear night, but, if the atmosphere was kind of foggy or so, you couldn't use those lights." It is conceded that at the time when the accident occurred the night was foggy, and that the defendant's car was equipped with two small dash lights, which had been substituted for the ordinary headlights. These

lights were of about 30 candlepower, were covered by frosted lenses, and were without reflectors. They were sufficient to enable the drive to see but 10 or 15 feet ahead of his car. In addition to these lights, he was using a spotlight, which he turned to the right to enable him to watch the right-hand curb, and which enabled him to see about 23 feet ahead of him on his right only. In this evidence there is no conflict, and the trial court was justified in finding that the appellant was negligent because of the inadequate lights on its machine.

[2] As to the rate of speed of the appellant's car, there is substantial evidence that the car was traveling at 20 miles an hour, over a street crossing in a closely built-up section of the city and on a foggy night, when the operator was unable to see objects in his line of travel because of his insufficient lights. In addition to the testimony of the operator of appellant's machine that he was going at a rate of 20 miles an hour, we have the conceded fact that Mrs. Stanward was picked up from the street at a point 8 feet in front of appellant's machine after it had been stopped. As the evidence is that the machine traveled 10 feet after the collision, it is thus apparent that this respondent was either carried or thrown a distance of 18 feet from the point of impact. This in itself is persuasive evidence from which an inference could properly be drawn that the appellant's machine was traveling at a rate of speed greater than was reasonable or proper and such as "to endanger the life or limb of any person" on the highway. Motor Vehicle Act of 1919, p. 220, § 13, amending St. 1915, p. 409, § 22 (a). There is really no evidence in conflict with this; the testimony of the passengers in appellant's cab was merely guesswork on their part; and the trial court was justified in making the finding as to speed adversely to the appellant.

[3] Upon the issue of contributory negligence, the evidence is that the respondents, after stopping at the intersection of the two streets, first looked to their left for approaching vehicles; saw an automobile approaching; waited on the curb for it to pass; looked again and saw the first half of the street clear; walked toward the middle of the street and saw an automobile approaching from their right; waited for it to pass in front of them; again looked for approaching vehicles, and did not see any; then followed their course across the street and were struck by appellant's machine. In opposition to this evidence, the appellant endeavored to show that the respondents must have crossed the street at some point beyond the curb crossing, because their bodies were found lying in the street some distance from the intersection of the streets. Appellant's position is this: The respondents must have failed to look to their right because, if they

had done so, they would have seen appellant's machine approaching, and they must have attempted to cross the street beyond the intersection, because their bodies were found some distance east of the intersection. Assuming that either one of these elements might constitute contributory negligence as a matter of law, the evidence on both is in wide conflict, and it was incumbent upon the trial court to determine the true facts. The trial court having found the facts against the appellant upon substantial evidence, that finding is conclusive here.

[4] The appellant for the first time insists that the complaint fails to state sufficient facts because it does not specify the particulars in which the automobile was negligently operated at the exact point of the collision. The pleading comes within the rule of *Stein v. United Rys. of S. F.*, 159 Cal. 368, 370, 113 P. 663. The issues were fairly and understandingly tried, and appellant was not prejudiced by the form of the complaint.

[5] It is also argued that the court failed to find as a fact upon the issues of proximate cause and contributory negligence. The point is that these findings appear under the head of "Conclusions of Law" rather than under the head of "Findings of Fact." There is no merit in the point, as has been held repeatedly. *Burton v. Burton*, 79 Cal. 490, 495, 21 P. 847; *Lange v. Waters*, 156 Cal. 142, 103 P. 889, 19 Ann. Cas. 1207; *Terry v. Southwestern Bldg. Co.*, 43 Cal. App. 366, 370, 185 P. 212.

[6] Finally it is argued that the award of damages in the first case for injuries to Mrs. Stanward is excessive. The finding is:

"That her face and head were thereby cut, bruised, and lacerated, the bones of her right leg were thereby broken below the knee, and her body, arms, and legs were bruised and rendered sore; that she suffered thereby great pain; that by reason thereof she was confined to the hospital and to her bed for a period of 23 days, and thereafter confined at her home for a period of 4 weeks; that she was severely hurt in her health, strength, and vitality; that she is yet unable to walk, except for a short distance, without difficulty and pain in her right leg, and is still suffering from the effects of said injury."

[7] The judgment was rendered about 18 months after the accident. The trial court found that this respondent was still suffering from the injuries inflicted at that time. It was the judgment of the trial court that for these injuries she and her husband were entitled to \$6,000 in damages. Unless it appears that a judgment awarding damages is the result of passion or prejudice on the part of the trial court or jury, it cannot be set aside by the appellate court merely because the appellate court might feel that the award is too high. There is nothing in the record which even suggests that this judg-

ment was the result of either passion or prejudice.

Judgments affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

74 Cal. App. 714

DIMITY v. DIXON et al. (Civ. 5218.)

(District Court of Appeal, First District, Division 2, California. Oct. 28, 1925.)

1. Appeal and error ⇨422—Appeal not dismissed for misdescription of judgment, unless respondent misled thereby.

Notices of appeal are not strictly construed, and an appeal will not be dismissed because of a misdescription of judgment, or order to which it relates, unless it appears that the respondent has been misled by such description.

2. Appeal and error ⇨419(1)—Notice of appeal specifically designating one of several judgments not interpreted to include others not mentioned.

Where several defendants are joined, and separate judgments are entered as to each, a notice of appeal specifically designating one of them cannot be interpreted to include others not mentioned.

3. Trusts ⇨372(3)—Plaintiff held not to have established that defendant purchased with knowledge of alleged trust and without consideration.

Plaintiff held not to have sustained burden of proving that defendant was not a purchaser for value of alleged trust property, or that she had knowledge of the alleged trust.

4. Trusts ⇨371(2)—Complaint alleging express trust resting in parol defective.

Under Civ. Code, § 852, an express trust must be created by written instrument, and complaint attempting to plead an express trust resting in parol is defective.

5. Trusts ⇨80—Resulting trust not established, where partner, with consent of others, purchases real estate as his own property with partnership assets.

That one partner, with consent of others, used portion of partnership assets to purchase real estate, title to which he took in his own name, held not to create a resulting trust.

6. Trusts ⇨77—Do not arise through furnishing funds to enable purchaser to complete installment payments, where title has passed.

A resulting trust does not arise through furnishing of funds to enable purchaser to complete installment payments on property, where title has passed, or to holder of legal title for purpose of making improvements thereon, but such a trust arises, if at all, the instant the conveyance is made and title vests.

7. Trusts ⇨102(1)—Trust created by partner failing to account after death of one of partners held a constructive, rather than express or resulting, trust.

Where partner holding property in trust for partnership, on death of one partner, which, under Civ. Code, § 2450, dissolved partnership, retained possession of property, he became trustee under constructive, as distinguished from an express or resulting, trust.

8. Limitation of actions ⇨102(8)—Action to establish constructive trust held barred by limitation.

Where constructive trust arose, if at all, in 1914, action to establish trust, not commenced until 1923, was barred by limitations.

9. Limitation of actions ⇨102(8)—In constructive trust, statute begins to run on doing of act by which trust arose.

The statute of limitations, in case of a constructive trust, begins to run on doing of the act by which the trust arose.

10. Trusts ⇨352—When property, with consent of trustor, mingled so it cannot be identified, none of it considered as property of trustor.

Where, with consent of trustor, property has been mingled with that of trustee so that it cannot be definitely traced or identified as part of any specific property, none of it can be considered as property of trustor.

11. Trusts ⇨352—Plaintiff seeking to impress trust on property in hands of defendants held not entitled to relief, where trust property in hands of innocent purchasers, and not segregated.

Suit to establish trust by reason of purchase of property from partnership assets must fail, where alleged trustee mingled funds obtained from partnership with his own, and no segregation was attempted, and wife of trustee to whom property had been distributed had conveyed it to innocent purchasers.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

On rehearing. Affirmed.

For former opinion, see 238 P. 1058.

Alfred Siemon, Siemon & Garber and L. E. Nathan, all of Bakersfield, for appellant.

Clafin & Lambert and W. A. McGinn, all of Bakersfield, for respondents A. H. and Hannah Dixon.

F. E. Borton and James Petrini, both of Bakersfield, for respondent Jessie C. Dixon.

NOURSE, J. On February 13, 1923, plaintiff commenced this action to impress upon certain real property a trust which she alleged arose from the purchase of such property with funds of a partnership which she alleged had been formed by her former husband, O. G. Dixon, his father, F. S. Dixon, and his brother, A. H. Dixon, some time in the year 1908 for the conduct of an undertaking business in the city of Bakersfield.

The plaintiff alleged that her husband, O. G. Dixon, died on October 6, 1914, and that his father, F. S. Dixon, died some time after February 10, 1920; that, in due course of administration, certain property was distributed to the defendant Hannah Dixon, the widow of F. S. Dixon, and to the defendant A. H. Dixon, the surviving son; that these parties conveyed the properties so distributed to them—a portion thereof to one Gettle, and a portion to the defendant Jessie C. Dixon. It is alleged, on information and belief, that F. S. Dixon in his lifetime and A. H. Dixon collected large sums in rents and profits of said property and demand is made for an accounting. Jessie C. Dixon was joined as a defendant on the theory that she was a purchaser of a portion of the property without consideration and with full knowledge of the alleged trust. Answers were filed putting in issue all the material allegations of the complaint and the cause went to trial before the court, sitting without a jury, on November 7, 1923. At the close of plaintiff's case defendants A. H. and Hannah Dixon moved for a nonsuit, in which motion the defendant Jessie C. Dixon joined. The motion was granted, and on November 9, 1923, judgment of dismissal as to A. H. and Hannah Dixon was duly entered therein and recorded on November 10, 1923. On January 28, 1924, a paper entitled "Findings of Fact and Conclusions of Law" was filed, which concluded with a judgment of dismissal in favor of Jessie C. Dixon. On February 13, 1924, the plaintiff filed her notice of appeal from the judgment; the notice specifying the judgment "dated November 10, 1923, and entered November 10, 1923."

In a former opinion (238 P. 1058) we dismissed the appeal from the judgment in favor of A. H. and Hannah Dixon on the ground that the appeal was not taken within the time required by section 939, Code of Civil Procedure, and we dismissed the appeal from the judgment in favor of Jessie C. Dixon upon the ground that the record disclosed that no notice of appeal had been filed. Upon a petition for rehearing the appellant filed an addition to the transcript, from which it appears that a motion for a new trial for the purpose of vacating the judgment of November 10, 1923, in favor of A. H. and Hannah Dixon, was filed on November 17, 1923, and denied on January 14, 1924. Upon this showing we concluded that the notice of appeal from this judgment was within time and that as to these respondents the cause should be determined upon the merits.

The record as amended, however, still fails to disclose any notice of appeal from the judgment in favor of Jessie C. Dixon filed on January 28, 1924. The appellant argues in support of this appeal that it was her intention to appeal from both judgments, and states that both judgments were of like character. In this respect, however, she is not

supported by the record. The judgment of November 9, 1923, referred exclusively to the defendants A. H. and Hannah Dixon and was based upon the ground that there was a failure of proof that O. G. Dixon furnished any part of the consideration for the purchase of the property, the proceeds of which were claimed to be a trust estate. On the other hand, the judgment filed January 28, 1924, related to Jessie C. Dixon exclusively and was based upon the additional ground that there was a failure of proof that when Jessie C. Dixon had purchased the property she was not an innocent purchaser for value and without notice of the existence of the alleged trust. The fact that the two judgments were separately treated is further emphasized by reference to the notice of motion for new trial which related to and concerned the judgment against A. H. and Hannah Dixon only and was in fact filed prior to the entry of the later judgment in favor of Jessie C. Dixon.

[1, 2] Reference is made to *Harrelson v. Miller & Lux*, 182 Cal. 408, 188 P. 800, and similar cases holding that a notice of appeal should be liberally construed and that an appeal should not be dismissed for a mere misdescription of the judgment from which the appeal is intended to be taken. We think the rule stated in *Harrelson v. Miller & Lux*, *supra* (page 414 [188 P. 802]), is applicable here. It was there said:

"Notices of appeal are not strictly construed, and an appeal will not be dismissed because of a misdescription of the judgment or order to which it relates, unless it appears that the respondent has been misled by such misdescription."

Here the case is not one of misdescription of the judgment, but is one where the description of one of two judgments is so clear and unmistakable as to preclude a description of the other judgment which is not mentioned. In a case where several defendants are joined and separate judgments are entered as to each a notice of appeal specifically designating one of these judgments cannot be interpreted to include others not mentioned.

[3] Though we are satisfied that for this reason the purported appeal from the judgment in favor of Jessie C. Dixon should be affirmed, we have made further examination of the record as to this branch of the case, and are satisfied that the judgment as to her must be affirmed upon the merits. The appellant alleged that on the 24th of April, 1922, Hannah and A. H. Dixon conveyed four lots to Jessie C. Dixon, the wife of defendant A. H. Dixon, and then alleged, on information and belief only, that Jessie C. Dixon paid no valuable consideration for said conveyance and that she knew and had full knowledge at the time that the property had been held by F. S. Dixon prior to his death in trust for the members of the alleged partnership. In support of these allegations of the complaint

the appellant offered the testimony of Mrs. Hannah Dixon only and now argues that this testimony shows that no consideration was paid by Jessie C. Dixon. To support this argument the appellant adopts the method of citing a portion of the testimony only, omitting that portion which completely negatives her claims. Appellant cites the following testimony of this witness:

"I did not understand it. I decided that property to Jessie Dixon because I did not want to be bothered with it. * * * She never paid me any money."

In the next line of the testimony of the same witness we find: "She paid him (A. H. Dixon), and, of course, he looks after all my business." There is no evidence of any character that at the time of the conveyance Jessie C. Dixon had any knowledge of the purported trust, or that she at any time had any knowledge of the purported partnership. The appellant has therefore failed to sustain the burden of proof which the law casts upon her to show that Jessie C. Dixon was either not a purchaser for value or one with knowledge of the alleged infirmities. *Tillaux v. Tillaux*, 115 Cal. 663, 668, 47 P. 691.

The case against A. H. and Hannah Dixon presents numerous difficulties which are not discussed in the brief. The complaint alleges that F. S. Dixon and his two sons A. H. and O. G. constituted a partnership in the year 1909 for the purpose of conducting an undertaking business in the city of Bakersfield; that on December 16 of that year the "said partners" purchased a track of land in the city of Bakersfield for the sum of \$7,000, which sum constituted a part of the assets of the partnership and one-third of which belonged to O. G. Dixon; that at the time of the purchase it was orally agreed among the said partners that the property should be conveyed to F. S. Dixon and that the title thereto should be held by him for the use and benefit of the other members of the partnership; that thereafter the "said partners" expended a large sum of the "partnership assets" on the construction of an apartment house upon said premises, of which assets O. G. Dixon owned one-third; that O. G. Dixon died on the 6th of October, 1914; that thereafter and on the 10th day of February, 1920, F. S. Dixon sold said property and invested the proceeds thereof in the purchase of other land designated as lots 1 to 8, inclusive, of block 115 in the city of Bakersfield; that thereafter said F. S. Dixon died and in due course of administration the said property was distributed to Hannah Dixon and A. H. Dixon; that on September 28, 1921, said Hannah Dixon and A. H. Dixon sold lots 1 to 4, inclusive, of said tract to a stranger to this action and that they invested the proceeds from such sale in other properties, the nature and description of which is unknown to the pleader; that on April 24,

1922, said Hannah Dixon and A. H. Dixon conveyed lots 5 to 8, inclusive, of said tract to Jessie C. Dixon, who paid no valuable consideration for the conveyance and took with full knowledge of the existence of the alleged trust; that F. S. Dixon prior to his death and A. H. Dixon had collected large sums of money on account of the rents, issues, and profits of said real property and that the said A. H. Dixon had invested the same in other tracts of land, the character and description of which is unknown to the pleader; that prior to the commencement of this action demand was made upon A. H. and Hannah Dixon that they render an account of the proceeds realized by them from the sale of such properties, but this they refused to do. The complaint concluded with a prayer that the property first described be decreed to be held by F. S. Dixon in trust for O. G. Dixon as to a one-third portion thereof; that the title to the property described as lots 5 to 8, inclusive, of block 115, be adjudged to be held in trust by Jessie C. Dixon as to a one-third portion thereof for the benefit of this appellant; and that A. H. Dixon and Hannah Dixon be required to account to the appellant for the rents, issues and profits of the various tracts of land described in the complaint.

[4, 5] The case is founded upon the theory that the father and two sons were partners in the undertaking business, of which each owned a one-third interest, and that the real property purchased in the year 1909 was purchased by these partners and held by the father in trust for his two sons. We will pass the question of the sufficiency of the proof of the existence of this partnership and assume that the evidence was sufficient to make prima facie proof of the original partnership. Turning to the allegations of the complaint, we find that these partners purchased the land in question with the assets of the firm and at the time orally agreed that the father should take the title in his name and hold it in trust, not for the partnership, but for the two sons. We have, then, an attempt to plead an express trust resting in parol. Herein the pleading fails by reason of section 852 of the Civil Code, which requires such a trust to be created by written instrument. But, aside from the character of the pleading, there is not a word of evidence tending to prove the oral agreement. In so far as the land itself is concerned, there is therefore a complete failure of both pleading and proof to establish a valid express trust. Assuming, however (though, as we have said, these matters are not mentioned in the briefs), that the appellant relies upon these facts as constituting a resulting trust, we are faced with this situation so far as the land itself is concerned. The allegations of the complaint are that the father, with the consent of the other partners, used a portion of the assets of the firm to purchase real property, the title to which he took in his own

name. Such a transaction does not constitute a resulting trust. "Partners have an unquestionable right to deal with the funds of the firm as they please; and, if, with their consent or knowledge or acquiescence, a portion of their funds is applied to the purchase of real estate in the name of an individual member, and as his private property, there is in such case no resulting trust." *Lefevre's Appeal*, 69 Pa. 122, 126, 8 Am. Rep. 229, 233.

Though the complaint alleges that \$7,000 of the partnership funds was paid for the land, the proof was that the sum of \$2,500 only was paid. The evidence further showed that the father purchased the undertaking establishment for \$7,000 and that after conducting it for a period of nine months sold it for the same price; that after using the sum of \$2,500 for the purchase of the land in question the father borrowed on his own credit sufficient money to erect the apartment house. Though there is neither pleading nor proof of the dissolution of the partnership, nor of any adjustment of the individual interests of the members thereof, it would appear that in the main the purchase of the realty was effected by the use of the portion of the assets belonging to the father individually. Thus again assuming that a resulting trust is sought to be established, there is complete failure of proof that O. G. Dixon furnished the consideration for the purchase of the realty either in whole or in part.

[6] Coming then to the allegations of the complaint relating to the use of the proceeds of the partnership in the construction of the apartment house, we find that no special agreement is pleaded, and we assume therefore that it is the contention of the appellant that in this respect a resulting trust was created because of the allegation that the partnership furnished a portion of the consideration. In this respect we are met by the well-known rule that a resulting trust arises, if at all, the instant the conveyance is made and the title vests. It does not arise through the furnishing of funds to enable a purchaser to complete installment payments on the purchase of property where title has passed, or where funds are furnished to the holder of the legal title for the purpose of making improvements thereon. *Lincoln v. Chamberlain*, 61 Cal. App. 399, 401, 214 P. 1013. It would seem, therefore, that there is a complete failure of proof to show either a valid express trust in either the land or the improvements thereon, or to show a valid resulting trust in either.

[7-9] Assuming, however, that it may be the contention of appellant that a constructive trust arose because of the fiduciary relationship of the father and sons while they composed the partnership, the case is no less difficult than under the other cases which have been discussed. If a trust was created whereby F. S. Dixon was obliged to hold the property for the benefit of the partnership,

such trust terminated upon the death of one of the partners, O. G. Dixon, in October, 1914. 26 R. C. L. p. 1210, § 52. The partnership having been dissolved by the death of one of the partners (section 2450, Civ. Code), it became the duty of F. S. Dixon (assuming again that he held this property in trust for the partnership) to account to the other partners, or their successors in interest, for the partnership assets which he held. Having failed to do this, and having continued to retain possession of the realty and to exercise the right of ownership over it, he became a trustee for the equitable owners by operation of law and the trust estate thus created was a constructive trust as distinguished from an express or a resulting trust. We do not propose to enter into a discussion of the various lines of distinction between these different classes of trusts. The whole subject-matter is covered in the opinion of Justice Olney in *Lezinsky v. Mason Malt W. D. Co.*, 185 Cal. 240, 196 P. 884. The discussion in that opinion as to the effect of a variance between pleading and proof when these different kinds of trusts are involved is pertinent here, and we quote from page 243 (196 P. 886):

"We may grant, at least for the purposes of discussion, that it would not be a material variance if the complaint were based upon the alleged existence of an express trust and the findings showed but a resulting trust. But it should be noted at the outset that the variance is material, if the findings show facts which would possibly create a trust, but such trust would be neither an express nor a resulting trust, but what is commonly designated as a constructive one; that is, a trust based on fraud, or what is really a particular kind of fraud, a breach of some duty incident to a fiduciary relation. The complaint contains no allegations of fraud or breach of fiduciary duty or of facts from which either would appear, and a cause of action based upon such facts is manifestly very different from one to enforce either an express or resulting trust, based as they are upon the intention of the parties, expressed in one case and presumed in the other."

Bearing in mind that the complaint falls far short of pleading a constructive trust, but assuming again that this was what was intended to be pleaded, we are faced by the plea in both demurrer and answer that the complaint is barred by the statute of limitations. It would seem on the face of the complaint that this plea was good because the trust arose, if at all, upon the death of O. G. Dixon in October, 1914, and the action was not commenced until February, 1923. In the case of a constructive trust the statute begins to run upon the doing of the act by which the trust arose. *Varrois v. Gomet*, 43 Cal. App. 756, 759, 185 P. 1001.

[10, 11] There is a further difficulty which, aside from any of the points heretofore discussed, is fatal to a recovery on the part of appellant on the record as here presented. It is the commonly accepted rule that—

"Where property, with the consent of the trustor, has been in that manner commingled with the property of the trustee, so that no part of it can be definitely traced and segregated from that held by the trustee, or identified as a part of any specific fund or property, none of it can be considered as the property of the trustor. 'The right of pursuing it fails when the means of ascertainment fails. This is always the case where the subject-matter is turned into money and mixed and confounded in a general mass of property of the same description.' Where the identity cannot be traced, the trustor 'is forced to rely upon the personal liability of the trustee. * * * He has no special lien upon the general estate of the trustee which is superior to that of any other creditor,' and his only remedy is a personal action for damages or for money had and received." Estate of Arms, 186 Cal. 554, 561, 199 P. 1053, 1055.

Now the complaint alleges that a trust was intended to be applied to the premises and to the Dixon Apartments which were purchased by F. S. Dixon in the year 1909. It also alleges that, after the conveyance, assets of the partnership were used in the construction of the apartment house. It appears from the evidence that \$2,500 was used in the purchase of the land and that the apartments were built, in part, from proceeds from the undertaking business, but largely from loans obtained on the credit of F. S. Dixon alone. It appears, therefore, that from the time of the conveyance the funds which F. S. Dixon obtained from the business were constantly commingled with his own and no attempt has been made by either pleading or proof to segregate or designate as a part of the trust fund any property now in the possession of any party to the action. Furthermore the pleading is that the trust was created solely for the purpose of holding the property designated as the Dixon Apartments in trust for the members of the partnership. If this is so, the trust was repudiated in the sale of the premises by the trustee in February, 1920. If at that time a valid constructive trust existed in favor of the estate of O. G. Dixon, it could be followed into the property of the parties to this action only by allegation and proof that the proceeds thereof went into property now held by them and which is specifically described. Far from meeting these requirements, the complaint alleges that after

Hannah and A. H. Dixon obtained the property as distributees in the F. S. Dixon estate they sold a portion thereof to a stranger to the action and invested the proceeds thereof in property unknown to the pleader, but as to the other portion thereof they sold to Jessie C. Dixon, who took with notice and without consideration. Now the proof is that the property was distributed not to Hannah and A. H. Dixon, as alleged in the complaint, but to Hannah Dixon alone. As to A. H. Dixon, therefore, there is no property upon which a trust could be settled.

Coming now to the four lots conveyed to the stranger to the action by Hannah Dixon, the appellant successfully alleges herself out of court by failing to plead that this purchaser did not take without notice and for a valuable consideration. As to the remaining four lots which were conveyed to Jessie C. Dixon, we have already seen that the proof wholly fails to show that she took with notice, or that she did not pay a valuable consideration. It was also shown as a part of appellant's case that Hannah Dixon at the time of the trial had no property upon which a trust could be settled in favor of the appellant. As to the respondent A. H. Dixon, the only proof was that he did not receive any of the property coming down from the original conveyance and no effort was made to show that he had any of the profits from any of the transfers thereof. At the close of appellant's case, therefore, the uncontradicted evidence was that there was no property in the hands of any of the respondents which could be impressed with any trust in favor of the appellant.

As to that portion of the prayer of the complaint which asked for an accounting from A. H. and Hannah Dixon of the rents, issues, and profits of the various tracts of land mentioned in the complaint, it is sufficient to say that as to Hannah Dixon the complaint wholly fails to put that matter in issue and that as to A. H. Dixon there is no proof of any nature that he received any rents, issues, or profits of any of the property mentioned in the complaint.

Judgments affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

75 Cal. App. 146

Ex parte BELLIS. (Cr. 1301.)

(District Court of Appeal, First District, Division 1. California. Nov. 7, 1925.)

1. Criminal law ☞1208(9)—Indeterminate sentence is in legal effect sentence for maximum term.

Indeterminate sentence is in legal effect sentence for maximum term.

2. Criminal law ☞1218—Confinement in state prison held proper for one guilty of attempt to commit burglary.

Where defendant pleaded guilty to charge of attempting to commit burglary in second degree, he was properly confined in state prison in view of Pen. Code, § 461, defining "burglary," and section 664, subd. 1, fixing punishment for attempt.

Application by Harold Bellis for writ of habeas corpus prayed to be directed to the Warden of San Quentin prison. Writ denied.

Harry S. Harper, of Los Angeles, for petitioner.

Thomas Ramage, of San Francisco, for respondent.

TYLER, P. J. The petition alleges that applicant is confined in the state prison at San Quentin under a judgment that is unlawful. The judgment shows that petitioner pleaded guilty of the crime of an attempt to commit burglary, a felony, which the court found to be burglary in the second degree as charged in count 1 of the indictment, and that he was punished by imprisonment in the state prison at San Quentin for the term prescribed by law.

It is claimed that under subdivision 2 of section 664 of the Penal Code petitioner could only be imprisoned in the county jail for the offense to which he pleaded guilty. The Code prescribes punishment for burglary as follows: (1) Burglary in the first degree for not less than five years; (2) burglary in the second degree for not less than one or more than fifteen years. Pen. Code, § 461. Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows: (1) If the offense so attempted is punishable by imprisonment in the state prison for five years, or more, or by imprisonment in the county jail, the person guilty of such attempt is punishable by imprisonment in the state prison or in a county jail, as the case may be, for a term not exceeding one-half the longest term of imprisonment prescribed upon the conviction of the offense so attempted. (2) If the offense so attempted is punishable by imprisonment in the state prison for any

term less than five years, the person guilty of such attempt is punishable by imprisonment in the county jail for not more than one year. Pen. Code, § 664.

[1, 2] An indeterminate sentence is in legal effect a sentence for the maximum term. In re Lee, 177 Cal. 690, 171 P. 958. The crime of which petitioner pleaded guilty being punishable for not less than one nor more than fifteen years, one-half of the longest term is greater than five years and the crime is, therefore, punishable by imprisonment in the state prison.

It follows that the claim here made is without merit.

Writ denied.

We concur: CASHIN, J.; KNIGHT, J.

75 Cal. App. 157

ALPINE PETROLEUM CO. v. LEWIS et al. (Civ. 5258.)

(District Court of Appeal, First District, Division 2, California. Nov. 9, 1925.)

1. Mines and minerals ☞74—Assignees of oil leases held not entitled to damages because of actions brought by lessors against assignors to quiet title.

Assignees of oil leases held not entitled to damages because of actions to quiet title, brought by lessors in good faith, in belief that assignors had not complied with terms of leases and that assignees had no legal right thereto because assignment was without lessors' consent.

2. Mines and minerals ☞74—Lessors' refusal to serve assignee of lease, in actions against assignors to quiet title, held not indicative of bad faith as matter of law.

Refusal of lessors, suing to quiet title against assignees of oil leases and fictitious defendants, to serve summons on subsequent assignee which offered to accept service, be substituted for fictitious defendant, and waive technical defense, held not to indicate bad faith as matter of law, so as to entitle such subsequent assignee to damages for bringing such actions.

3. Mines and minerals ☞74—Party not intervening in action against its assignors not injured by plaintiff's refusal to serve it with summons.

As assignee of oil lease might have intervened in lessors' action against assignors and fictitious defendants to quiet title, lessors' refusal to serve it with summons on its offer to accept service and be substituted for fictitious defendant caused it no injury for which it could recover damages.

4. Evidence ☞269(1)—Representations by assignors that leases could not be assigned without lessors' consent held admissible on issue of lessors' good faith.

In action by assignee of oil lease against lessors for damages from commencement of ac-

tions by latter against assignors to quiet title, representations by assignors that leases could not be assigned without lessors' consent held admissible, not to vary terms of written contract, but on question of lessors' good faith.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by the Alpine Petroleum Company against Guy E. Lewis and another. From a portion of the judgment against plaintiff, it appeals. Affirmed.

Marshall D. Andrews, of Los Angeles, and Wayne L. Clark, of Ventura, for appellant.

Chas. F. Blackstock, of Oxnard, for respondents.

LANGDON, P. J. This appeal is by the plaintiff from a portion of a judgment denying it damages for alleged interference with leasehold rights in certain land in the county of Ventura, Cal. Judgment was given quieting plaintiff's title to this leasehold interest and restraining defendants from interfering with the enjoyment thereof.

The defendants are the owners of the land, and transferred to lessees the right to sink wells and prospect for oil. Through successive transfers, the plaintiff became the owner of these oil leases. There is no question about this phase of the case, and the portion of the judgment quieting plaintiff's title to the leases, from which no appeal was taken, makes it unnecessary for us to set forth the details of the transactions leading to this result.

In its complaint, plaintiff also charged that defendants interfered with it in obtaining drilling contractors, and persuaded drillers to leave its employment, and circulated false stories that plaintiff was not paying its bills, all willfully and maliciously and for the purpose of obstructing plaintiff in its work under its leases; that defendants commenced certain actions against plaintiff's predecessors in interest in said leaseholds, seeking to have it judicially declared that they had no right, title, or interest in the land, well knowing that plaintiff was the assignee of the defendants in said actions, and that said actions were brought to hamper and interfere with the quiet enjoyment of plaintiff herein.

[1] The trial court has found upon conflicting evidence, that the defendants did not interfere with the drillers or drilling contractors in the employ of plaintiff, and that defendants did not make the statements or do the acts charged by plaintiff. With reference to the other allegations of the complaint, it was found by the court that defendants commenced actions against Spellacy and Neiswender and fictitious defendants to quiet title to the land in question, but that such actions were commenced in good faith and in the belief that the said Spellacy and Neiswender, who were the first assignees of the

lessees named in the leases, and who, in turn, had assigned said leases to Alpine Petroleum Company, had not complied with the terms of their leases. This finding is supported by the testimony in the record regarding the assignments of the leases. They were originally given to Messrs. Oaks and Watlington and were nonassignable. The lessors, later, signed a consent to an assignment and in accordance therewith the leases were assigned to Spellacy and Neiswender, trustees, who, later, assigned to plaintiff herein. The lessors contended that, when they signed the consent to the first assignment, they believed, and were assured by Spellacy and Neiswender, that this consent operated only upon the first assignment and that consent would have to be obtained for any further assignments. The court believed their version of this transaction, and that they honestly thought they were entitled to some further consideration for the second assignment and for each successive assignment thereafter, and that the plaintiff herein had no legal right to the leases because the assignment to it was without the consent of the lessors. Upon such a state of facts, the conclusion of the court that the said actions by defendants herein against Spellacy and Neiswender did not entitle the plaintiff herein to damages is undoubtedly correct.

[2, 3] Appellant's contention that these actions against Spellacy and Neiswender were commenced in bad faith is based upon evidence in the record that the plaintiff herein offered to accept service of summons and complaint in said actions and be substituted in the place and stead of one of the fictitious defendants, and to waive the technical defense that no corporation, fictitious or otherwise, was sued in the action, and that the defendants herein refused to so serve plaintiff and thus enable it to litigate and settle its right to the leases. Of course, defendants were under no legal obligation to serve plaintiff and allow it to enter the action in the mode suggested, and their failure to be accommodating in the matter would not of itself necessarily indicate bad faith. The evidence was before the trial court for what it was worth, but the finding was against appellant on this issue. It is to be remarked also that plaintiff might have intervened in the action against Spellacy and Neiswender, but did not see fit to do so, so that the action of defendants in refusing to serve it with summons did not cause plaintiff any injury.

[4] There is also a complaint that the trial court erred in admitting testimony with reference to the representations on the part of Spellacy and Neiswender, to the effect that the leases could not be assigned a second time without the consent of the lessors. This testimony was not admitted to vary the terms of the written contract, but solely upon the question of the good faith of the defendants

in refusing to recognize the validity of the assignments to Alpine Petroleum Company. For this limited purpose it was admissible.

The judgment is affirmed.

We concur: **NOURSE, J.; STURTEVANT, J.**

75 Cal. App. 178

FINDLEY v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.
(Civ. 5102.)

(District Court of Appeal, Second District, Division 1, California. Nov. 12, 1925.)

1. Master and servant $\S$ 416½, New, vol. 11A Key-No. Series—General statute as to right to certified copy of public writing inapplicable to award of Industrial Accident Commission.

Code Civ. Proc. $\S$ 1893, requiring officer having custody of public writing, which citizen has right to inspect, to give him certified copy on payment of fee, is merely the general rule as to public documents, and is inapplicable to findings and award of Industrial Accident Commission, the law as to which is given by Workmen's Compensation Act, 1917, $\S$ 21.

2. Master and servant $\S$ 416½, New, vol. 11A Key-No. Series—No abuse of discretion by Industrial Accident Commission in withholding certified copy of award, in view of application for certiorari.

Under Workmen's Compensation Act, 1917, $\S$ 21(c), authorizing commission to withhold certified copy of findings and award, where it is deemed advisable to stay enforcement of award, there is no abuse of discretion authorizing disturbance of such withholding, where defendants in the proceeding had advised the commission that they intended to apply for certiorari, and that they desired a stay till they should exhaust their rights in the appellate courts.

Petition by Esther Findley for writ of mandate to the Industrial Accident Commission of California and the members thereof to issue certified copy of award. Petition dismissed.

Perry F. Backus, of Los Angeles, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondents.

HOUSER, J. It appears that in a certain proceeding brought before the Industrial Accident Commission an order was made including an award to petitioner herein of the sum of \$2,500, to be paid to her by Thomas Gordon, George W. Harrison, and Charles W. Russell, individually and as copartners, doing business under the firm name of Gordon & Harrison, and which award on rehearing of the matter by the said commission was thereafter by it affirmed. Thereupon the

petitioner herein applied to said commission for a certified copy of such award, but such application was by said commission refused. Whereupon petitioner filed her petition herein for a writ of mandate to be directed to said commission, commanding it to issue to said petitioner a certified copy of said award.

Before the application herein for said writ of mandate could be heard by this court, the defendants in the proceeding before the commission, against whom the said order of award had been made, petitioned this court for a writ of certiorari for the purpose of reviewing the proceedings which resulted in such order of award. Such last-mentioned matter having come on regularly for hearing and decision, it was ordered by this court that the said order of award, so far as it purported to award to petitioner the sum of \$2,500 to be paid by said individual defendants, be annulled. *Gordon et al. v. Ind. Acc. Com.* (Cal. App.) 249 P. 844. In the proceeding before the Commission, however, the petitioner was granted further pecuniary relief as against one other defendant, and, so far as said award affects said defendant, the rights, if any, of petitioner to have issued to her a certified copy of the award remain intact.

[1, 2] The ordinary rule as to public writings is that any citizen is entitled to inspect them, and that, on his demand and the payment by him of the legal fees therefor, the custodian of such writings is bound to give to such citizen a certified copy thereof. Section 1893, Code Civ. Proc. That rule, however, applies to public documents only in the absence of a special rule to the contrary or one which places some limitation upon the general rule. The law with reference to the right of a party to a certified copy of the findings and the award by the Industrial Accident Commission is set forth in section 21 of the act. Stats. 1917, p. 831. After providing for the filing of a certified copy of the findings and award with the clerk of the superior court of any county, etc., and that judgment must be entered by such clerk in conformity therewith, the statute proceeds with certain limitations thereon, including the following:

"* * * Where it is deemed desirable to stay the enforcement of an award and a certified copy of said findings and award has not been issued by the commission, the commission, or any member thereof, may order such certified copy to be withheld with the same force and under the same conditions as it might issue a stay of execution if said certified copy had been issued and judgment entered thereon." Section 21(c).

The representation is made by respondent, and not denied by petitioner, that the reason for refusing petitioner's application to the commission for a certified copy of the award

was that the individual defendants in the proceeding before the commission had advised the commissioner to whom the application for the said certified copy of the award had been made that it was their intention to apply to this court for a writ of certiorari, and that they "desired a stay of proceedings until they should exhaust their rights in the appellate courts."

The records herein show that the said defendants thereafter did apply to this court for a writ of certiorari, and in connection therewith that the defendants furnished a satisfactory undertaking for stay of proceedings, from which it follows that their said statement to the commissioner was made in good faith. The substance of the statute (section 21[c], Stats. 1917, p. 831), is that, where it is deemed desirable to stay the enforcement of an award, the commission may refuse to issue a certified copy thereof. Judging from the language of the statute, the probable intention of the Legislature was to vest in the commission a legal discretion as to whether under given circumstances a certified copy of an award should issue. It is the unquestioned rule that, where a discretion is thus vested in an individual or commission of any sort, the exercise thereof will be disturbed by an appellate court only where a clear abuse of such discretion has been shown. It appearing that good cause existed for the withholding by the commission of the certified copy of the award, its action therein must be affirmed by this court.

It is therefore ordered that the petition for a writ of mandate herein be and the same is dismissed.

We concur: CONREY, P. J.; CURTIS, J.

75 Cal. App. 109

PEOPLE v. BRAIN. (Cr. 1234.)

(District Court of Appeal, Second District, Division 2, California. Nov. 4. 1925. Hearing Denied by Supreme Court Dec. 31, 1925.)

1. Indictment and Information § 111(1)—Different offenses, arising out of single transaction, may be charged in separate counts of indictment.

Where a single transaction includes commission of several crimes, prosecutor may carve as large an offense out of it as he can, and under Pen. Code, § 954, may charge different offenses in separate counts of indictment or information.

2. Criminal law § 200(1)—Plea of former conviction for burglary held not sustainable in prosecution for robbery committed after entry effected.

In prosecution for robbery, plea of former conviction and once in jeopardy, based on plea of guilty of burglary for housebreaking imme-

diately preceding robbery charge, held not a valid plea in bar, as burglary was complete when felonious entry into house was effected, and robbery was a second and later transaction.

3. Criminal law § 296—Court may instruct jury that plea of former acquittal and once in jeopardy not sustained, where evidence uncontradicted.

Where, under special pleas of former conviction and once in jeopardy, evidence submitted is uncontradicted that former conviction relied on was for different offense, question becomes one of law, and court may instruct jury that special pleas are not sustained.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Eugene A. Brain was convicted of robbery, and he appeals. Affirmed.

H. E. Manning, of Vallejo, for appellant. U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

WORKS, J. By information filed by the district attorney defendant was charged with the crime of robbery. He was convicted, and appeals from the judgment and from an order of the trial court denying his motion for a new trial.

Long before the filing of the information which eventuated in the conviction in the present case, appellant had been charged, for a housebreaking immediately preceding the robbery, with the crime of burglary. To this earlier charge he had pleaded guilty, and had made an application for probation. The application was denied, appellant was sentenced to a term in the state prison, and was incarcerated pursuant to the sentence. In the present case he pleaded not guilty, and he entered special pleas of former conviction, former acquittal and once in jeopardy. In support of these special pleas he proved, at his trial under the charge of robbery, the facts above set forth concerning the earlier charge. This was the only defense made. The trial judge instructed the jury that the special pleas were not sustained by the evidence.

[1, 2] Appellant contends that the special pleas were good, that, therefore, the instruction given by the judge was erroneous, and, moreover, that the judgment of conviction of robbery cannot stand. In support of this position appellant cites *People v. Defoor*, 100 Cal. 150, 34 P. 642, and other cases. In the decision named the court, in upholding a plea of former conviction and once in jeopardy, quoted from a Tennessee case to the effect that where a single transaction or set of facts includes the commission of several crimes "the prosecutor may carve as large an offense out of it as he can, but it is said 'he must cut only once.'" And, of course, in "cutting once" out of the facts of a single

transaction, the "prosecution" may charge different offenses in separate counts of the indictment or information. Pen. Code, § 954. Here, however, we do not deal with the facts of a single transaction. The burglary was complete when the felonious entry into the house was effected, and the robbery was a second and later "transaction." *People v. Devlin*, 143 Cal. 128, 76 P. 900; *People v. Snyder* (Cal. App.) 239 P. 705. These cases are also authority for the proposition that appellant's special pleas were not established.

[3] Appellant insists that the court erred in instructing the jury that the special pleas were not sustained upon the ground that the instruction trenched upon the right and duty of the jury to determine a question of fact. The point is not well taken. Where, under such special pleas as were entered here, the evidence submitted is uncontradicted, and results in such a condition as that with which we have dealt above, the question involved becomes one of law, and the court may instruct the jury directly that the special pleas are not sustained. *People v. Conson* (Cal. App.) 237 P. 799.

Judgment and order affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

75 Cal. App. 35

MIDDLEBROOK et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (Civ. 5218.)

(District Court of Appeal, Second District, Division 1, California. Nov. 2, 1925.)

1. Justices of the peace ☞ 166(2), 167(3)—Statute requiring dismissal, when appeal from justice's court not brought to trial within one year, refers to dismissal of appeal, and not of the action.

Code Civ. Proc. § 981a, providing for dismissals of appeals from justices' courts, where not brought to trial within one year, refers to dismissals of the appeal, and not of the action.

2. Justices of the peace ☞ 166(6)—Defendant, appealing from justice's court and not objecting to setting of case for trial at date beyond one year from filing of appeal, deemed to have acquiesced therein, and cannot complain of dismissal of such appeal.

Where superior court, on appeal by defendant from justice's court, set case for trial, pursuant to request of plaintiff, at a date beyond one year from date of filing of appeal, held that, under Code Civ. Proc. § 981a, providing for dismissals of appeals from justices' courts, where not brought to trial within one year, the responsibility for calling court's attention to necessity for an earlier date was on the defendant, and he, having failed to do so, must be taken to have acquiesced in date set, and hence cannot seek to compel court to vacate order of dismissal.

Application for writ of mandate by Charles J. Middlebrook and others, prayed to be directed to the Superior Court of Los Angeles County and Harry R. Archbald, a Judge thereof, to require respondent court to vacate an order dismissing an appeal. Writ denied.

Benj. M. Stansbury, of Los Angeles, for petitioners.

CONREY, P. J. On the 22d day of July, 1924, the petitioners herein appealed to the superior court of Los Angeles county from a judgment rendered against them as defendants in the justice's court of Los Angeles township. On September 18, 1924, the Industrial Loan & Investment Company, plaintiff in that action, duly presented to the court a motion to set the case for trial. That motion was made upon notice, and also according to a stipulation between the parties "that said cause might be called for setting" at that time. Pursuant to said motion, "and pursuant to said stipulation, the respondent superior court set the trial of said appeal for the 23d day of September, 1925, in department 9 of said court." In August, 1925, upon motion of the plaintiff in that action, and solely upon the ground that the appeal had not been brought to trial within one year from the date of filing of the appeal, the appeal was dismissed. By reason of the dismissal so entered the superior court has refused to try the case. The facts above stated appear in the petition for writ of mandate. Petitioners contend that in dismissing the appeal the court acted in excess of its jurisdiction. Wherefore they now by this proceeding seek to compel that court to vacate the order of dismissal and proceed to try the cause upon its merits.

[1] Section 981a of the Code of Civil Procedure provides for dismissals of appeals from justices' courts, where not brought to trial within one year, in the following language:

"No action heretofore or hereafter appealed from the justice court to the superior court, shall be further prosecuted, and no further proceedings shall be had therein, and all such actions heretofore, or hereafter appealed must be dismissed by the court to which the same shall have been appealed, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, where the appealing party fails to bring such appeal to trial within one year from the date of filing such appeal in said superior court, unless such time be otherwise extended by a written stipulation by the parties to the action filed with the clerk of the superior court to which the appeal is taken. * * *

The dismissal referred to and intended by the statute is a dismissal of the appeal, and not of the action. *California Law & Adjustment Co. v. Superior Court* (Cal. App.) 234 P. 408. In the cited case this court had

under consideration a petition for a writ of mandate to compel the superior court to dismiss an appeal, upon the ground that the appealing defendant had failed to bring the appeal to trial within the prescribed period of time. The petition showed that the petitioner itself, by its attorney, on a date less than one year from the time of taking the appeal, had "caused said case to be set for trial in respondent court on the 4th day of December, 1924," which date was more than one year from the time when the appeal was filed. Therefore this court held that the superior court should not be required to dismiss the appeal. The respondent to the appeal, who was petitioner for the writ of mandate, had not only caused the case to be set for trial, but also had caused it to be set for a specified date, which date was after the expiration of the year. It was held here that, if such conduct of said respondent to the appeal was not the legal equivalent of a written stipulation, duly filed with the clerk (as mentioned in the statute), then at least there was an estoppel to take advantage of the defect.

[2] Relying upon the decision of this court in *California Law & Adjustment Co. v. Superior Court*, supra, petitioner herein argues that the superior court, at the time of the dismissal of the appeal, had not lost jurisdiction thereof, and that in ordering such dismissal that court exceeded its jurisdiction. But we do not think that this contention of petitioner should be sustained. The plaintiff in the superior court (respondent to the appeal therein) did nothing more than ask the court to set the case for trial. The selection of a date beyond one year from the date of filing the appeal was an act of the court. It reasonably may be assumed that if, when the court announced its intention to delay the trial until the date named, the appellant had called to the court's attention the legal consequences of such delay, an earlier date would have been chosen. *Boyd v. So. Pac. R. R. Co.*, 185 Cal. 344, 346, 197 P. 58. Under the provisions of section 981a, Code of Civil Procedure, the responsibility for calling the court's attention to the necessity for an earlier date was on the appealing party, and, since he did not do so, he must be taken to have acquiesced in the date set.

For the purposes of the present decision it is not necessary to express an opinion as to whether or not, in *California Law & Adjustment Co. v. Superior Court*, supra, the rule of estoppel there stated was properly applied to a case arising under the provisions of said section 981a, Code of Civil Procedure. The parallel existing between the language of that section and sections 581a and 581b, Code of Civil Procedure, was not in that case noticed or considered. Concerning these two sections, and their force in compelling dismissals under the specified conditions, see

decision of this court in *Sauer v. Superior Court* (Cal. App.) 241 P. 570.

The petition for writ of mandate is denied.

We concur: HOUSER, J.; CURTIS, J.

75 Cal. App. 103

KERN COUNTY LAND CO. v. NIGHBERT. (Civ. 5255.)

(District Court of Appeal, First District, Division 2, California. Nov. 4, 1925.)

1. Adverse possession ⇨109—Apparent abandonment or failure to occupy land does not divest one of title without adverse possession.

Apparent abandonment or failure to occupy land does not divest one of title except where adverse possession has continued for the statutory period.

2. Adverse possession ⇨22—Claim not founded on written instrument held not to show necessary inclosure or cultivation.

A claim of adverse possession, not founded upon a written instrument, but upon mere use of land for pasturage, held not valid under Code Civ. Proc. §§ 323, 325.

3. Quieting title ⇨10(2) — Title of lawful owner will be quieted as against one failing to prove adverse possession, irrespective of manner in which legal title was secured.

Title of lawful owner of land will be quieted as against one failing to prove claim of adverse possession, irrespective of the manner in which owner obtained legal title or the equities between legal owner and others.

4. Adverse possession ⇨106(1)—Rights acquired thereby are stricti juris.

Rights acquired by adverse possession only are stricti juris.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Suit by the Kern County Land Company against Thomas Sanders to quiet title, in which F. A. Nighbert was substituted as defendant and prayed for similar relief. From a judgment refusing to quiet title in either party, defendant appeals. Reversed and rendered in favor of defendant.

J. W. Wiley, of Bakersfield, for appellant.
W. B. Beazley, of Bakersfield, for respondent.

LANGDON, P. J. This appeal is by the defendant from a judgment denying his claim of ownership to certain real property situated in Kern county, California.

The plaintiff brought an action to quiet its title to the land in controversy and named Thomas Sanders and unknown persons claiming any interest therein as defendants.

The complaint alleged that plaintiff was the owner in fee and entitled to the possession and seized and possessed of the land described therein, and also alleged that for more than 20 years prior to the commencement of the action plaintiff had been in the actual, exclusive, continuous, and adverse possession of the property, holding the same and claiming to hold the same in fee adversely against all the world, and had paid all taxes assessed against said property during said period.

Appellant filed an answer denying specifically the allegations of the complaint and setting forth that on October 30, 1887, the land was conveyed to Thomas Sanders by United States patent, duly recorded; that Sanders remained the owner thereof until April 27, 1920, when he conveyed his interest to defendant Nighbert, who has since been the owner thereof, and asked that he be substituted in the place of Sanders as a defendant, and that his title be quieted against plaintiff.

Sanders filed a disclaimer of any interest in the land and Nighbert was substituted as a defendant.

The court found that the land was granted to Thomas Sanders in 1877 by United States patent and said patent was recorded at the request of J. B. Haggin in the office of the county recorder in April, 1883; that the land was never assessed upon the county assessment roll to said Sanders, but from the date of the recordation of the patent until 1898 it was assessed to Haggin, during which time he paid the taxes thereon; that Haggin was one of the organizers and officers of the plaintiff company, and about the year 1898 executed a deed conveying said land to plaintiff, together with other parcels, and since said time the land has been assessed to plaintiff and the taxes thereon paid by it; that said land is not susceptible of irrigation, except from rainfall or wells which might be drilled thereon; that it is undeveloped and unimproved; that from 1906 to the time of the commencement of this action, the land was used for grazing and pasturage by Miller & Lux, Incorporated, under an oral agreement therefor made with the plaintiff; that no other use was made of the land; that in November, 1915, a notice of the pendency of this action was duly recorded; that in April, 1920, Thomas Sanders and his wife executed a quitclaim deed to Nighbert, conveying all their right, title, and interest in the land; that prior to the execution of said deed Sanders had never seen or occupied said land nor paid any taxes thereon, nor had the land ever been assessed to him; that at the time of the execution of said deed Sanders did not own nor claim to own said land nor any interest therein. It was further found that neither Sanders nor Nighbert had ever occupied the land and that plaintiff, by itself

or its predecessors in interest, for more than 20 years, has continuously claimed and asserted, in good faith and openly and notoriously against all the world, the title in fee simple to the land and has occupied and used the land in the manner hereinbefore stated. The court concluded that Nighbert acquired no interest in the land by reason of the conveyance from Sanders. The court decreed that the plaintiff should not be granted the relief prayed for, but that Nighbert should also be denied relief, and that he was not the owner of the property described and that each party should bear his own costs.

Plaintiff has not appealed from the judgment, but defendant attacks it in this court, contending that he has a perfect legal title to the land, being the successor in interest of Sanders to whom the United States patent for the same was issued.

[1] Of course, apparent abandonment or failure to occupy land does not divest one of title except where adverse possession has continued for the statutory period. *Northern Assurance Co. v. Stout*, 16 Cal. App. 548, 557, 117 P. 617; *Davenport v. Turpin*, 43 Cal. 597; *Barrett et al. v. K. & T. Coal Co.*, 70 Kan. 649, 79 P. 150, 151; 1 Corp. Jur. p. 10.

[2] In the instant case, since the adverse claim of plaintiff was not founded upon a written instrument, in order to establish possession, it was necessary to show, either that the land had been protected by a substantial inclosure or had been cultivated or improved in the usual manner. Section 325, Code Civ. Proc.; *Gray v. Walker*, 157 Cal. 381, 108 P. 278. Using the land for pasturage would have constituted sufficient possession if the claim of plaintiff had been founded upon a written instrument (section 323, Code Civ. Proc.), but not where the possession alone is relied upon to establish the right. The trial court found against plaintiff on the question of adverse possession, in conformity with the foregoing statutory rules.

It becomes clear, therefore, that the plaintiff had no legal right to the land and the title to the same remained, perforce, as it was before plaintiff and its predecessor in interest did the acts with relation to the land which are set out in the findings, since such acts are insufficient to divest the legal owner of his title. It follows that Sanders had legal title to the land up to the time he executed the deed to the appellant here, and that deed conveyed such title to appellant.

[3, 4] Respondent sets forth fully in its brief the facts appearing from the record with relation to defendant's effort to acquire title to this land, and contends that his claim presents many features which would cause a court of equity to withhold its aid. Sanders' deposition was introduced in evidence on behalf of plaintiff and showed that he was a Civil War veteran. He homesteaded 160 acres of land and was entitled, by reason of

his military service, to claim 40 acres additional. This right was transferable and, according to his statement, he sold it for 50 cents an acre. His assignee, however, whose name Sanders does not remember, never had the legal title to this 40 acres of land and the patent for the same was issued to Sanders, and the purchaser of the homestead right is not before the court claiming to be the equitable owner of the land by reason of such purchase.

Forty-eight years after the issuance of the patent and five years after the commencement of the present action, Nighbert visited Sanders at the latter's home in the state of Kansas and said that he (Nighbert) was working for an abstract company in California and that in order to quiet title to the land secured under the homestead right which Sanders had sold, it would be necessary for Sanders to execute a deed "to make sure that I (Sanders) put up no claim on it." Nighbert gave Sanders and his wife \$200 for executing the deed and did not tell them that an action had been brought by plaintiff to quiet its title to the land. If Sanders were asserting his right against Nighbert in the present proceeding, these facts would be of great weight, and, certainly, a court of equity would not lend its aid to Nighbert against Sanders upon a showing that the former had secured his deed by fraud or misrepresentation. But the record does not present such a situation. Sanders has disclaimed any interest in the land, and the plaintiff cannot take advantage of any inequities in the dealings between Sanders and Nighbert. The plaintiff is relying entirely upon adverse possession, and rights acquired in this way are stricti juris. *North Fork Water Co. v. Edwards*, 121 Cal. 662, 666, 54 P. 69. "There are no equities in favor of a party seeking by adverse holding to acquire the property of another." *Glowner v. De Alvarez*, 10 Cal. App. 194, 196, 101 P. 432.

Upon the face of this record and as between the parties hereto, appellant is the lawful owner of the land and his title thereto should have been quieted. As stated by the trial court in its opinion, the record discloses only two conveyances of title; the first one, a patent from the United States government to Sanders, and the second a quitclaim deed from Sanders to Nighbert. It is to be observed that the pleadings gave no notice that plaintiff was claiming as the successor in interest of one having the equitable right in the land as against Sanders by reason of the purchase from him of the homestead rights in the land, and this position was not taken at the trial. The trial court mentioned in its opinion that Nighbert had information from Sanders that the homestead rights had been sold by him years ago, and that this gave Nighbert notice of an equitable

ownership in someone other than Sanders. Conceding that Nighbert thus had notice of some outstanding equitable title in a person unknown, as well as notice from the pendency of the quiet title suit that the Kern County Land Company was claiming statutory adverse possession, Nighbert then took the legal title subject to the successful assertion of either of these claims. We have seen that the claim of title by adverse possession was not substantiated. The equitable title which might have been asserted, if not barred, by the unknown person who purchased from Sanders the homestead rights in this 40 acres of land is not set up in this action and may never be put forth. If it is asserted, a decree in this case quieting the legal title of Nighbert against the plaintiff will be no bar to its enforcement. Conceding for the moment that there is some unknown person to whom Sanders sold the homestead rights, nevertheless, while the legal title was in Sanders, he held the same subject to this equitable title, and Nighbert, standing in the place of Sanders, would also so hold the title. But this cannot enlarge the plaintiff's rights, nor abridge the right of Nighbert to quiet his title against it. The title to land is not a nebulous thing; it must rest somewhere. By the judgment appealed from, the legal title is in no one. Upon the record before us, full justice is done by quieting Nighbert's legal title against plaintiff, leaving him to account to the equitable owner should such equity ever be asserted and proven.

The judgment is reversed, and the title of the defendant Nighbert to the land described in the complaint is quieted as against the plaintiff.

We concur: NOURSE, J.; STURTEVANT, J.

75 Cal. App. 111

HUTCHESON v. TOWNE. (Civ. 5247.)

(District Court of Appeal, First District. Division 2, California. Nov. 5, 1925. Rehearing Denied Dec. 1, 1925. Hearing Denied by Supreme Court Jan. 4, 1926.)

1. Appeal and error $\Leftrightarrow$ 1195(1)—Supreme Court opinion on appeal from first trial held to be law of case on second trial, where facts stated in opinion found to be true.

Where trial court, at conclusion of second trial, found facts stated in opinion of Supreme Court on appeal from first trial to be true, such opinion was the law of the case, and compelled judgment in accordance therewith.

2. Action $\Leftrightarrow$ 62—Action on promise to pay claims not prematurely brought, where promise to execute mortgage denied, and, not being in writing, did not constitute equitable mortgage.

Action by assignee of claims against a defendant, who had promised to pay them, is not prematurely filed on nonpayment, on ground

that defendant had agreed to execute a note and mortgage to pay claims, which, as an equitable mortgage, could only be enforced by foreclosure, where such promise was denied by defendant, and, if made, did not constitute an equitable mortgage, because not in writing.

3. Appeal and error $\Rightarrow$ 1195(1)—**Complaint held to state cause of action, where it detailed facts held by former opinion of Supreme Court on appeal from first trial to be sufficient.**

Complaint by assignee of materialmen's claims against party who had promised to pay them *held to state a cause of action, where it detailed facts held by former opinion of Supreme Court on appeal from first trial to constitute sufficient consideration for oral promise to pay.*

4. Contracts $\Rightarrow$ 28(3)—**Defendant's claim that agreement to pay claims of materialmen was made before undertaking to complete building held negated by evidence.**

In suit by assignee of materialmen's claims against defendant completing building and promising payment, defendant's claim that he made but one agreement to pay before he undertook completion of building *held negated by evidence.*

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Action on assigned claims, for labor performed and materials furnished by Robert Hutcheson, substituted as plaintiff in place of J. D. Fuller, deceased, against Z. A. Towne. Judgment for plaintiff, and defendant appeals. **Affirmed.**

See, also, 184 Cal. 89, 193 P. 88.

Tanner, Odell & Taft, of Los Angeles, for appellant.

Sheldon Borden, Richard J. O. Culver, G. C. De Garmo, and Albert A. Kidder, Jr., all of Los Angeles, for respondent.

NOURSE, J. This action was commenced on August 1, 1916, by J. D. Fuller, as the holder by assignment of certain claims, against one La Rue upon the alleged promise of the defendant, Towne, to pay such claims. On the first trial of the action judgment went for the defendant, and, on plaintiff's appeal therefrom, the judgment was reversed by the Supreme Court. *Fuller v. Towne*, 184 Cal. 89, 193 P. 88. On the second trial judgment went for the plaintiff, Robert Hutcheson, who had theretofore been duly substituted for J. D. Fuller, who had died subsequent to the commencement of the action. From this judgment, the defendant appealed upon the judgment roll and a bill of exceptions.

[1] The facts of the case are fully stated in the opinion of the Supreme Court on the first appeal and no new facts were developed at the second trial. The findings of the trial court at the conclusion of the second

trial find those facts as stated in the opinion of the Supreme Court to be true. This opinion was, therefore, the law of the case and compelled judgment in favor of the plaintiff.

On this appeal the appellant urges but three points which require consideration: First, that the suit was prematurely filed; second, that the amended complaint does not state a cause of action because it does not show any consideration for the defendant's promise to pay; and, third, that the defendant made but one agreement in which he promised to pay, and that was before he undertook the completion of the building.

[2] The first point is based upon the theory that the appellant at some stage of the negotiations promised to execute a promissory note secured by a mortgage to pay the claims of La Rue's creditors, and it is argued that this promise constituted an equitable mortgage which could be enforced only by suit to foreclose. There are two answers to this point: First, that the appellant positively denies ever having made such a promise; and, second, that if any such promise were made it was not in writing, and hence did not constitute an equitable mortgage. *Hall v. Cayot*, 141 Cal. 13, 18, 74 P. 299. In addition to this the trial court found on substantial evidence that the appellant did not execute the note or mortgage and that the representations that he had done so were not true.

[3] As to the second point, the complaint alleges the facts as detailed in the former opinion of the Supreme Court as constituting the consideration for the oral promise and these facts were held by the court in that opinion to be sufficient to take the oral promise out of the statute of frauds. It was because of the facts alleged in the complaint that the Supreme Court in that opinion reversed the cause and held that the finding that no valid promise had been made was unsupported by the evidence.

[4] Third, the contention that but one agreement was made and that it was made before the appellant undertook the completion of the building is negated by all the substantial evidence in the record. The evidence is that after the appellant had completed the building, and at his instance and request the creditors had been called together, he informed them through his agent that it would be necessary for them to withdraw all their stop notices against the school district in order that he might withdraw the money held by the school trustees. At the same time, also, upon the appellant's instance and request, written releases, which had been prepared by the county counsel, were executed by these creditors to enable appellant to secure the money then in the possession of the school district. As a result of those written releases, and because of them only, the appellant did obtain this money

from the school district and used it for the payment of the bills which he himself had incurred for labor and materials in the completion of the building and for which he alone was responsible.

As was said in the beginning, the case presented on this record is identical with that presented to the Supreme Court in *Fuller v. Towne*, supra, and the decision in that case controls the second judgment. The other points which appellant raises for the first time on this appeal do not require consideration.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

75 Cal. App. 125

WHITMORE v. SMITH. (Civ. 5265.)

(District Court of Appeal, First District, Division 2, California. Nov. 6, 1925.)

1. Municipal corporations ⇨706(5)—Finding of negligence of driver of automobile sustained.

In action for injuries when struck by automobile, attempting to pass bus in front of which plaintiff was passing after alighting therefrom, evidence held sufficient to support finding of defendant's negligence.

2. Municipal corporations ⇨706(5)—Evidence held to show person struck by automobile was not negligent.

In action for injuries when struck by automobile, evidence showing that plaintiff after alighting from bus looked for approaching vehicles, then passed in front of bus, at rapid pace, held sufficient to support finding that she was not guilty of contributory negligence.

3. Appeal and error ⇨1010(1)—Finding of trial court in favor of person struck by automobile cannot be disturbed, unless evidence shows contributory negligence as matter of law.

Where plaintiff was given a judgment for injuries received when struck by automobile, unless evidence demonstrates as a matter of law that plaintiff was guilty of contributory negligence, finding of trial court in her favor cannot be disturbed on appeal.

4. Appeal and error ⇨1010(1)—Determination of questions of fact by trial court, in absence of jury, conclusive on appeal.

Determination of trial court, in absence of jury, upon questions of automobile driver's negligence and plaintiff's contributory negligence, is conclusive on appeal when evidence made questions of fact.

Appeal from Superior Court, Los Angeles County; Edgar A. Luce, Judge.

Action by Nora L. Whitmore against C. T. Smith. From a judgment for plaintiff, defendant appeals. Affirmed.

George F. Kapp, of Long Beach, for appellant.

Fred A. Watkins, of Long Beach, for respondent.

NOURSE, J. Plaintiff commenced this action for damages for injuries suffered when struck by defendant's automobile while she was crossing a public street in the city of Long Beach. The cause was tried before the court without a jury with the result of a judgment in favor of plaintiff in the sum of \$1,800. From this judgment the defendant appeals upon a record prepared under the provisions of section 953a, Code of Civil Procedure.

The only grounds urged on the appeal from the judgment are that the evidence was insufficient to support the finding of defendant's negligence and that it is also insufficient to support the finding that the plaintiff was herself not guilty of contributory negligence. The evidence is that the plaintiff, having just alighted from a public bus at the corner of Atlantic avenue and Seventeenth street, passed around the front of the bus to cross Atlantic avenue when without warning she was struck by the defendant's automobile and thrown back in front of the bus, suffering the injuries which are the basis of the complaint.

[1] Concerning the finding of defendant's negligence the evidence is in wide conflict, both as to the rate of speed and as to the proximity to the side of the bus in which defendant was attempting to pass. On the part of the plaintiff it was shown that the defendant was attempting to pass this bus "as close as it could come without hitting it" and that he was traveling at a high rate of speed in violation of the statutory regulation at that point. On the part of defendant the testimony was that he was attempting to pass the bus at a distance of 4 or 5 feet; that he was not traveling more than 12 or 15 miles an hour; and that the plaintiff ran into his machine. If the defendant's testimony were true, it is apparent that the accident as detailed by all the witnesses could not have happened as it did. The plaintiff was thrown directly in front of the standing bus, her head toward the curb and her feet toward the path of defendant's machine. If the defendant had been traveling at 12 or 15 miles an hour on a path 5 feet west of the standing bus, he could not have thrown the plaintiff to the place where she was picked up. And, again, if he had been traveling in that manner, he would have had ample opportunity to have avoided the collision. The court believed the testimony offered by the plaintiff, and that settles the question of defendant's negligence so far as this appeal is concerned.

[2] On the question of plaintiff's contributory negligence, the only evidence upon which

defendant relies is the inference which he insists must be drawn from the fact that the plaintiff was attempting to cross the street at a rapid rate without having previously looked for approaching vehicles. The evidence is that the plaintiff, after alighting from the bus, looked for approaching vehicles and then passed in front of the bus, not running, as claimed by the defendant, but merely walking at a rapid pace. The last thing she remembered after passing the bus was that she looked and saw the lights of defendant's machine directly in front of her. There is no evidence that she failed to take the precautions that an ordinary person would have taken under similar circumstances.

[3] Unless the evidence demonstrates as a matter of law that the plaintiff was guilty of contributory negligence, the finding of the trial court in her favor cannot be disturbed on appeal. The only circumstance to which the defendant refers as imputing contributory negligence to the plaintiff is that as she was passing in front of the bus she was looking straight ahead and did not look to see if vehicles were approaching from her left. But there is evidence that at that time she saw defendant's lights directly in front of her and from this it must be inferred that she did look to the left. The fact that she was struck by the right-hand fender at a point about one foot from the front thereof does not necessarily indicate that she ran into the automobile. The testimony was that immediately before the automobile struck the plaintiff the driver turned his wheel sharply to the left "as far as it would go" and that act caused the front of the automobile to swerve so that the point of impact was on the side of the fender rather than on the front portion of the car.

[4] On a review of the entire record, we are satisfied that the evidence is such as would compel a submission of the cause to a jury, both on the question of defendant's negligence and on the question of plaintiff's contributory negligence. Such being the case the determination of the trial court upon those questions, in the absence of a jury, is conclusive on this appeal.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

75 Cal. App. 25

In re MILLSAP. (Civ. 5182.)

(District Court of Appeal, Second District, Division 1, California. Oct. 31, 1925.)

1. Appeal and error ⚡597(1)—Reporter's duty to include in transcript for appeal copies of all writings offered or received in evidence.

Under Code Civ. Proc. § 953a, it is duty of reporter to include in transcript for appeal

prepared by him copies of all writings offered or received in evidence.

2. Appeal and error ⚡612(2)—Trial judge's function to examine and certify reporter's transcript.

Examination and certification of reporter's transcript is a function of trial judge.

3. Appeal and error ⚡598—Reviewing tribunal unauthorized to direct that originals of exhibits received in evidence be transmitted on appeal because of great cost of transcribing.

Reviewing tribunal held unauthorized, in view of Code Civ. Proc. § 953a, in disbarment proceedings, to direct that exhibits admitted in evidence in such proceedings be omitted from reporter's transcript, and that originals thereof be transmitted on appeal, on account of great costs of transcribing, Supreme Court rule 25 not authorizing exhibits required by such statute to be prepared by reporter to be omitted from transcript.

Homer C. Millsap appeals from judgment of disbarment, and petitions to be relieved from having certain exhibits transcribed by reporter. Petition denied.

L. E. Dadmun, of Los Angeles, for appellant.

W. I. Gilbert, Kenyon F. Lee, and Ovilla N. Normandin, all of Los Angeles, for respondent.

CURTIS, J. According to the petition filed herein, the appellant, petitioner herein, was by a judgment of the superior court of the county of Los Angeles disbarred from the practice of law in the state of California, and has appealed from said judgment of disbarment; that during the trial of said proceeding in said superior court a large number of written instruments and documents were admitted in evidence as exhibits in said proceeding, and that it will cost approximately the sum of \$350 to have said exhibits transcribed and made a part of the record on appeal herein. Petitioner therefore asks for an order of this court that he be relieved from having said exhibits transcribed, and that this court direct the clerk of said superior court to produce and file said original exhibits in this court, to be used at the hearing of said appeal. The attorneys of the bar association, instituting said proceedings of disbarment against appellant, have appeared and objected to the granting of said order.

[1, 2] The appeal was taken under section 953a of the Code of Civil Procedure, and petitioner has filed with the clerk of said trial court his notice of appeal and notice demanding clerk's transcript and stenographic report of the trial as required by said section. By said section it is provided that:

"The stenographic reporter shall * * * prepare a transcript of the phonographic report

of the trial, including therein copies of all writings offered or received in evidence."

It will thus be seen that, by the terms of this section, it is made the duty of the reporter to include in the transcript prepared by him copies of all writings offered or received in evidence. We know of no provisions of law giving to this court any authority or power to vary the express provisions of this section of the Code, or to control in any manner the action of the reporter in preparing said transcript by directing him to exclude therefrom any portion of the proceedings of said trial. This section of the Code has determined the duty of the reporter in this respect. The examination and certification of the reporter's transcript is a function of the trial judge. *Martin v. Pacific, etc., Co.* (N. M.) 234 P. 321.

[3] Neither do we think petitioner can obtain the relief sought by virtue of rule 25 of the Supreme Court, which provides that:

"When the inspection of an original paper, which was offered in evidence in the court below, is shown to be necessary to a correct decision of the appeal, the court may order the clerk of the court below to transmit such original paper, if in his possession, to the clerk of the court. * * *"

While under the authority given the court by this rule it may order the clerk of the trial court to transmit original exhibits admitted at the trial when it is made to appear that an inspection of the same is necessary, yet we do not understand from this rule that said exhibits can be omitted from the transcript required by section 953a to be prepared by the reporter. The plain provisions of this section require that copies of all writings offered and received in evidence shall be included in the reporter's transcript. Thereafter, if the appellate court deems it necessary that the originals, or any of them, shall be inspected by the court, under rule 25 it is given the authority to order the clerk of the trial court to transmit the same to the appellate court. Petitioner has alleged:

"That it will be necessary for the above-entitled court to inspect and examine said exhibits in order to properly rule and pass upon all legal questions involved on appeal."

But no facts are stated in the petition showing that an inspection of said exhibits, or any of them, is or will be necessary. But even if such a showing were made, it would still be the duty of the reporter to include said copies of said exhibits in the transcript to be prepared by him. We do not understand, however, that appellant seriously presses this point. His main contention is that, on account of the great cost of transcribing these exhibits, the court should direct that they be omitted from the transcript, and that the originals thereof be transmitted

to this court. As we have already stated, this court has no authority to make such an order. If petitioner desired a shorter record than that of the so-called "alternative method," he should have presented his appeal on a record containing a bill of exceptions.

It was suggested at the hearing that the court might have power to make said order under stipulation signed by all the parties to said action. At the time of the hearing, however, the attorneys declined to enter into such a stipulation, and we understand that they are still of the same mind. Without such a stipulation any order made by this court would, in our opinion, be illegal and void.

The petition is denied.

We concur: CONREY, P. J.; HAHN, Justice pro tem.

74 Cal. App. 792

BERTIZ v. CITY OF LOS ANGELES et al.
(Civ. 5243.)

(District Court of Appeal, First District, Division 2, California. Oct. 30, 1925. Hearing Denied by Supreme Court Dec. 28, 1925.)

1. Municipal corporations ☞742(6)—Governmental act question of law.

Question whether city, in maintaining garage for repair of city automobiles, was engaged in a governmental act, as distinguished from an independent enterprise operated by city, is one of law for the court.

2. Municipal corporations ☞745½—City liable for negligence of garage employee.

City, in maintaining garage for repair of city automobiles, was acting in a proprietary and not in governmental capacity, and hence is liable for negligence of mechanic of such garage who, in driving such automobile for purpose of testing it, injured plaintiff.

3. Municipal corporations ☞742(4)—Complaint for negligence of employee held sufficient without alleging city was acting in private capacity.

Complaint alleging that city maintained garage for repair of city automobiles, and that it was in furtherance of such repair work that automobile was being negligently operated by garage employee at time of injury, to plaintiff, held sufficient, without setting out affirmatively that city was acting in a private capacity in doing acts charged.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Jose Bertiz against the City of Los Angeles and another, consolidated with three other actions. Judgment for plaintiff, and defendants appeal. Affirmed.

Hearing denied by Supreme Court; Myers, C. J., and Shenk, J., deeming themselves disqualified, not participating therein.

Jess E. Stephens, City Atty., Lucius P. Green, Asst. City Atty., and Chas. B. MacCoy, Deputy City Atty., all of Los Angeles (Philip C. Sterry, of Los Angeles, of counsel), for appellants.

Harold Ide Cruzan and Harold S. Kiggins, both of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal by the defendants from a judgment for \$1,000 against them in an action for damages alleged to have been caused by the negligence of defendant Boston in operating an automobile as the agent of the defendant city of Los Angeles. The plaintiff brought the action as the father of Marie Bertiz, a minor, who was killed as the result of a collision between the automobile owned and operated by defendants and an automobile in which she was riding.

At the trial of the cause three other cases growing out of the same accident were consolidated with it, and by stipulation of the parties and order of court the transcript on appeal in this cause constitutes the transcript in the other three cases, and the several appeals are to be considered upon the briefs herein.

The parties hereto stipulated that the following facts should be deemed proven: That prior to the year 1913 the city of Los Angeles maintained a mechanical division of the purchasing department, and it was the duty of said mechanical division to repair all automobiles owned by the city; that in 1918 the mechanical division of the purchasing department was transferred to the mechanical division of the board of public works, and that from that time on it was the duty of the mechanical division of the board of public works to repair all automobiles owned by the city of Los Angeles except automobiles belonging to and operated by the bureau of power and light and the water department of said city; that the only departments of the city government of the city of Los Angeles which have automobiles belonging to the said departments repaired by said mechanical division of the board of public works are the following, to wit, engineering department, park department, playground department, library department, fire department, police department, building department, and the city council.

Defendant W. C. Boston was, on the 2d day of July, 1920, employed as a mechanic at a garage owned by the city of Los Angeles, located at Pasadena avenue and Avenue 19 in said city. Among the duties of said W. C. Boston was the testing and repairing of carburetors and cars upon the public highways of said city. The city owned a Cadillac automobile, which was driven by the defendant W. C. Boston on El Monte road on July 2, 1920; and on said date Boston, in performance of his duties as

a garage mechanic, was testing out the operation of the carburetor on said Cadillac automobile by driving the automobile in an easterly direction along El Monte road within the corporate limits of said city. In driving the automobile at said time and place Boston exceeded a speed of 30 miles an hour. The plaintiff was driving an automobile in a westerly direction on El Monte road. A collision occurred between the two automobiles, and as a result thereof both automobiles were damaged, Marie Bertiz, minor daughter of plaintiff, was killed, and plaintiff and his two other children were injured. It was further stipulated that at the time of the accident Boston was negligent in exceeding the speed limit applicable under the law to the time of the collision and the injuries resulting therefrom.

[1] It is apparent that this agreement as to facts presents but one legal question: Was the maintenance of the garage for the repair of city automobiles a governmental act as distinguished from an independent enterprise operated by the city and not incidental or necessary to the performance of a purely governmental function? In the former case there is no liability upon the part of the city, but the trial court took the latter view in its instructions to the jury. The question was one of law for the court as evidenced by the case of *Chafor v. City of Long Beach*, 174 Cal. 478, 163 P. 670, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106, in which the court instructed the jury that the construction, erection, and maintenance of the auditorium building or convention hall by the city of Long Beach was an act of said city in the exercise of its proprietary or private capacity, and the measure of its responsibility or reliability in relation thereto was the same as that of any other individual or private corporation engaged in similar conduct, and no more or no less. A jury would not be qualified to determine this question, for it might involve the interpretation of a municipal charter—a highly technical legal problem in many instances.

In the case above cited it was said:

"But it is of course true that modern cities and towns enter upon many forms of activity, operate utilities for the benefit of the inhabitants, and provide many means for the easing or improving of the condition of the people that were never dreamed of at common law. Nevertheless the uniform holding as to all such activities on principles manifestly just to the people themselves is that no matter how beneficial they may be in a general sense to the inhabitants of the municipality, unless they are governmental in their essence, the municipality's conduct in managing them is controlled by the same rules of liability that apply to an individual. Thus, while schoolhouses, city halls, jails, firehouses, are with much uniformity held to be instrumentalities for governmental purposes, no such rule applies to other buildings constructed by a municipality, though for the

benefit, convenience, or advantage of its people."

In *Dillon on Municipal Corporations* (5th Ed.) § 109, it was said:

"* * * Municipal corporations * * * possess * * * a double character: The one governmental, legislative or public; the other, in a sense, proprietary or private. The distinction between these, though sometimes, indeed very often, difficult to trace, is highly important, and is frequently referred to particularly in the cases relating to the property and to the implied or common-law liability of municipal corporations for the negligence of their servants, agents or officers in the execution of corporate duties and powers. On this distinction, indeed, rests the doctrine of implied liability. In its governmental or public character, the corporation is made, by the state, one of its instruments. * * * But in its proprietary or private character, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quo ad hoc* as a private corporation, or at least not public in the sense that the power of the Legislature over it or the rights represented by it, is omnipotent."

In the case of *Fire Ins. Co. v. Village of Keeseville*, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. Rep. 667, it was said:

"When we find that the power conferred has relation to public purposes and is for the public good, it is to be classified as governmental in its nature and it appertains to the corporation in its political character. But when it relates to the accomplishment of private corporate purposes, in which the public is only indirectly concerned, it is private in its nature and the municipal corporation, in respect to its exercise, is regarded as a legal individual. In the former case, the corporation is exempt from all liability, whether for non-user or misuser; while in the latter case, it may be held to that degree of responsibility which would attach to an ordinary private corporation."

[2] We think respondent's position is correct when he says that if the maintenance of a garage for the repair of city automobiles should be considered as a governmental function, then it might be contended, successfully, that the manufacture of fire apparatus or of arms and equipment for policemen should also be so considered upon the theory that these activities are necessary adjuncts to the governmental duty to protect against fires and to maintain police protection. This would seem to extend governmental activities beyond their proper limits, and there is

no public policy demanding such extension of the principle exonerating municipal corporations from liability for negligence of their agents. We concur with the trial court in its conclusion that the city of Los Angeles was acting in a proprietary capacity in maintaining the garage for the repair of its automobiles, and was therefore liable for the negligence of its agents in the course of employment in such enterprise.

[3] This determination disposes of numerous objections in appellant's brief, such as the objection that the evidence does not justify the conclusion of the court, and that the court erred in refusing to instruct the jury that the city was acting in a governmental capacity. The only objection remaining to be considered is that the complaint is defective in not setting out, affirmatively, that the city was acting in a private capacity in doing the acts charged. The complaint alleged that the city owned, operated, and controlled an automobile garage, at which were repaired automobiles used by officers and agents of the city in the performance of their various functions, both governmental and proprietary. It is alleged that the automobile which was being tested by defendant Boston at the time of the accident was used by the city council in both governmental and proprietary functions. Appellant's argument seems to be that if the car was being used for a governmental activity at the time the carburetor became in need of repair, or if it was being repaired and tested for the purpose of being used in a governmental activity, defendant is excused from liability, and that the complaint is susceptible of this construction. Under our view of the matter, it is immaterial whether the automobile was used exclusively in governmental functions when it was in running order. During such use, the city would not be liable for its negligent operation; but when it was not in running order and was not being used in governmental activities, but was being repaired and tested by the city in its private capacity as a garage owner and automobile repairer, then liability existed for damage caused by its negligent operation.

We think it was sufficient to allege that the city maintained and operated a garage for repairing city automobiles. It follows as a matter of law that such business was not governmental. The complaint set forth that it was in furtherance of such repair work that the automobile was being negligently operated at the time of the accident. We think the demurrer was properly overruled.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

75 Cal. App. 150

Ex parte MULLIN. (Cr. 1302.)

(District Court of Appeal, First District, Division 1, California. Nov. 9, 1925.)

1. Criminal law — 1218—Imprisonment in penitentiary on conviction for entering inhabited dwelling with intent to commit rape held legal.

In prosecution under information containing counts for entering inhabited dwelling with intent to commit rape, and for assault with intent to commit rape on conviction under first count, indeterminate sentence of imprisonment in state prison, later fixed by prison board at seven years, was legal; conviction being for felony.

2. Burglary — 2—Entry of house with intent to commit felony held to constitute "burglary."

Entry of house with intent to commit felony constitutes "burglary," which is itself a felony.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Burglary.]

Application by M. B. Mullin for a writ of habeas corpus on behalf of Arthur S. Lawrence, to be directed to the Warden of San Quentin Prison. Writ denied.

L. W. Lovey and Walter E. Dorn, both of San Francisco, for petitioner.

TYLER, P. J. It appears therefrom that petitioner is confined in the state prison at San Quentin. It is claimed that his imprisonment is unlawful.

On the 15th day of April, 1922, an information was filed against petitioner by the district attorney of Riverside county. It contained two counts. The first charged a felony, committed as follows: That said Arthur S. Lawrence, on or about the 9th day of April, 1922, at the county of Riverside, unlawfully and feloniously and burglariously entered a certain inhabited dwelling with intent then and there to commit a felony, to wit, rape.

The second count alleged that defendant, and as part of the same transaction, did willfully, unlawfully, feloniously, and violently make an assault upon one E. A. Rowe, a female person, not then and there the wife of the said Arthur S. Lawrence, with the intent then and there feloniously, and by force and violence, to carnally know and ravish the said E. A. Rowe, and accomplish with her an act of sexual intercourse against her will and without her consent.

[1] Defendant was tried upon such charge, and on the 30th day of June, 1922, and after hearing, was found guilty under the first count, and not guilty upon the second. Thereafter he was sentenced to imprisonment at the state prison at San Quentin under an indeterminate sentence, which was there-

after fixed by the prison board at seven years. It is here claimed that said sentence and imprisonment is illegal and void, and without any effect, for the reason that petitioner was found not guilty of having committed a felony. But defendant was found guilty under the first count of the information of having committed this crime.

[2] The entry of a house with intent to commit a felony constitutes burglary, which is itself a felony.

There is therefore no merit in petitioner's contention.

The writ is denied.

We concur: KNIGHT, J.; CASHIN, J.

75 Cal. App. 74

PEOPLE v. FRANK. (Cr. 1293.)

(District Court of Appeal, Second District, Division 1, California. Nov. 3, 1925. Hearing Denied by Supreme Court Dec. 31, 1925.)

1. Witnesses — 277(4)—Cross-examining defendant as to having given false name on arrest held error, where not testified to on direct examination.

Questioning defendant on cross-examination as to having given false name at time of his arrest held error, where defendant had not, in his direct examination, given any testimony on such question, which would justify asking it on cross-examination.

2. Witnesses — 277(4)—Defendant taking stand may be cross-examined only as to matters testified to on direct examination.

One accused of crime cannot be compelled to testify against himself, but, after taking witness stand and testifying in his own behalf, he can be cross-examined as to matters to which he testified on direct examination, but on no other.

3. Criminal law — 1170½(5)—Error in cross-examining defendant as to giving false name on arrest held not prejudicial where such fact already before jury.

Cross-examination of defendant as to having given a false name on being arrested, though error, held not prejudicial, nor to have seriously injured defendant, where such testimony was already before jury.

4. Criminal law — 351(5)—Testimony as to defendant having given a false name on arrest held admissible, in view of attempt to escape officers immediately before arrest.

Testimony that defendant, on being arrested, gave false name, held properly admitted, where immediately prior to his arrest he had attempted to escape officers seeking to arrest him as he was attempting to sell pin he was alleged to have stolen.

5. Criminal law — 720(8)—Referring to defendant as potential murderer held not error, in view of the evidence.

In view of evidence that defendant prosecuted for robbery and burglary had pointed re-

volver towards his victim and threatened to kill, held that argument of district attorney classifying defendant as a "potential murderer" was not improper.

6. Criminal law $\S$ 730(6)—Reference to pending murder case, if improper, held not prejudicial, in view of court's prompt sustaining of objection with instruction to disregard it.

Though reference by district attorney, in prosecution for robbery and burglary, to case of another charged with murder, which had no connection with case pending against defendant, may have been improper, no prejudice resulted where court promptly sustained defendant's objection to such reference and instructed jury to disregard it.

7. Criminal law $\S$ 723(4)—Statement of district attorney that jurors would make themselves responsible if they suffered defendant to escape held proper.

Argument of district attorney that, if jury suffered defendant to escape, they would make themselves responsible, was proper.

8. Criminal law $\S$ 204, 1175—Failure to render verdict on former jeopardy plea held not prejudicial, where no evidence in support thereof, and plea is waived by failure to produce evidence.

A defendant waives his plea of former acquittal and once in jeopardy by failing to produce any evidence in support thereof, and failure of jury to render verdict on such pleas is not prejudicial to defendant, in absence of any evidence to support them, since in such a case it would be duty of court to advise jury to find against defendant on such pleas.

9. Criminal law $\S$ 1175—Failure of jury to render verdict on plea of once in jeopardy not prejudicial, where plea based on verdict on former trial, which was reversed on appeal.

Defendant being without right under Pen. Code, $\S$ 1180, to interpose pleas of former acquittal or once in jeopardy, based on verdict rendered at first trial, which was reversed on appeal, suffered no prejudice by failure of jury to render verdict on such pleas.

Appeal from Superior Court, Los Angeles County; Elliott Craig, Judge.

George E. Frank was convicted of robbery and burglary, and he appeals. Affirmed.

Frank W. Allender, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CURTIS, J. [1, 2] The appellant was found guilty of the crimes of robbery and burglary, and appeals from the judgment and the order denying his motion for a new trial. This same action was before the Supreme Court (193 Cal. 474, 225 P. 448) and later before this court (236 P. 189). The first contention of appellant for reversal of the judgment is that the court erred in asking appellant on cross-examination the following

question: "What name, if any, did you give to Officers Rich and Murphy when you were first arrested?" This question appellant answered: "Williamson." From what had transpired during the trial just preceding the asking of this question, it is clear that its purpose was to show that appellant had given a false name when arrested. The question was objected to upon the ground that it was not proper cross-examination. This objection was overruled. Appellant had not, in his direct examination, given any testimony relative to the name used by him at the time of his arrest or any other testimony that would justify the asking of this question on cross-examination. To ask it under such circumstances was error. *People v. Mohr*, 157 Cal. 732, 736, 109 P. 476. There is no rule better understood in our criminal procedure than that a person accused of crime cannot be compelled to testify against himself. After taking the witness stand and testifying in his own behalf, he can be cross-examined as to such matters to which he testified upon direct examination, but upon no other matter. This rule, limiting the cross-examination of a defendant while a witness to such matters testified to upon his direct examination, is a general rule applicable to all witnesses. But it has been held in some cases that the rule thus limiting cross-examination is much narrower when applied to the defendant as a witness than when applied to ordinary witnesses. *People v. O'Brien*, 96 Cal. 171, 31 P. 45; *People v. Crowley*, 100 Cal. 478, 35 P. 84. The latter of these two cases quotes with approval the following language found in the former case:

"And in *People v. O'Brien*, 96 Cal. 171 [31 P. 45], the court say that 'so far as the defendant is concerned, the court is not allowed that discretion as to the extent of the scope of the cross-examination which it is permitted to exercise in the examination of the other witnesses.'"

The court also in this same case says:

"We have been referred to no case, decided since the present condition of the statutory law [section 1323, Penal Code] on the subject, which holds that the cross-examination of a defendant may be as wide as that of any other witness."

[3, 4] While the court erred in overruling appellant's objection to this question, we are of the opinion that the appellant was not injuriously affected thereby. The officer Murphy, to whom he testified he gave the false name, had already been called as a witness for the prosecution, and had testified that appellant had given the name of Williamson to him shortly after his arrest. This evidence therefore being already before the jury, the appellant was not seriously injured by being compelled to testify to what

had already been given in evidence by the officer. Nor was it error in our opinion to permit the officer Murphy to testify to this fact. The evidence showed that just prior to appellant's arrest he was in the office of a diamond broker attempting to sell the diamond pin which he was charged with stealing. This office was on the ninth floor of the building. While there, two officers entered the room and announced in the hearing of appellant that they were from the city detective bureau; whereupon appellant hurried from the room out into the hall, and then down eight flights of stairs, closely pursued by the officers, who followed him through the lobby of a hotel situated on the ground floor and then out onto the sidewalk and across the street, where he was arrested by them, after he had assaulted them and attempted to avoid arrest by the use of force and violence. Upon his arrest, he was immediately taken to the police station, and there gave his name to the officers in charge as Williamson. Under these circumstances there was no error in admitting the evidence complained of, as his statement giving a false name was made after the offense had been committed and evidently with knowledge on appellant's part of its commission. It must be considered, in connection with, and as a part of his attempted flight, after he, with a stolen pin in his possession, found himself in the presence of the officers of the law. As was said in *People v. Cox*, 29 Cal. App. 419, 422, 155 P. 1010, 1011:

"When a person suspected of and charged with crime resorts to deception and falsehood, that is a circumstance which, like flight and concealment, tends to show a consciousness of guilt, * * * arising from other established facts."

No complaint is made as to the evidence that appellant, when the officers appeared in the broker's office, fled from them down numerous flights of stairs and out upon the street, and that, upon an attempt being made to arrest him, he resisted arrest and committed an assault on the arresting officers. This evidence is conceded to be competent and material, as it showed an attempt to elude the officers by flight. His statement giving a false name, made to the officers at the police station only a short time thereafter, was made undoubtedly for the purpose of deceiving them as to his true identity, and with the evident intent and purpose of accomplishing by deception that which he had failed to attain through flight. All of this evidence was of the same general character, and was properly admissible against appellant. There is nothing inconsistent with these views to be found in the former opinions rendered in this action by this court. At the trial of the action resulting in the judgment reviewed by this court and reported in 236 P. 189, the evidence of the

assumed name of the appellant was all given on cross-examination, and for this reason it was held to be incompetent. On page 189, the court said:

"On no one of the occasions when a witness was thus interrogated with respect to the use by defendant of an assumed name was the questioning done under proper cross-examination."

[5] The further contention is made that the district attorney was guilty of misconduct, prejudicial to the rights of appellant, in his closing argument to the jury, and that his conduct was such that it prevented appellant from having a fair trial. Appellant specifies three instances in which he claims that the district attorney was guilty of misconduct: First. In his reference to the appellant as "this innocent young man—this potential murderer." Second. In his reference to Dr. Young, accused of murder, and whose case was then pending in said court. And, lastly, in his statement to the jury that, if they suffered appellant to escape, they would make themselves responsible. In each instance, after the remark claimed to be improper had been made by the district attorney, the appellant made his objection thereto and specified the same as misconduct on the part of the prosecuting officer. The court in each instance sustained appellant's objection, and instructed the jury to disregard the same. As to the remark of the district attorney that the defendant was a potential murderer, we are not prepared to say that the use of these words on the part of the district attorney was not justified by the evidence before the jury. This evidence tended to show that the appellant had entered the room of Mr. and Mrs. McPherson during their absence, and after their return he pointed his gun at Mr. McPherson and threatened to kill him. According to the testimony of Mr. McPherson:

"He had his gun stuck right in my face or stomach, and he finally grabbed the pin, pulled it out of my necktie, demanded what money I had in my pocket with his gun stuck at me, and turned around and rushed toward the door."

He had previously pointed his gun towards Mrs. McPherson and said, "Drop that telephone." A person guilty of such conduct has no reasonable ground to complain if he is classified as a "potential murderer."

[6] The reference of the district attorney in his argument to the jury to the case of Dr. Young was to the effect that he (the district attorney) expected to try the case of Dr. Young in the next three or four weeks, and that he predicted that there would be a plea of insanity in that case, because of the conclusive character of the case against Dr. Young. He further stated that the other defense which is familiar to prosecutors was that of an alibi. It is apparent that the case of Dr. Young and the character

of the defense he might interpose to the charge against him had absolutely no connection with the case then pending against appellant. The reference thereto by the district attorney may accordingly have been improper. But we are unable to see that the appellant was materially or at all prejudiced by this reference to the case of Dr. Young, even though the defense interposed by appellant was that of alibi. The court promptly sustained appellant's objection to said reference, and instructed the jury to disregard the same.

[7] As to the third and final remark of the district attorney, of which appellant complains, we see no objection to it. The prosecutor told the jury, if they suffered the appellant to escape, they would make themselves responsible. It was just another way of stating to the jury that the final determination of the case rested with them, and that they would be responsible for such final determination. The jury would be responsible if they acquitted the appellant, but in no less or greater degree than if they convicted him. This responsibility the law directly places upon the jury and upon them alone, and we can conceive of no impropriety on the part of counsel either for appellant or for respondent in reminding the jury that they have this important responsibility resting upon them.

[8] The third and final ground in support of his appeal is that the jury failed to find upon his plea of once in jeopardy. Upon the first trial of this action, the appellant was convicted, but on appeal the judgment was reversed. Appellant thereafter, and before the second trial, entered his plea of once in jeopardy by virtue of the first trial. On the second trial, the jury found him guilty as charged in the information, and rendered a verdict against his plea of once in jeopardy. From a judgment based upon this verdict, he again appealed, and this second judgment was reversed. On the third trial, the one now under review, no evidence was introduced by appellant upon his plea of once in jeopardy, and the same was not passed upon by the jury. The fact that appellant had interposed such a plea had apparently been overlooked both by the court and by counsel. It has repeatedly been held in this state that:

"Where a defendant accused of crime has interposed a plea of not guilty, and also a separate plea of 'once in jeopardy' for the same offense, he is entitled to have the latter plea passed upon by the jury before judgment can properly be pronounced against him, and, where the jury found a verdict of guilty without passing upon the plea of 'once in jeopardy,' a judgment of conviction will be reversed, and a new trial granted." *People v. Tucker*, 115 Cal. 337, 47 P. 111; *Ex parte King*, 10 Cal. App. 282, 101 P. 810; *People v. Kinsey*, 51 Cal. 278; *People v. Helbing*, 59 Cal. 567; *People v. Fuqua*, 61 Cal. 377; *People v. Hamberg*, 84 Cal. 468, 24

P. 298; *People v. Eppinger*, 109 Cal. 294, 41 P. 1037.

It has been so held, even where no evidence was introduced or offered in support of the plea. *People v. Tucker*, supra. Since the above cases were decided, there have been some decisions of the Supreme and appellate courts of this state which, while not directly overruling these cases, or for that matter even referring to them, appear to enunciate a somewhat different rule. In *People v. Strickler*, 167 Cal. 627, 140 P. 270, it was held that, where a defendant pleaded not guilty and also former acquittal and once in jeopardy, and thereafter withdrew his plea of not guilty and pleaded guilty to the charge, but no action was taken by him or by the court as to his other pleas, he thereby waived his pleas of former acquittal and once in jeopardy. In the very recent case of *People v. Newell*, 192 Cal. 659, on page 667, 221 P. 622, 625, the court, said:

"It is just as necessary to support special pleas by proof (*People v. Cummings*, 123 Cal. 269, 272 [55 P. 898]), as it is to interpose the pleas, and the failure to do either is to be deemed a waiver of the defense. *People v. Strickler*, 167 Cal. 627 [140 P. 270]; *People v. McFarlane*, supra [138 Cal. 481, 484, 71 P. 568, 72 P. 48, 61 L. R. A. 245]. It was said in *People v. Stoll*, 143 Cal. 689, 696 [77 P. 818, 821]: 'The right to interpose a plea of once in jeopardy is a personal privilege, of which a defendant may, or may not, avail himself.'"

In *People v. Brannon* (Cal. App.) 233 P. 88, the defendant was tried and convicted of first degree murder. He was charged in two counts of the indictment: First, with the crime of an assault with a deadly weapon upon his wife; and in the second count with murder of one Margaret Cronin. He pleaded not guilty to both charges, and moved for a separate trial upon each count of the indictment, and the same was granted by the court. He was first tried for the assault upon his wife and acquitted. He thereupon moved the court to permit him to interpose the pleas of former acquittal and once in jeopardy. The evidence tended to show that he had fired his pistol at his wife, but that the bullet therefrom had missed his wife and struck and killed Margaret Cronin. The court refused to permit him to interpose either of the special pleas. The appellate court held that the acquittal of said defendant of assault with a deadly weapon upon his wife was not a bar to his prosecution upon the charge of murder of Margaret Cronin, and therefore, to use the words of the court, "that the appellant suffered no prejudice by reason of the court's refusal to permit him to plead former acquittal and once in jeopardy." From these later decisions, we question whether the strict rule invoked in the earlier cases above referred to can now be considered the law in this state. On the other hand, we think that it can be reason-

ably inferred from these later decisions that the appellant may and does waive his pleas of former acquittal and once in jeopardy by his failure to produce any evidence in support thereof, and, furthermore, that the failure of the jury to render a verdict upon said pleas in the absence of any evidence to support them does not result in any prejudice to appellant. As we understand the decision in *People v. Brannon*, the court held that evidence of the acquittal of the defendant of the charge of an assault with a deadly weapon upon the wife of the appellant would not support a plea of once in jeopardy or former acquittal in a prosecution against him for the murder of Margaret Cronin, even though the two charges grew out of the same act on the part of the defendant. Accordingly, the court held that the appellant was not prejudiced by the refusal of the court to permit him to interpose the special pleas of former acquittal and once in jeopardy. If, therefore, the accused is not prejudiced by the refusal of the court to permit him to interpose such pleas, when there was no evidence to support them, or either of them, how can he be prejudiced by the failure of the jury to find upon such pleas when he has introduced no evidence to support either of them? It may be conceded that the proper procedure would have been in the action now before us to submit these pleas to the jury and require of them a verdict upon each of them. But, as there was no evidence offered by appellant to support either of said pleas, it would have been the duty of the court to advise the jury to find for the people and against the defendant upon each of such pleas. We think it reasonable to assume that the jury under such circumstances would follow the advice given them by the court, and find against the defendant. Had this been done in the present action, the appellant would have been in no better, nor worse, condition than that in which he now finds himself. He therefore suffered no prejudice by reason of the failure of the jury to render a verdict upon the special pleas interposed by him.

[9] There is another provision of law which we consider applicable to this case. Section 1180 of the Penal Code is as follows:

"The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to, either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the indictment."

By the provision of this section, the appellant was prohibited from pleading in bar the judgment rendered upon his former trial, which was reversed on the appeal taken by him. It is true that the constitutionality of

this section has been questioned, but in so far only as the latter part of said section may apply to an offense of which the defendant has been acquitted by virtue of conviction of another of less degree included in the information. *People v. Gordon*, 99 Cal. 227, 232, 33 P. 901. In all other respects the section is legal and free from constitutional objections. As appellant under this section had no right even to interpose the pleas of former acquittal or once in jeopardy by virtue of the verdict rendered at the first trial of said action, he cannot be held to have been prejudiced or deprived of any right whatever by the failure of the jury to render a verdict upon pleas that were illegal and were made without any legal authority.

The judgment and order denying motion for a new trial are affirmed.

We concur: CONREY, P. J.; HAHN, Justice pro tem.

75 Cal. App. 1

PEOPLE v. KNOX. (Cr. 1223.)

(District Court of Appeal, Second District, Division 1, California. Oct. 30, 1925. Hearing Denied by Supreme Court Dec. 23, 1925.)

1. Embezzlement $\S$ 42—District attorney may elicit information that part of money embezzled was used to pay check previously issued.

In prosecution for embezzlement, where accused had testified that he had used money for personal uses, it was proper for district attorney to elicit specific information that accused had used portion of money for purpose of paying check which he had previously issued for personal expenses.

2. Embezzlement $\S$ 47—Whether accused appropriated money openly and avowedly, and under claim of title in good faith, held for jury.

In prosecution for embezzlement, where accused had given his note for amount alleged to have been embezzled, question as to whether accused appropriated money openly and avowedly and under claim of title preferred in good faith, so as to constitute a defense under Pen. Code, $\S$ 511, held for jury.

3. Embezzlement $\S$ 44(2)—Evidence held sufficient to justify finding that amount was not appropriated openly and avowedly.

Evidence held sufficient to justify inference that accused did not appropriate amount alleged to have been embezzled openly and avowedly and under claim of title preferred in good faith.

4. Criminal law $\S$ 369(5)—Conduct of district attorney in questioning accused as to specific use made of money held proper.

In prosecution for embezzlement, act of district attorney in questioning accused as to specific use made by him of money received from prosecuting witness to buy property, eliciting

that defendant used the money to pay a check issued for personal indebtedness, *held* not subject to the objection that it showed another offense by defendant.

5. Criminal law ☞706—Remark of state's attorney during argument as to relevancy of certain evidence held not improper.

In prosecution for embezzlement, remark of district attorney, as to relevancy of evidence, that, if he could establish that accused had no source of income at that time and was simply living by his wits, the jury had the right to know it, *held* not improper, where record does not show that the remark was not pertinent to question or that it was made in other than fair manner of argument.

6. Criminal law ☞829(12, 18)—Requested instructions elaborating general principle set forth in other instructions held properly refused.

In prosecution for embezzlement, requested instructions which simply elaborated in some detail general principle set forth in other instructions, covering subject of reasonable doubt and duty of jury in weighing and considering the evidence, *held* properly refused.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Edgar J. Knox was convicted of embezzlement, and he appeals. Affirmed.

Hearing denied by Supreme Court; MYERS, C. J., and LENNON, J., dissenting.

Schenck, Silverstein & Hanley and Paul W. Schenck, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Erwin W. Widney, Deputy Atty. Gen., and Hamish B. Eddie, of Los Angeles, for the People.

HAHN, Justice pro tem. This is an appeal from a judgment of the court upon a verdict of the jury finding the defendant guilty of the crime of embezzlement. An information filed by the district attorney of Los Angeles county charged the defendant and appellant herein, Edgar J. Knox, with embezzlement in count 1 and grand larceny in count 2. Appellant was acquitted on the charge of grand larceny, but was found guilty on the count of embezzlement.

In urging a reversal of the judgment, the appellant admits that under the rule of "conflict of testimony" this court will not disturb the finding of the jury; but he contends that the testimony in the case is so strongly in his favor that the court, in reviewing the points he raises, should apply the doctrine of the "close case."

We have carefully examined the transcript of the evidence, and are moved to observe that, if the complaining witness' testimony was given full credit by the jury, as undoubtedly it was, it cannot be said that this is what may be termed a "close case."

The complaining witness, Alice M. Bright, testified that in November, 1924, the defendant, with whom she had a limited acquaintance, approached her with the statement that he knew where he could purchase for her some lots in a new subdivision, known as the Pico Vista tract, at a discount of 20 per cent. from the market price. Subsequently the defendant took Mrs. Bright out and showed her certain lots which he represented to her to be the lots which he had in mind, and which could be purchased for \$1,500. Relying upon these representations, the complaining witness gave the defendant, first, a check for \$150 and, a few days later, another check for \$1,350, to be used in acquiring these lots for her. At the time she delivered the \$1,350 check, according to her testimony, she asked the defendant what she was to receive as evidence that she had given him this money, and he replied that he would give her his note, which he proceeded to do, for the sum of \$1,500. She also testified that subsequently she asked the defendant for a contract which she understood was always given in the purchase of property, and that the defendant on one occasion had replied that he never gave any contract to the people for whom he invested money. Subsequently, according to the testimony of the complaining witness, the defendant told her, in response to her inquiry about the lots, that he had sold them and made a profit of \$300 for her; that the money was in escrow in the Security Trust & Savings Bank and would soon be paid to her; that, although she made repeated requests thereafter for her money, she had never been able to obtain it.

One Thomas B. Leddy, an attorney at law, testified that Mrs. Bright, the complaining witness, had consulted him with regard to the money she had turned over to the defendant, and requested him to represent her in securing its return; that pursuant to this employment he took the matter up with the defendant, and in one interview with the defendant in the witness' office, the defendant admitted that he had received \$1,500 from Mrs. Bright for the purpose of purchasing some property, but that he had never purchased the property with the money.

The defendant, taking the stand in his own behalf, admitted that he had secured \$1,500 in two checks from the complaining witness, but contended that it was money which he borrowed from her, and insisted that the note which he gave her was for the purpose of evidencing a loan which she had made to him. For the purpose of our discussion, it may be said that the defendant denied substantially all of the other material assertions made by the complaining witness, and also denied that he had admitted to Thomas B. Leddy, as testified to by him, that he had received the money from the complaining

witness for the purpose of buying property and that he had not purchased the property.

The fact that the defendant gave, and the complaining witness accepted, a note for \$1,500 at the time the second check was given, is pointed out by the appellant as a strong circumstance in support of his contention that the evidence in the case is very close. As further supporting the defendant's story that the transaction was a loan, it is urged that, after receiving the note, the complaining witness endeavored to discount the note at a bank.

Manifestly, if the jury believed the defendant's story, namely, that the transaction was a loan, there would have been no verdict of guilty, and all that is urged by the defendant here would be entitled to weight; but, unfortunately for the defendant's position, the verdict necessarily presupposes that the jury did not believe his story, but accepted the story of the complaining witness. The jury may very well have construed the giving of the note by the defendant as a bit of sharp practice indulged in for the purpose of covering up any indication of criminal intent, and may likewise have interpreted the action of the complaining witness in accepting the note as due to her inexperience in business; for manifestly the record in the case clearly shows that the complaining witness was inexperienced, if not unfamiliar, with business transactions of this kind.

The first point urged by appellant is that the court committed prejudicial error in overruling the objection of his counsel to certain questions asked by the district attorney of the defendant while on the stand, concerning the use which he had made of the \$1,500 secured by him from the complaining witness. At the outset of his testimony while on the stand, the defendant frankly admitted that he used this money for his own personal uses. Upon cross-examination, and over the objection of defendant's counsel, the district attorney elicited from the defendant a statement or admission that he owed the Alexandria Hotel the sum of \$600 for personal expenses, and had previously issued a check for this amount, which check he took up with \$600 of the money received from Mrs. Bright. Appellant urges that this information, which was in effect forced from the defendant by the questions of the district attorney, was for the purpose of showing "the commission of another offense" by the defendant, and that this was improper and prejudicial. We are unable to find anything in the record, either in the questions asked or answers given on this subject, that could possibly be construed as indicating that the defendant had committed a public offense in connection with either the issuing of the check to the Alexandria Hotel, or in its payment. Appellant admits that in a case of embezzlement it is a proper line of inquiry to ascertain what use was made of the money

claimed to have been embezzled, but urges that, when the defendant admitted he made personal use of the money, the district attorney had no right to make specific inquiry as to the particular uses.

[1] We cannot agree with the appellant in this criticism. Once conceded that the inquiry was proper, the district attorney had a perfect right to elicit specific information instead of being satisfied with a general admission. *People v. Rowland*, 12 Cal App. 6, 106 P. 428; *Dimmick v. United States*, 135 F. 257, 70 C. C. A. 141; *Bridges v. State*, 103 Ga. 21, 29 S. E. 859.

The next point urged is that the evidence does not support the charge of embezzlement under the provisions of section 511 of the Penal Code of the state of California. The portion of the section which appellant contends is applicable to this case reads as follows:

"Upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable. * * *"

[2, 3] Appellant's contention is based upon the theory that, inasmuch as he testified that the transaction wherein he secured the \$1,500 from the complaining witness was a loan, or that he believed it was a loan, even though mistaken as to the legal effect of the transaction, such asserted circumstances bring him within the provisions of the section of the Penal Code above quoted. The question as to whether or not the defendant appropriated the money "openly and avowedly, and under a claim of title preferred in good faith" was one for the jury, and there can be no doubt but that there is sufficient evidence in the record to justify the inference which must have been drawn by the jury that the defendant did not appropriate the \$1,500 in question "openly and avowedly, and under a claim of title preferred in good faith."

[4] Appellant urges also misconduct on the part of the district attorney as being prejudicial to his interests and of such a character as to justify a reversal of the judgment. It is contended that the district attorney's questioning of the defendant while on the stand, as to the specific use made by him of the money received from the complaining witness, resulted in the testimony that the defendant had used \$600 of this money to take up a check he had issued to the Alexandria Hotel. It is urged that, in pursuing this line of questioning, the defendant was forced to admit that he had committed some other crime. In discussing one of the previous points made by the appellant, we have indicated that we do not believe the record justifies such a deduction, and hence, if the line of questioning was proper, as we have held, there could have been no misconduct on the part of the district attorney in asking the questions referred to.

[5] During a discussion between counsel and the court as to the relevancy of certain evidence which the district attorney was endeavoring to elicit from the defendant on cross-examination, the district attorney used the following language:

"If I can establish he had no source of income at that time, that he was simply living by virtue of his wits, I think the jury has a right to know that."

Appellant's counsel objected to the use of the clause, "simply living by virtue of his wits," and requested the court to instruct the jury to disregard the same. The use of this language and the failure of the court to give a specific instruction is assigned as prejudicial error. The phrase in question is subject to various interpretations; but, assuming that it was intended by the district attorney and interpreted by the jury as meaning that the defendant was making his living by obtaining money improperly from other persons, this was the very crux of the case on trial, and in the argument upon any point raised as to the competency or relevancy of the evidence it could not be said to be improper if the district attorney frankly states his reason why certain evidence should be admitted. There is nothing in the record which discloses that the remark was not pertinent to the question under discussion, or that it was made in other than a fair manner of argument; and, as we have already held, the inquiry, as well as the evidence resulting from the line of questioning, was proper.

[6] Appellant also urges that error was committed by the court in refusing to give to the jury certain instructions requested by the defendant. These instructions simply elaborated in some detail the general principle set forth in other instructions covering the subject of reasonable doubt and the duty of the jury in weighing and considering the evidence. Such amplification is not necessary, and failure to give the requested instructions is not error.

The last point urged for a reversal arises out of three instructions given by the court, dealing with the subjects of grand larceny, obtaining money under false pretenses, and embezzlement. These instructions give the definition of each of the crimes noted, and lay down the rules to be applied by the jury in distinguishing between the several crimes. Counsel for appellant suggests that "the difference between the three offenses should have been clearly stated without confusion. * * *" The instructions under criticism unquestionably state the law on the subjects involved. That some confusion may have arisen in the minds of the jurors in attempting to understand and apply the rules laid down in these instructions is quite possible. In fact, briefs filed in this court by eminent

counsel would indicate that members of the bar frequently have difficulty in noting the demarcation between grand larceny, obtaining money under false pretenses, and embezzlement, and that confusion in dealing with these subjects is not limited to the lay mind. In the instant case a careful examination of the evidence leads us to suggest that the jury showed unusual discernment in applying the rules laid down by the court's instructions in arriving at its verdict, for each essential element in the crime of embezzlement has abundant evidence in the record to support it.

For the reasons indicated, the judgment and the order of the court denying appellant's motion for a new trial are affirmed.

We concur: CONREY, P. J.; CURTIS, J.

75 Cal. App. 9

PEOPLE v. SOLOMON. (Cr. 1218.)

(District Court of Appeal, Second District, Division 1, California. Oct. 30, 1925. Rehearing Denied Nov. 28, 1925. Hearing Denied by Supreme Court Dec. 28, 1925.)

1. Criminal law $\S$ 1170(5)—Errors in exclusion of testimony bearing on counts on which accused was not convicted held not prejudicial.

Any errors in excluding evidence bearing solely on three counts on which defendant was not convicted held not prejudicial on appeal from conviction on fourth count.

2. Larceny $\S$ 3(2)—One obtaining money by fraudulent representations as to intended use with intent to convert it, and who does convert it, guilty of larceny.

A person obtaining possession of money or property on a representation as to its use which is false, and made with fraudulent intent of obtaining the money or property and converting it to his personal use, which he does, is guilty of larceny.

3. Larceny $\S$ 57—Evidence sufficient to justify conviction.

Where accused obtained check from complaining witness, giving in exchange check for \$3,300, with request that complaining witness hold same until accused obtained certain moneys, when he would take it up, evidence held sufficient to sustain conviction for larceny, notwithstanding check given by accused was not presented to bank.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Frank Solomon was convicted of grand larceny, and he appeals. Affirmed.

Milton G. Gill, of Red Bluffs, for appellant. U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

HAHN, Justice pro tem. The grand jury of Los Angeles county returned an indictment charging Frank Solomon, appellant herein, in four counts, with the crime of obtaining money under false pretense, and also with the crime of grand larceny, in four counts. At the time of trial the district attorney dismissed the four counts charging obtaining money under false pretense, and presented the case to the jury on the four grand larceny counts, three of which alleged the taking of money from one Ralph Marcher, while the fourth, being count 8, alleged the taking of money from one Frederick A. Rose. As to the three Marcher counts, the jury failed to agree, but did return a verdict of guilty upon the Rose count. From the judgment of the court on the verdict of guilty, and the order of the court denying his motion for a new trial, the defendant appeals.

Appellant urges a reversal of the judgment upon two grounds: First, that the court erred in sustaining the objection of the district attorney to certain questions propounded in cross-examination to one Frank Clayton, who was a witness on behalf of the prosecution; and, second, that the evidence is insufficient to sustain the judgment of conviction of grand larceny.

[1] As to the first point, an examination of the transcript discloses that the witness Frank Clayton had testified on direct examination to an alleged conversation between the defendant and the district attorney relating to the disposition made by the defendant of certain money he had obtained from Ralph Marcher and which alleged taking constituted the basis for the three counts of grand larceny upon which the trial jury had disagreed. Upon cross-examination by defendant's counsel, certain questions were asked, which were objected to by the district attorney upon the ground that the questions were not proper cross-examination. It is not necessary to enter into a detailed consideration of the appellant's contention on this point, because, if any error was committed by the trial court in sustaining the district attorney's objection, such error could not have operated in any way to the prejudice of the defendant, for the reason that the subject-matter of the testimony related wholly and solely to counts other than the one upon which the defendant was found guilty; hence the point raised would have no bearing upon the merits of this appeal.

[2, 3] In support of his second point appellant urges that, while the evidence might support a charge of obtaining money under false pretenses, it falls far short of the requirements necessary to support the crime of grand larceny. A consideration of this point requires a brief summary of such evidence as the record discloses may be regarded as supporting the verdict. (It may be noted at this point that the record shows a conflict in the testimony.) The complaining witness,

Frederick A. Rose, had been acquainted with the defendant for some time, during which period the defendant had been engaged as a salesman for a concern selling typewriting supplies. Early in July, 1924, the defendant approached the complaining witness, stating to him that he (the defendant) had an opportunity to purchase a large bankrupt stock of carbon paper and typewriting supplies at a very low figure, which, if obtained, he could sell at a good profit; that, anticipating that he would be able to obtain this stock, he had negotiated for the sale of a portion of it, and in support of this statement he displayed to the complaining witness a check for \$18,000, signed by one Lilah Holliser, and which check the defendant represented was an advance payment on account of a sale to Lilah Holliser; that he could not cash this check until he had secured the stock of goods and delivered the portion he had contracted to sell to Lilah Holliser. Defendant further stated that he did not have sufficient funds to make the purchase, and stated to the complaining witness that, if he would furnish him with the sum of \$3,000, to be used by him (the defendant) in the purchase of these goods, he (the defendant) would repay the sum of \$3,000, with a bonus of \$300, in ten days or two weeks, which was the time he suggested would be required in turning over the stock and cashing the \$18,000 check.

The complaining witness further testified that, believing and relying upon these statements of the defendant, he gave him a check for \$3,000, which was cashed by the defendant. At the time of the delivery of this check, the defendant wrote out a check, payable to the complaining witness, for the sum of \$3,300, being the principal advanced, with the promised bonus. This check the defendant requested the complaining witness to hold until the stock had been purchased and turned, and the \$18,000 check of Lilah Holliser, which had been exhibited to the complaining witness, could be cashed. After the expiration of the ten-day period, when the complaining witness requested the defendant to take up his check as he had promised, the defendant represented to the complaining witness that Lilah Holliser had written him a letter from San Diego requesting him (the defendant) not to present her check for payment, as she had been unable to accomplish the sale of the goods she had purchased from him, and in payment for which she had given him this check. On one occasion, when the complaining witness requested payment of the check, the defendant exhibited a telegram which he claimed to have received from Lilah Holliser, requesting him (the defendant) not to cash the check because she had been unable to dispose of the goods; and defendant advised the complaining witness that he had suggested to the said Lilah Holliser that she ship the goods to some other point, where she might more readily accomplish the sale.

Lilah Holliser was placed on the stand as a witness for the prosecution, and while her testimony is not direct, and in some respects somewhat conflicting—apparently due to the fact that she was an unwilling witness—she does state that she did sign the \$18,000 check in question, and which was exhibited to the complaining witness, at the urgent request of the defendant. She stated that the defendant had for some time been selling typewriting supplies to her, she being a public stenographer, and that on this particular occasion the defendant came to her and represented to her that it was necessary for him to make some showing to his creditors, in order to obtain credit or an extension of time within which to pay some obligation he owed; that, if she would sign this check for \$18,000, he could display it to his creditors, and thereby obtain the desired credit or extension of time; that he would in a very short time return the check to her, after it had accomplished its purpose; that she did not owe the defendant the sum of \$18,000, or any sum, except perchance a small current bill for typewriting supplies purchased by her for use in her business as a public stenographer; that she did not have the sum of \$18,000, or any amount approximating that sum, on deposit in her bank; that when she signed the check in question it was not the intention on her part, nor was it represented that there was any intention on the defendant's part, that it would be cashed, or that any sum of money whatever would be paid the defendant on account of the check; that she had not purchased any portion of a bankrupt stock of carbon paper and typewriting supplies from the defendant for the purpose of resale, nor did she go to San Diego for the purpose of selling any typewriting supplies there, nor did she have any typewriting supplies in San Diego for the purpose of sale; that at the urgent request of the defendant she did write a letter, in which she stated that she owed him the amount of the check which she had signed, and she expected to pay it, but that the letter in question was obtained from her by the defendant upon the representation that it would help him out; that the defendant had promised to return this letter to her.

The jury, in construing the foregoing testimony, interpreted in the light most favorable to the defendant, could hardly have concluded other than that the defendant, in obtaining the check for \$3,000 from the complaining witness, practiced a gross fraud upon him. Nor do we discern anything in appellant's brief that attempts to deny that there is abundant evidence in the record to support the charge of fraud. The emphasis made by the appellant upon the testimony is that the evidence in the record does not furnish the foundation necessary to constitute grand larceny, namely, that the complaining witness did not part with the title to the

\$3,000 when he gave the check to the defendant.

The rule is well established that, where one person obtains possession of money or property from another upon the representation that it is to be used for a certain purpose, or paid to a particular person, which representation is false, and made with fraudulent intent, title to such property or money remains in the giver, even though possession passes to the defendant; and if, at the time of obtaining such money or property, the defendant harbors the secret purpose of converting the same to his personal use, and did so convert the money or property to his personal use, and not for the purposes represented, he is guilty of larceny. The fraud in the transaction supplies the trespass necessary in larceny. This question, arising out of circumstances similar to those in the instant case, has had such full and careful consideration by this court, as well as the Supreme Court of this state, that we feel a reference to the cases wherein this question has been carefully considered will meet all the requirements of the present case. *People v. Tomlinson*, 102 Cal. 19, 36 P. 506; *People v. Shwartz*, 43 Cal. App. 696, 185 P. 686; *People v. Delbos*, 146 Cal. 734, 81 P. 131; *People v. Edwards* (Cal. App.) 236 P. 944. The opinion in the last cited case, written by Mr. Justice Finlayson, contains such a thorough and clear dissertation upon this question that we commend it as embodying all that we might say upon the subject.

There is abundant evidence in the record to justify the finding of the jury necessarily involved in the verdict, that the defendant obtained the \$3,000 from the complaining witness by fraudulent representations, and that at the time he obtained the check the defendant had no intention of using the money for the purposes referred to, but in fact at that time had in mind the intention to convert it to his own personal use. All of the essential elements necessary to support the charge of larceny are readily discerned in this case.

The defendant urges that, inasmuch as the complaining witness had never presented the \$3,300 check which he received from the defendant to the bank for payment, the evidence lacks the essential element of showing that the complaining witness was defrauded of his money; in other words, that there was no evidence in the record showing that the check was not good for \$3,300 and would not have been paid, had the same been presented to the bank, and that manifestly, if the check was paid, the complaining witness was not in any sense defrauded, and hence there could be no grand larceny.

The complaining witness testified—and on this point there is no conflict in the record—that when he received the \$3,300 check from the defendant he was requested by the defendant to hold the check until he (the de-

endant) could cash the \$18,000 check of Lilah Holliser, at which time the defendant would personally take up his check from the complaining witness. Under these circumstances there was no obligation on the part of the complaining witness to present the check to the bank for payment; nor had he any reason to believe that the bank would pay the check, if presented. The contract was definitely and distinctly that the defendant would take up the check.

For the foregoing reasons, the judgment of the court, and the order of the court denying defendant's motion for a new trial, are affirmed.

We concur: CONREY, P. J.; CURTIS, J.

75 Cal. App. 122

Ex parte LINDSLEY. (Cr. 894.)

(District Court of Appeal, Third District, California. Nov. 5, 1925.)

1. Habeas corpus ☞106—Jurisdiction is only question which can be considered on habeas corpus for release from commitment for contempt of court.

Where editor of newspaper was adjudged guilty of contempt in publishing article relative to motive of district attorney in criminal prosecution, and reflecting on character of witness, only question which can be considered on habeas corpus is jurisdiction, and allegations of affidavit upon which proceeding was based must be taken as true.

2. Contempt ☞9—Only legitimate purpose of contempt proceedings is to punish for improper interference with administration of justice.

The only legitimate purpose of contempt proceeding against editor, who had impugned motives of district attorney and character of prosecuting witness in criminal case, is to punish for improper interference with orderly administration of justice in trial of case and decision thereof.

3. Constitutional law ☞90—Liberty of press does not permit publications respecting pending causes, calculated to interfere with due administration of justice.

Liberty of the press, as guaranteed by the Constitution, does not permit publications respecting pending causes which are reasonably calculated to interfere with due administration of justice.

4. Contempt ☞9—Issuing publications calculated to prejudice or prevent fair and impartial action in pending cause is contempt.

Issuing publications calculated to prejudice or prevent fair and impartial action in cause pending, including those seeking to influence judicial action by threats or other intimidation, which reflect on court, counsel, parties, or wit-

nesses, or which tend to corrupt or embarrass due administration of justice, is contempt.

5. Contempt ☞9—Publication calculated to interfere with administration of justice need not be made in place where court is held to constitute contempt.

Publication, respecting pending causes calculated to interfere with the administration of justice to constitute contempt need not be made in place where court is held; circulation in and about such place being sufficient.

6. Contempt ☞9—Publication may constitute contempt, whether true or false.

Publication tending to interfere with due administration of justice may constitute contempt, whether it is true or false.

7. Habeas corpus ☞4—Sufficiency of evidence on charge of contempt cannot be reviewed on habeas corpus.

Sufficiency of evidence presented to sustain charge of contempt of court cannot be reviewed on habeas corpus.

Application by Alfred Lindsley for writ of habeas corpus against the Sheriff of Humboldt County, to secure his release from custody on a commitment for contempt of court. Writ denied.

Metzler & Mitchell, of Eureka, and V. A. McGeorge, of Sacramento, for petitioner.

FINCH, P. J. [1] This is an application for a writ of habeas corpus. The petitioner was adjudged guilty of contempt of court and sentenced to pay a fine, or, in default of the payment thereof, to be imprisoned in the county jail. He is now so imprisoned. The petitioner alleges that the affidavit upon which the proceeding for contempt is based is insufficient, and that no proof of the facts stated in the affidavit was produced at the hearing. It appears from the affidavit that an action against the petitioner for criminal libel was pending in the superior court of Humboldt county; that the cause had been set to be tried on the 26th day of October, 1925; that the names of 60 persons had been drawn from the trial jury box from which to impanel a jury to try the cause; that the petitioner is the editor of a newspaper, published and circulated in the city of Eureka and county of Humboldt, and having a large number of subscribers in that county; that, after the drawing of said names from the jury box, in four separate issues of said newspaper, the petitioner published therein certain statements, which are set out at length, attacking the district attorney of the county and impugning his motives in respect to his prosecution of said criminal action, and reflecting upon the character and veracity of the prosecuting witness therein, for the purpose and with the intent of influencing the jurors who had been so drawn and of influenc-

ing witnesses against testifying for the prosecution and of interfering with the administration of justice. Among other things, the published statements referred to the prosecuting witness as "a former admitted stool pigeon, and the man who made a perjured expense bill against the county, later stolen from the supervisors' files." Since jurisdiction is the only question which can be considered on habeas corpus in a case of this character, the allegations of the affidavit must be taken as true, and it must be presumed that the publications were made for the purpose of influencing the conduct of the jurors and the testimony of the witnesses in the trial about to be had.

[2-7] The purpose of a contempt proceeding is not that of punishing a person for the mere publication of libelous statements against witnesses or officers of the court or the judge thereof. The laws relating to libel are enacted for the accomplishment of that purpose. The only legitimate purpose of a contempt proceeding, in a case such as this, is to punish for the improper interference with the orderly administration of justice in the trial of a case in court and the decision thereof.

"Liberty of the press, as guaranteed by the Constitution, does not permit publications respecting pending causes which are reasonably calculated to interfere with the due administration of justice. Hence the rule is now firmly settled that it is contempt to issue publications which are calculated to prejudice or prevent fair and impartial action in a cause of judicial investigation then pending, including those which seek to influence judicial action by threats or other form of intimidation, which reflect on the court, counsel, parties, or witnesses, respecting the cause, or which tend to corrupt or to embarrass the due administration of justice. * * * To constitute contempt, the publication need not be made in the place where the court is held; circulation in and about such place is sufficient. Neither is it necessary to show that they were read by the jurors or by those whose conduct was sought to be influenced by them, nor that the court was affected by the publication. According to the weight of authority, the publication may constitute contempt, whether it is true or false. * * * Publications concerning a trial thereafter to be had may constitute contempt." 13 C. J. 34.

The facts alleged in the affidavit upon which the proceeding for contempt is based are clearly sufficient to show willful contempt within the foregoing rule:

"The sufficiency of the evidence presented to sustain the charge upon which the prisoner is held * * * cannot be reviewed on habeas corpus." 29 C. J. 46; In re Jacobs, 175 Cal. 661, 166 P. 801.

The application is denied.

We concur: HART, J.; PLUMMER, J.

PEOPLE v. BURNS. (Cr. 1248.)

(District Court of Appeal, Second District, Division 2, California. Nov. 3, 1925.)

1. Criminal law ☞1186(4)—Sufficiency of evidence to sustain verdict, based on information, defective to extent it does not charge crime does not entitle state to affirmance.

The sufficiency of the evidence to sustain a verdict, based upon an information, so defective that no crime is charged, does not entitle state to affirmance, under Const. art. 6, § 4½, especially where defendant at the trial continually urges the objections constituting the defect in the information.

2. Indictment and information ☞96—Is fatally defective, if it does not state all facts or circumstances contained in definition of offense.

Indictment and information is fatally defective, if it does not state all facts or circumstances contained in definition of offense.

3. Statutes ☞206—Effect must be given, if possible, to every word, clause, and sentence of statute defining offense.

Effect must be given, if possible, to every word, clause, and sentence of statute defining offense, and no part or word can be ignored, discarded, treated as meaningless, or denied purpose and effect in the absence of irreconcilable contradiction and repugnance.

4. Criminal law ☞1186(4)—Information for pandering, not stating offense, held miscarriage of justice, not to be disregarded on appeal.

Information for pandering, under Act Feb. 8, 1911 (St. 1911, p. 9), which failed to charge means designated in statute, held to evidence a miscarriage of justice, which could not be disregarded on appeal, under Const. art. 6, § 4½.

5. Prostitution ☞3—Information, not charging means designated by statute, held bad.

Information, charging that defendant induced, persuaded, and encouraged a female to become an inmate of a house of prostitution, and likewise charging persuasion to remain in such house, held fatally defective for failure to charge that defendant employed any of the means designated in the statute such as promise, threat, violence, or some device or scheme, etc., thereby inducing such female to become an inmate.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Clara Burns was convicted of pandering, and she appeals. Reversed.

Anderson & Anderson, John L. Richardson, and T. E. Parke, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. By an information containing two counts defendant was charged with the crime of pandering, as de-

fined in the Act of February 8, 1911 (Stats. 1911, p. 9). A verdict of guilty upon each count was returned by the jury, and defendant now appeals from the judgments entered thereon and from an order denying her motion for a new trial.

The statute enumerates several separate, definite, and distinct acts, the commission of any one of which constitutes a specific offense, although each offense separately defined by the statute is included within the generic crime of pandering. By the information filed in the court below an attempt was made to charge defendant with the violation of two distinct provisions of the statute, each of which defines a specific offense. The first of these two provisions reads as follows:

"Any person * * * who, *by promises, threats, violence, or by any device or scheme*, shall cause, induce, persuade or encourage a female person to become an inmate of a house of prostitution * * * shall be guilty of a felony, to wit: pandering."

The second provision under which it was attempted to charge defendant reads:

"Any person * * * who, *by promises, threats, violence or by any device or scheme*, cause, induce, persuade or encourage an inmate of a house of prostitution or any other place in which prostitution is encouraged or allowed to remain therein as such inmate * * * shall be guilty of a felony, to wit: pandering." (Italics ours.)

Appellant contends that in order to constitute an offense under either of these provisions it is imperative that the inmate shall have been caused, induced, persuaded, or encouraged to become or to remain an inmate by means of some "promise," or "threat," or "violence," or "device," or "scheme." The information under which she was convicted omits all mention of any promise, threat, violence, device, or scheme used by her as a means whereby she was enabled to cause, induce, persuade, or encourage the female to become and remain an inmate. The charging part of the first count is as follows:

"That the said Clara Burns on or about the 19th day of June, 1924, at and in the county of Los Angeles, state of California, did willfully, unlawfully, and feloniously cause, induce, persuade, and encourage one Alice Jacobs, a female person, to become an inmate of a house of prostitution, and to become an inmate of a place in which and where prostitution was encouraged, allowed, and practiced."

The charging part of the second count is like unto that of the first, except that it charges defendant with causing, inducing, persuading, and encouraging the inmate "to remain" in the house of prostitution.

Appellant urges here, as she did in the lower court, that neither count of the information states a public offense, for the reason that it wholly fails to charge that the female

was caused, induced, persuaded, or encouraged to become or to remain an inmate by the use of any of the means mentioned in the statute, i. e., by "promises, threats, violence or by any device or scheme." Appellant vigorously urged her objection at each and every proper stage of the proceedings in the court below. She presented it by demurrer and likewise by a motion in arrest of judgment; and she requested an instruction to the effect that, to justify a verdict of guilty, the jurors must believe beyond a reasonable doubt "that the defendant, by use of, or by means of, some promise, or threat, or violence, or by any device or scheme, or any one of them, did thereby cause, or induce, or persuade, or encourage" the female to become or to remain an inmate of the house in question. The demurrer, the motion in arrest of judgment, and the requested instruction were without avail; for the learned trial judge, assuming that the facts alleged in each count were alone sufficient to state the offense denounced by the particular provision of the statute under which appellant was charged, overruled the demurrer, denied the motion in arrest of judgment, and refused to give the proffered instruction. Indeed, the district attorney, with the concurrence of the learned trial judge, presented the case for the people upon the theory that it was not necessary to show that appellant made any promise, or used any threat, or violence, or device, or scheme, as a means to enable her to cause, induce, persuade, or encourage the female to become or to remain an inmate of the house. And the evidence fails to show that any promise was made, or that any threat, or violence, or device, or scheme was used by appellant as a means to enable her to cause, induce, persuade, or encourage the female to become or to remain such inmate.

[1] It follows from the foregoing that if, as appellant claims, it was necessary to allege and to prove that she did make some promise, or that she did use some threat, violence, device, or scheme, then there has been a "miscarriage of justice" within the meaning of section 4½ of article 6 of the Constitution, and that provision of our organic law may not be employed, like a broad mantle of charity, to cloak the error. If the making of a promise, or the use of a threat, violence, device, or scheme has been made by the statute an essential ingredient of each of the two specific offenses with which it was attempted to charge appellant, then the defect in the information is not one of mere form, but, as there was a failure to state one of the constituent elements of the offense, it is a defect of substance. And, if it be a defect of that character, then appellant would be entitled to a reversal, even if the proof had shown the existence of some one of the essential facts omitted from the information. In *People v. Salisbury*, 59 Cal.

App. 299, the court, on page 301 (210 P. 642, 643), says:

"The fact that the evidence would have sustained the verdict if the information had described the commission, by defendant, of a criminal offense, does not entitle the state to an affirmance when the information is so defective that no crime was charged, and particularly when, as in this case, the objections made by the defendant were continually urged upon the attention of the court. Under such circumstances, section 4½ of article 6 of the Constitution does not apply to the case."

[2, 3] Is the making of a promise, or the use of a threat, or of violence, or of some device, or scheme, a necessary and essential element of each of the two offenses defined in the above-quoted provisions of the statute? If it is, then there can be no doubt as to the necessity for alleging such promise, or such threat, violence, device, or scheme; for it is an elementary rule of criminal pleading, needing no citation of authority to substantiate it, that an indictment or information is fatally defective if it does not state all the facts or circumstances contained in the definition of the offense. Equally elementary is the uniformly recognized canon of statutory construction that effect must be given, if possible, to every word, clause, and sentence of the statute defining the offense, and that no part or word can be ignored, discarded, treated as meaningless, or denied purpose and effect, unless there be irreconcilable contradiction and repugnance.

[4] If effect be given to every word which the Legislature has employed in its definitions of the two specific offenses with which it was sought to charge appellant—and it is manifest that some effect can be, and therefore must be, given to every word in those definitions—then it necessarily follows that it has not been made a crime merely to cause, or to induce, or to persuade, or to encourage a female to become or to remain an inmate of a house of prostitution, but that an additional fact has been made a prerequisite, namely, some one or more of the means named in the statute, i. e., a promise, threat, violence, or some device or scheme whereby the female was thus caused, induced, persuaded, or encouraged to become or to remain such inmate. A mere persuasive argument addressed to the female for the purpose of inducing her to become or to remain an inmate, but which is wholly dissociated from any promise, threat, violence, device, or scheme to make it an effective argument, is, of course, a most heinous infraction of the moral code; but by neither of the statutory provisions under which this information was drawn has the Legislature seen fit to make inducement of that character a crime. The courts can go no further than the Legislature has gone, and their duty is to see that punishment is confined to the particular species of immoral conduct intended

to be suppressed by the lawmaking body. Appellant's acts were grossly immoral and were flagrantly violative of the divine law; but the question for dispassionate judicial consideration is whether in what she did she was guilty of either of the offenses denounced by those particular parts of the statute under which she is being prosecuted. Says the Supreme Court of Utah in *State v. Topham*, 41 Utah, 39, 123 P. 888:

"The Constitution and the statute prescribe the rules by which the sufficiency of an information may be determined, and they apply to all alike. They do not prescribe one rule for a keeper or director of a house of prostitution and another for a nun, nor one rule for one offense and another for another offense."

So far as we are advised, the question here under consideration has never been directly presented to, or definitely decided by, any of the appellate courts of this state. But our conclusion that it was necessary to allege and to prove that some promise, threat, violence, device, or scheme was the means whereby appellant caused, induced, persuaded, or encouraged the female to become or to remain an inmate is in line with well-considered decisions by the highest courts of sister states. For example, the Supreme Court of Utah, in *State v. Topham*, supra, having under consideration an information drawn under certain statutory provisions of that state which are practically the same as ours, said that it not only is necessary to allege that the accused used some promise, threat, device, or scheme, but that it is necessary to go further and to allege the facts and circumstances constituting the promise, device, etc.; the court there holding that a charge in the language of the act is not sufficient, even though it states the offense in the precise language of the statute. In the course of its opinion in that case the Utah court employs this language:

"What are here the essentials of the charged offense? The state urges to cause, induce, and encourage an inmate of a house of prostitution to remain therein as such inmate. That is one essential; but it is not all the essentials declared by the statute. It declares that 'any person who shall, by promises, threats, violence, or by any device or scheme,' cause, induce, etc., an inmate of such a house to remain therein, is guilty of an offense. The act or conduct of the person who shall, by a promise or threat or violence, or by a device or scheme, cause, induce, or encourage, etc., is a necessary 'act constituting the offense,' and is a 'particular circumstance of the offense to constitute a complete offense.' Without it no offense under the statute is committed."

And later in the opinion it is further said:

"It is not enough that the defendant made some kind of a promise to the inmate; it must also appear that the promise was made with the design or purpose of causing or inducing the inmate to remain in the alleged house of prosti-

tution, and that it was one fairly calculated or naturally tending to produce such a result, and that the inmate in fact did so remain, not as evidenced by a state of mind expressed on the witness stand, but as evidenced by some act or conduct on her part, or by something said or done by her, showing, or tending to show, that she acted on, or was induced or influenced by, the promise, and by reason thereof remained in the house of prostitution."

The Oklahoma Criminal Court of Appeals, having before it a similar question, employed this language:

"The gist of this offense is not that a woman is in a house of prostitution, but that she has been procured or induced *by some of the means named in the statute* to enter or remain in a house of prostitution. Hence a state of facts must be pleaded that will show that the person charged did, in reality, *by some one or more of the means named in the statute*, procure or induce the female to enter or remain in such house." *Abrams v. State*, 13 Okl. Cr. 11, 161 P. 331. (Italics ours.)

It is not necessary to consider whether in this jurisdiction a charge in the language of the statute would be held sufficient. That question is not before us. This is not a case where the information *insufficiently* alleges an essential ingredient of the offense. Here there is a total failure to charge one of the essentials of the offense, even in the language of the statute.

The judgments and the order denying a new trial are reversed.

We concur: WORKS, J.; CRAIG, J.

74 Cal. App. 726

MURPHY v. MURRAY, Acting Chief of Police, et al. (Civ. 5252.)

(District Court of Appeal, First District, Division 2, California. Oct. 28, 1925. Hearing Denied by Supreme Court Dec. 26, 1925.)

1. Death ☞21—Officer making arrest not acting in self-defense.

Rule that, where person attacked may use only such force as is necessary to protect himself, does not apply to peace officer seeking to arrest one charged with crime, as he does not then act in self-defense but in defense of the state.

2. Assault and battery ☞10—Liability of peace officer in arresting without warrant depends on whether he acted in good faith and had reasonable grounds to believe person committed felony.

Where peace officer, under Pen. Code, § 836, makes an arrest without a warrant of one who proves not to have committed felony, or where officer injures person in attempting to make such arrest, his liability for damages depends on question whether he acted in good faith and had

reasonable grounds to believe that person committed felony.

3. Appeal and error ☞842(1)—Whether peace officer had reasonable grounds to believe that party he attempted to arrest committed felony is a question of law for appellate court.

Whether peace officer had reasonable or probable cause for believing that party whom he attempted to arrest had in fact committed a felony is a question of law for appellate court, which is not bound by conclusion of trial judge.

4. Death ☞21—"Reasonable cause" for arrest without warrant "probable cause."

Provision of Pen. Code, § 836, that peace officer may arrest without warrant when he has "reasonable cause" to believe that person has committed a felony, is same as requirement of "probable cause," defined as a suspicion founded upon circumstances sufficiently strong to warrant reasonable man in belief that charge is true.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Probable Cause; Reasonable Cause.]

5. Death ☞75—Evidence held to show arresting officer had reasonable cause to believe deceased committed felony.

Evidence held to show that peace officer had reasonable or probable cause to believe that deceased had in fact committed a felony, that he acted in good faith, under honest belief that deceased committed felony and was endeavoring to resist arrest, and that officer shot only to intimidate deceased, so that officer was not liable in damages for death of deceased, caused by one of his shots.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Action by Joe Murphy against A. W. Murray, Acting Chief of Police of the City of Los Angeles, and B. C. Croft. Judgment for plaintiff, and defendant Croft appeals. Reversed.

Jess E. Stephens, City Atty., and Chas. B. MacCoy, Deputy City Atty., both of Los Angeles (Philip C. Sterry, of Los Angeles, of counsel), for appellants.

Martin Forrest and W. R. Rutherford, both of Los Angeles, for respondent.

NOURSE, J. Plaintiff sued the defendant Murray as acting chief of police of the city of Los Angeles, and the defendant Croft as a member of the police department of that city, for damages for the death of his son, caused by the defendant Croft while attempting to arrest the son. Judgment went in favor of the defendant Murray and in favor of the plaintiff as against the defendant Croft in the sum of \$2,600. The defendant Croft has appealed from the judgment upon the judgment roll and a bill of exceptions.

The facts of the case are that, about 10:57 p. m. of the night of October 30, 1920, Officer Croft reported by telephone to the central

police station and he was informed that a burglary had been committed at the home of a Mr. Eaton, and was directed to go over there as quickly as possible. He picked up another member of the police department, Officer Bligh, and on the way to the place of the burglary they picked up a Mr. Kloepfel, asking him to direct them to the house they were seeking. When these three parties arrived at the Eaton home, they immediately called Mr. Eaton out and he then informed them that his house had just been robbed. While Officer Croft was questioning him further as to the result of the burglary, Mr. Kloepfel called to him that two fellows were running away from the rear of the house. These four parties immediately started in pursuit; Croft running around the south side of the house, and Bligh running around the other. The men pursued were at first about 75 feet in advance of Croft and were continually gaining as they ran. They separated in their course, and when about 100 feet apart Croft called upon them to stop, that he was an officer, and that he would shoot. They continued to run, and Croft fired three shots in the air. Nelson, the companion of young Murphy, then stopped and threw up his hands, whereupon Croft called to him, asking him if he knew the other fellow who ran down the hill, referring to young Murphy, who continued on his course down the ravine and into a grove of trees. Nelson denied that he knew him, and Croft then called to him, asking if he knew where he lived. Nelson again answered, "No," and then he called to Murphy, who was then concealed in the grove of trees at a point about 250 feet from where the officer stood, demanding that he come out, and threatening him that if he did not he would shoot. After waiting a minute or two, and believing that Murphy was getting into a position to shoot at him, he fired once into the grove for the purpose, as he said, "to intimidate the fellow and make him come out." At that time Officer Bligh joined Croft, and the two went into the grove and found that Murphy had been mortally wounded. The night in question was the night commonly called Hallowe'en, and Nelson and Murphy afterward proved to be boys of about 16 years of age who were engaged in Hallowe'en pranks. They had previously approached the Eaton home from the rear and entered the back porch, after Murphy had cut the screen to unlock the door, and had there turned off the electric current, leaving the house in darkness. The Eatons were having a party at the time and some of the men of the party soon succeeded in turning the lights on again. About 10 minutes later the boys approached the rear of the house again, for the purpose, as stated by Nelson, of entering the back porch and again turning off the current. It was at this time that they were surprised by the police officers and attempted to flee

from the premises. They were both about 6 feet in height and weighed about 150 or 155 pounds; in the darkness giving the appearance to the police officers of being adult men.

[1] The theory of respondent's case as maintained in the trial below and on this appeal is expressed in that portion of his brief which reads:

"The rule of law applicable, we contend, is no different than it would be where a person is attacked by another, he may use only such force as would be necessary to protect himself from his assailant's attack."

The error of this position is that, when a police officer is seeking to arrest one charged with crime he is not acting in self-defense, but in defense of the state. The law requires him to make arrests under certain circumstances, and, if he merely assumes the position of a private citizen protecting himself against harm, he is neglectful of the duty imposed upon him and is open to censure therefor. The authority of the police officer to arrest without a warrant is fixed by section 836 of the Penal Code as follows:

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it. * * * At night, when there is reasonable cause to believe that he has committed a felony."

[2,3] When a peace officer, acting under this authority, makes an arrest of one who afterward proves not to have committed a felony or when in attempting to make such an arrest he causes injury to the party arrested, his liability for damages therefor depends upon the question whether he acted in good faith and had reasonable grounds for believing that the person did commit the felony. The rule applicable here is found in 11 R. C. L. 801, where it is said:

"But since in such a case the person to be arrested is not specifically indicated by a written warrant, and the officer must necessarily act on his own reasonable judgment and often in haste to prevent the escape of the criminal, he is protected if he acts in good faith and on reasonable grounds of suspicion, though the person arrested proves not to have been the felon, or no felony was in fact committed."

This being the issue which arises in all cases of this nature, the primary question to be determined is whether the peace officer had reasonable or probable cause for believing that the party whom he attempted to arrest had in fact committed a felony. This the court must determine as a matter of law, and the appellate court is not bound by the conclusion of the trial judge on that issue. Michel v. Smith, 188 Cal. 199, 205, 205 P. 113. In the case just cited a rule of guidance for the trial courts was laid down where the Supreme Court say:

"Whether there is probable cause for making an arrest depends upon all the circumstances of each case, including delay which might en-

able the guilty person to escape, the nature of the information, the character of the person at whose instance the alleged wrongful arrest is made, and the extent of possible inquiry as to facts and circumstances."

Reference should also be made to *People v. Kilvington*, 104 Cal. 86, 93, 37 P. 799, 801 (43 Am. St. Rep. 73), where the Supreme Court says:

"In considering this question of probable cause upon the part of the defendant to arrest the deceased, we are to look only at the facts and circumstances presented to him at the time he was required to act. The defendant did not recognize the deceased before he fired, and the fact that the latter was an innocent and respectable citizen, and who may have been fleeing from an assailant, cannot be allowed to affect the question we are now discussing." (Emphasis ours.)

[4] The latter case is closely analogous to the one under consideration. The defendant in that case was a police officer of the city of San Jose and was tried and convicted of murder. While in the performance of his duty, he heard some one cry "stop thief," and observed two men, one in advance of the other, running down the street. The officer ordered the men to stop and threatened to shoot. The order was not obeyed, and the officer fired, killing the pursued man, whom it was afterward shown had not committed any felony. The Supreme Court, in reversing the conviction, pointed out that it was not only the right but the duty of the police officer to arrest any person in the nighttime when he had reasonable ground to believe that such person had committed a felony, and held that the trial court should have instructed the jury that the defendant had reasonable cause to believe at the time of the killing that the deceased had committed a felony. In *People v. Adams*, 85 Cal. 231, 24 P. 629, the Supreme Court approved an instruction given to the jury to the effect that a peace officer making an arrest has the right to use all the force which from the surrounding circumstances seems to him as a reasonable man necessary, and that, where the offense charged is a felony, he has a right, if apparently necessary to a reasonable man, to kill the person whom he is seeking to arrest. In *People v. Matthews*, 6 Cal. Unrep. 341, 58 P. 371, the Supreme Court approved an instruction to the effect that, if the defendant, a peace officer, had reasonable cause to believe, and did believe, that the deceased had committed a felony and had fired the fatal shot, intending to shoot over the head of the deceased, the jury should find the defendant not guilty, if they believed that such act on the part of the defendant was necessary for the purpose of effecting an arrest. The term "reasonable cause" as used in the Penal Code expresses the same thought as the term "probable cause" as used in the decisions cited. "Probable cause"

is defined in *Michel v. Smith*, *supra*, page 205 (205 P. 116), "as a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true."

[5] In view of these authorities, we must approach the case as in the first instance to determine whether as a matter of law, under the facts and circumstances as they appear in the record the appellant had reasonable or probable cause for believing, at the time of the shooting, that young Murphy had in fact committed a burglary, and that it was necessary, in order to prevent his escape, to fire the shot into the grove of trees. In determining this question, the case is made more difficult because the findings on all material issues of the case are either directly contrary to all the competent evidence appearing in the record or are unsupported by any evidence of any nature.

The meat of the case appears in finding No. 6, wherein the court found that, about 10:57 p. m. on the night of October 30, Croft was informed by some one at the central police station that a burglary had been committed at 951 Micheltorena street, and that at some time after being informed, to wit, about one-half hour, Croft and Officer Bligh drove in an automobile to said address. Now the only evidence covering this portion of the finding is found in the testimony of Officer Bligh, who testified that as soon as he and Croft got the call they drove to the place of the burglary "just as though we were going to a fire," and in the testimony of Croft that they went over as quickly as possible. Inasmuch as the complaint alleged, and the trial court found to be true, that the shooting occurred at about 10:30 p. m. of that evening, the finding that these officers had delayed answering the call for a period of one-half hour is so inconsistent with the pleading and other finding that it must be disregarded. In the same finding the trial court found that it was not true that, when the officers arrived at the Eaton home, Eaton informed them "that his house had just been burglarized." The only evidence covering this portion of the finding is found in the testimony of Croft as follows:

"He said, 'My house has just been robbed,' and I said, 'What did they take?' and he said, 'They cleaned me out,' in a decided manner; and I asked him again, 'What did they take?' and he said, 'A hundred and fifty dollars' worth of silverware and my wife's jewelry and good clothes;'"

—and from the testimony of the same witness that from Eaton's actions and the tone of his voice he was led to believe that the burglary had just occurred. The finding that Russel Murphy, the deceased, was not guilty of the crime of burglary or any misdemeanor is not supported by any evidence. An offer was made of the record in the juvenile court wherein Murphy's companion was tried

and found not guilty of the burglary. In the record before us no proof was made that Murphy was not guilty of any crime or any misdemeanor. The finding that it was not true that, when Eaton informed Croft that a burglary had been committed, the latter commenced an investigation or that while in the course of such investigation some one called to Croft, "There they go," or words to that effect, is contrary to all the evidence. The only evidence on this subject is found in the testimony of Croft to the effect that he was questioning Eaton regarding the burglary when Kleopfel drew his attention to the two boys at the back of the house, and, pointing to them, "There is the two fellows running sneaking away right now;" and in the testimony of the witness Kleopfel to the same effect. The finding that when Croft started in pursuit of Murphy and Nelson he *overtook* Nelson is not supported by any evidence. The only testimony on the subject is that of Croft that, when Nelson stopped in obedience to the officer's command, they were then about 200 feet apart, and that Croft continued after Murphy while Mr. Eaton and Officer Bligh approached and put Nelson under arrest. The finding that Murphy, in obedience to the command of the officer, "attempted to come out of said grove," is unsupported by any evidence. The evidence is that, while Croft was at a distance of 250 feet from the grove, he called upon Murphy to come out and threatened to shoot, but that Murphy made no attempt to come out.

The real facts of the case as disclosed by the record are that Croft went to the place of the burglary with all possible speed, and, while investigating the charge, his attention was suddenly directed to these two boys who were running away from the rear of the house. The night was dark, and it was impossible for the officer to determine their ages. The fact that they were running in the darkness from the premises which had been burglarized and their refusal to heed the repeated commands to stop were sufficient to give the officer reasonable grounds to believe that they had participated in the felony. All the testimony goes to show that both officers were acting in good faith, that Croft honestly believed that the boys had participated in the felony and were endeavoring to escape into the darkness, and as to Murphy he believed that he was endeavoring to secure a favorable position in the grove of trees to resist the arrest, and that all the shots fired by Croft were fired into the air for the purpose of intimidating the boys and to bring them to a stop. There is therefore no evidence to support the conclusion that Croft did not have reasonable cause to believe that Murphy had committed the burglary, or that it was necessary, in order to arrest him, to fire the shot which caused his

death. The case comes squarely within the rule of *Michel v. Smith*, supra, and is controlled by that decision.

Judgment reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

75 Cal. App. 161

MCBRIDE v. CLARA BARTON HOSPITAL
(Civ. 5242.)

(District Court of Appeal, First District, Division 2, California. Nov. 10, 1925. Hearing Denied by Supreme Court Jan. 7, 1926.)

1. Hospitals ⇐8—Evidence held to make jury case imposing on defendant hospital burden of showing that plaintiff's nurses were not its agents.

In action for injuries to patient in defendant's hospital, plaintiff's evidence held to make out jury case, imposing on defendant burden of introducing evidence that nurses responsible were not defendant's agents, and that defendant was not negligent.

2. Hospitals ⇐8—Instructions relieving hospital from liability if injuries were caused by negligence of nurses not in its employ held properly refused.

In action against hospital for injuries to patient, where defendant failed to show that nurses responsible were not its agents, and that it was not negligent, instructions to find for defendant if injuries were caused solely by negligence of nurse not in its employ or under its control or supervision were properly refused.

3. Hospitals ⇐8—Contents of notices limiting hospital's liability for injuries to patient held properly excluded.

In absence of evidence that minor, suing hospital for injuries inflicted on him while patient, or his parents saw or read posted notices, or entered into contract limiting its liability, or any statute authorizing hospital to limit liability by posting notices, court properly excluded contents of such notices from evidence.

4. Hospitals ⇐8—Custom of hospitals as to employing special nurses from outside, etc., held inadmissible in action for injuries to patient.

In action against hospital for injuries to patient, evidence of custom in city as to hospitals employing special nurses called in from outside, controlling and supervising them, and collecting and paying them their compensation, held inadmissible.

5. Appeal and error ⇐237(2)—Defendant not asking for continuance or right to introduce evidence to meet testimony erroneously admitted in rebuttal cannot complain.

Defendant cannot complain of error in receiving in rebuttal testimony admissible in chief, where it did not ask for continuance because of surprise nor request privilege of introducing evidence to meet such testimony.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by John William McBride, a minor, by Ethel M. McBride, his guardian ad litem, against the Clara Barton Hospital. Judgment for plaintiff, and defendant appeals. Affirmed.

W. H. Dehm, of Los Angeles, for appellant.

Carroll Allen, Lorrin Andrews, and Howard L. Grace, all of Los Angeles, for respondent.

STURTEVANT, J. The plaintiff, a minor, commenced an action to recover damages for burns inflicted on his leg while a patient in the hospital operated by the defendant corporation. The defendant answered. A trial was had in the lower court before a jury. The jury brought in a verdict for \$5,000. A judgment was entered for that sum, but on the presentation of a motion for a new trial the plaintiff consented to waive \$2,000 of the verdict, and that the judgment be reduced to the sum of \$3,000. Thereupon the motion for a new trial was denied, and the defendant has appealed, bringing up a bill of exceptions.

Mrs. McBride, the mother of the plaintiff, testified:

"That at the date of the trial the plaintiff was nine years of age; that in February, 1920, Mr. McBride and I were living at 1147 Benton Way, Los Angeles. We had but one child, Johnnie, and at that time there was nothing the matter with his health, except for his tonsils and his nose bothering him. I consulted Dr. Ruddy, who advised that there was a growth in the nose, and that it should be removed, and that his tonsils should be removed. The doctor advised me to go to the Clara Barton Hospital. Later I called the hospital on the telephone and engaged a private room. On Friday morning, February 6, 1920, we took the child to the hospital at about 7 a. m. When we arrived there we registered, and I stated that we wanted a special nurse detailed on the case. We were taken to a wardroom containing several beds, and when I stated that I had engaged a special room I was told that the hospital had none, and that the bed in the ward was the only vacant bed. The child was put to bed undressed. At that time he was perfectly conscious. About 8 o'clock attendants took him in a wheel chair, and the child was operated upon. While the child was absent from the room the witness remained in the wardroom and in the hall adjacent. A nurse in a blue drab uniform, with a white apron and cap (hospital uniform), came forward and made the bed and put a hot water bottle in the bed. I asked why that was done, and the nurse replied 'that it was necessary, when a patient is coming out of an anæsthetic, to have the bed warm.' There were very likely three hot water bottles put in. The nurse was a young girl. After she put the hot water bottles in the bed, she left, and I did not see her again. After the child was brought from the operating room and placed in bed I went into the room and remained there until about noon. During that time the child was unconscious. When I entered the room the second time there

were present a nurse (Miss Woodward), dressed all in white, Mrs. McBride, and the doctor who had given the anæsthetic. Before that time I had not seen Miss Woodward. In reply to a question by me the nurse stated that she was to be the nurse on the case. I next saw John the next morning. The nurse told me 'that she was very sorry that John had been burned on hot water bottles; that she had shown the burn to the doctor and head nurse, and they had bandaged it up, and it would be all right in a few days.' The nurse was there when I arrived about 9 a. m. I had not hired any nurse. I did not do anything about a special nurse other than has been stated above. John was conscious, but I did not see his leg. He stayed in the hospital until the following Monday at noon. I was there every day, but did not see his leg at any time. No one offered to show it to me, and nothing else was said about it. On the Monday following the nurse, Miss Woodward, carried John out to the machine, and told the witness that she would be out the next day to dress the burns. The nurse came to the house the next day. Her coming was not at my request. She came about a month or six weeks after that to treat the burn."

On cross-examination the witness testified:

"I asked them to detail a nurse to me. I asked whoever was in the hospital. That was not over the telephone. That was when I went down there that morning. The nurse in white who was in the ward room when I went into the room after the operation was Miss Woodward, and she remained on the case and was the same individual who went to our house to dress the boy's leg. On one of those visits I asked Miss Woodward to have a doctor come to examine the burn. The boy's tonsils were healed, and he could eat and drink before he left the hospital. Dr. Sprague came to the house twice to treat the boy. The first visit was made within three weeks after the boy returned home. He unwrapped the wound, and dressed it, and gave the nurse instructions. About a week later he did the same thing. He did not return any more. We did not have any other doctor after that. The nurse came for a month or six weeks, a couple of times a week, then she did not come any more."

Marie Hodgdon, a witness called on behalf of the defendant, testified:

"In the month of February, 1920, I was employed as superintendent of nurses in the defendant's hospital, and was there when John McBride was received as a patient. At that time the defendant did not have any special nurses in the hospital. When any person wanted a special nurse we did not have any nurses employed by the hospital that would go on special duty. I had known Miss Woodward about a year and a half before that. She was a graduate nurse. She had never been employed in the hospital up to that time. She was not employed at the Clara Barton Hospital at that time. There was a request made in this case for a special nurse. I obtained Miss Woodward. My duties as superintendent of nurses are that I have charge of the student nurses in the hospital, in the training school. I did not have any control or supervision over special nurses who came into the hospital to take care of cases.

The special nurses report to the superintendent of nurses. Miss Woodward reported to the superintendent of nurses' office; that is my office. I mean when she first came she reported to the superintendent's office to see what room she is going to. After she has taken charge of the patient, she reports as to the condition of the patient to the doctor. After that I have no authority as superintendent of nurses to discharge her. I have authority to discharge the undergraduate nurses that are in the hospital right along. The custom in regard to preparing the bed for a patient who comes for an operation is that the bed is made with the blankets and hot water bottle put in to keep the bed warm, and those bottles are removed when the patient is put in. That is a custom of the hospital. I know the custom of the hospitals in this city. It is the duty of the nurse in charge of the case who receives the patient to take out the hot water bottle, whether one of our nurses or whether a special nurse—whatever is in charge of the room when the patient comes. No part of the money that was collected for the special nurse Miss Woodward was kept by the Clara Barton Hospital. Supervising nurses have charge of the floors—the head nurses. I have tried, but am unable, to locate Miss Woodward. I did not send her to the McBride home after the boy left the hospital. I did not know anything about her going until this case came up."

On cross-examination the witness further testified:

"Miss Woodward was not employed in the hospital before that time. After that time she was employed as a night nurse. She was so employed from May until July. After that I don't know what happened to her. She left of her own accord. She was not discharged. I don't know who put the hot water bottle in the bed. The uniform of the students in February, 1920, was blue with white aprons. If the case is on general it is the custom of these young girls to attend to the hot water bottle; that is, put it in and take it out—they carry the hot water bottle in and take it out under my supervision and order. It is not always the business of the nurse in the hospital to put the hot water bottle in the bed. They do sometimes. If the special nurse has not arrived when the operation is over that is done by the hospital nurse. They take it out if the case is on general. If the case is on special the special nurse looks after the patient entirely. These student nurses work in the hospital under my instructions. I do not know whether these hot water bottles were tested before they were put in the bed of little John McBride. The special nurse had arrived at the hospital when he was taken from the operating room. I know because she reported in. I know the boy had not been taken from the operating room when she reported, from the chart, from the record. I am just repeating what I understand from the record. I say that the special nurse came before the boy was removed to the ward room because of the chart. The chart reads, '9:45, from surgery; pulse good; respiration poor; doctor called and removed nasal pack.' That is in Miss Woodward's handwriting. The chart also reads, 'Friday 7:30, patient entered hospital, walked to room 114 to bed; ready for surgery; to surgery.' That is all in Miss Wood-

ward's handwriting. The chart also reads, '4:50, blisters on leg.' Below it reads 'Doctor Ruddy notified,' and on the next line 'Blisters opened.' Below that '6:30, dressing applied to leg.' I don't know whether the portion of the chart 'from surgery' in Miss Woodward's hand means whether she first saw him when he came from surgery. A nurse is not supposed to make any entries excepting what she sees. I don't remember at this time whether I personally had any conversation with Mrs. McBride from the start to the finish of this matter. I don't remember whether I was the one that had the first conversation with her about the nurse or not. No student nurse had anything to do with the patient after he was brought into the room until after he was burned. My knowledge is from the chart. I cannot remember each individual case. When a special nurse goes on a case, our nurses have nothing to do with it because she has special charge of the case."

Dr. Barton, called as a witness for the defendant, testified:

"I am president and general manager of the Clara Barton Hospital in Los Angeles. In our hospital we do not have any special nurses. When a patient comes to our hospital and wants a special nurse it is the custom of the hospital to telephone outside—look in the nurses' directory. I don't think Miss Woodward was employed by our hospital in February, 1920, because those things are turned over to the superintendent of nurses, and I don't have personal knowledge. If she was a special nurse she was not employed by our hospital. We have no control of the special nurses at all. They report to the doctor in charge of the patient. He is not one of our doctors. Dr. Ruddy never was connected with the hospital in any way. I know what the custom is in regard to preparing the bed where a patient is undergoing an operation. The custom is that the bed is prepared with blankets, and the hot water bottle put in there, and, when the anesthetized patient is returned to the bed, the fixed rule of the hospital is to remove the hot water bottle. It is the duty of the nurse in charge of the patient at the time the patient is returned to take out the hot water bottle. When Miss Woodward went out to the house from time to time to change the dressing after the patient went home, that was not done under my direction nor the direction of the hospital. We did not pay her for any services rendered in that connection. Dr. Sprague, who went out there several times and dressed the wound, was not employed by us. He did not go out there under my direction. I never received any word from Mrs. McBride or from Miss Woodward that we should send a nurse or a doctor out there. I never heard of this matter after the patient left the hospital until suit was filed against us. It is the custom in our hospital when a special nurse is employed in a case that we collect a fee for them. The hospital gets no part of it. The hospital did not get any part of Miss Woodward's fee. We got money for the board of the nurse and for the room, but no money for her compensation. We collect for the nurse just for accommodation—that is the custom. We never paid Miss Woodward any more than the amount that was collected; the \$15 shown by the bill. The hospital has no authority to discharge the special nurse who is employed. The

doctor in charge of the patient—the doctor in charge of the case—or else the patient, has that authority.”

On cross-examination Dr. Barton testified further:

“We have a regular printed form of bill, ‘Hospital room,’ ‘Board of special nurse,’ ‘Special nurse’s fee,’ ‘Use of surgery,’ are printed on each bill as a matter of accommodation to save writing the words ‘Special nurse.’ We do not charge any board for regular nurses. We do not charge any board for our supervising nurse. I do not know when Miss Woodward came.”

Iva B. Lounsbury, called as a witness by the defendant, testified:

“I know the custom in the hospital in regard to employing and paying a special nurse. The hospital makes no charge nor takes any part of the pay of the special nurse. In this case the hospital received nothing except what is shown on the bill. In this case the hospital charged Mrs. McBride \$23.70, which does not include \$10 collected for Dr. Biddle for giving the anæsthetic, nor a fee for Miss Woodward. That is the hospital charge. I did not enter in our cash book the \$15 for Miss Woodward or the \$10 for Dr. Biddle.”

In rebuttal John W. McBride was called as a witness for the plaintiff. He testified:

“I am the father of the plaintiff. I was present at the operation. There was a regular hospital attendant in the surgery room when the operation was going on. Miss Woodward was not there. After I left the surgery room I accompanied the boy to his room. Miss Woodward was not there. A nurse put the boy to bed. She was dressed in regular probation nurse, blue and white, I guess. After the patient was in bed was the first time I saw Miss Woodward in the room. I saw her come in the room after the boy was placed in bed. The other nurse went on about her duties, I presume. This nurse stated that she had charge of the case.”

All of the evidence given by Mr. McBride was objected to as not being in rebuttal; nevertheless, it was admitted. No motion for a continuance was made, but, when the time arrived, the appellant cross-examined Mr. McBride. On cross-examination the witness testified:

“Mrs. McBride arranged with the hospital to supply the room with a special nurse. I don’t know when she told the hospital she wanted to get a special nurse. I was not present when my wife made arrangements about a special nurse. I was there all the time when the operation was going on in the operation room. I came down with the boy when he was wheeled in. The man that administered the anæsthetic and a hospital attendant also came down. By a hospital attendant I mean a girl that worked in the hospital—probation nurse I call them. I don’t know whether that is right or not. When the boy had been in bed Miss Woodward appeared and stated she was the special nurse.”

[1, 2] After the foregoing evidence had been received, the case was argued to the

jury. Thereupon the court instructed the jury that—

“There is only one question for you to consider in this case, and that is the question of damages this boy is entitled to recover.”

Continuing, the court fully instructed the jury on the rules governing it in estimating damages. We do not understand that the appellant questions the correctness of any of the latter instructions. However, in connection with the first instruction which the trial court gave, appellant contends that the trial court erred in refusing to give Nos. V and VI of the instructions requested by the appellant. Those two instructions were worded as follows:

“V. You are instructed that, if the injuries claimed to have been sustained by the plaintiff, were caused solely by the fault, carelessness, or negligence, of a special nurse employed by the parent, or parents, of the said plaintiff, and that the said special nurse was not at the said time in the employ, nor under the control or supervision, of the defendant, then your verdict should be for the defendant.

“VI. You are instructed that a person, or corporation, is not liable for the negligence, or carelessness, of a person in an independent employment, over whom he, or it, exercises no control or supervision.”

In view of the evidence which we have recited above, we think it is quite clear indeed that the trial court committed no error in giving the instruction taking from the jury all issues excepting the amount of the damage. There was no legal evidence before the trial court that the first nurse (name not disclosed by the record) mentioned by Mrs. McBride, nor the nurse mentioned by Mr. McBride as the nurse that put the plaintiff in bed in contact with the hot water bottles (name of nurse also not disclosed), nor that Miss Woodward, the special nurse, and each of them, were not the agents of the defendant. The plaintiff made out a case for the jury. The law imposed on the defendant the burden of introducing evidence to show that said individuals, and especially the two last named, were not its agents, and that the defendant was not guilty of negligence. *Meyer v. McNutt Hospital*, 173 Cal. 156, 159 P. 436. It wholly failed to sustain that burden. There was no evidence before the court calling for the application of the rules stated in instruction No. V, or instruction No. VI, assuming, but not deciding, that such rules are correctly stated. All other requested instructions became immaterial in view of the first instructions given by the trial court.

[3] There was evidence that the appellant had posted in different places in its premises certain notices limiting its liability. There is no evidence that the plaintiff or his parents saw or read the notices or entered into any contract limiting the liability of the appellant. The appellant does not call to our

attention any statute which authorizes a hospital to limit its liability by posting notices. The trial court did not err in refusing to admit the contents of the notices in evidence. *Carter v. Service Co.*, 160 Iowa, 78, 90, 141 N. W. 26.

[4] During the trial the appellant sought to introduce in evidence what it claimed to be the custom obtaining in the city of Los Angeles in regard to hospitals employing special nurses called in from the outside, controlling and supervising such nurses, and collecting for and paying to such nurses their compensation. The trial court interrupted the proceeding, and suggested to the respondent that such evidence was inadmissible. Thereupon an objection was made, and the objection was sustained. The ruling was clearly correct. 6 *Thompson on Negligence*, § 7882.

[5] A point is made that the trial court erred in receiving as in rebuttal the testimony of Mr. McBride because his testimony should have been offered by the plaintiff as a part of his case in chief. The trial court did not err. If the appellant was taken by surprise, it could have asked for a continuance, or it could have asked the privilege of introducing any appropriate evidence to meet the evidence of Mr. McBride. Having failed to take either of those courses, the appellant may not complain. *Nuckolls v. College of Physicians, etc.*, 7 Cal. App. 233, 94 P. 81.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

74 Cal. App. 734

**SECURITY COMMERCIAL & SAVINGS
BANK OF SAN DIEGO v. SOUTHERN
TRUST & COMMERCE BANK.**
(Civ. 4012.)

(District Court of Appeal, Second District, Division 2, California. Oct. 28, 1925. Hearing Denied by Supreme Court Dec. 24, 1925.)

1. Banks and banking §174—Drawee's negligence may preclude recovery for payment of forged check.

Where drawee bank seeks to recover money paid to a collecting bank on forged check, negligence of drawee may preclude recovery by it, unless collecting bank's negligence induced it to omit ordinary care in detecting forgery.

2. Banks and banking §147(2)—Drawee bank chargeable with knowledge of signature of drawer.

Drawee bank of negotiable instrument is chargeable with knowledge of signature of drawer, and if it pays upon forged signature it cannot recover against innocent payee, if such recovery would result in loss to payee.

3. Banks and banking §174—When drawee bank not liable for failure to detect forgery stated.

Where bank, without inquiry or identification of person presenting forged check, purchases it, indorses it generally, and presents to drawee bank, which pays it, latter may recover, if its only negligence is failure to detect forgery.

4. Banks and banking §174—Collecting bank not liable for payment of forged check honored by drawee.

Where bank receives check for collection only, and relying on fact that drawee bank has honored it disburses amount required by payee, the drawee cannot recover when it afterwards discovers that check was forged.

5. Bills and notes §296—Liability on general indorsement stated.

Indorser, by general indorsement, warrants to subsequent holders, not liable to him, that paper is what it purports to be, that he has good title, and that signatures of prior parties are binding on them, as distinguished from his liability by restrictive indorsement set out in Civ. Code, § 3117.

6. Banks and banking §319—Rules of association of banks, as between members, may supplant law.

Banks may associate themselves together and make rules for own government, which, as between members of their association, will supplement and even supplant the law.

7. Banks and banking §320—Indorsement of check by bank for clearing house with prescribed stamp held not to indicate purchase.

In action by drawee bank to recover amount of forged check paid through defendant bank, wherein it appeared defendant indorsed check with stamp prescribed by clearing house containing word "paid," *held*, stamp was for clearing house purposes only, and "paid" did not indicate defendant had purchased paper.

8. Banks and banking §319—Member banks bound by rules of clearing house association as to significance of clearing house stamp indorsement.

Member banks of clearing house association were bound by any interpretation of significance of clearing house stamp indorsement, which they had agreed upon between themselves.

9. Banks and banking §318—"Clearing house" defined.

A clearing house is an association composed of a number of banks for convenient and expeditious handling of certain claims and credits against and in favor of members.

[Ed. Note.—For other definitions, see Words and Phrases, Clearing House.]

10. Banks and banking §320—Bank presumed to have known usage and customs in banking.

In action by drawee bank on forged check, *held*, plaintiff presumed to have known and recognized usage and custom of banks taking pa-

per drawn on other banks and passing it through clearing house.

11. Banks and banking ⚡320—Indorsement by clearing house stamp did not imply identification of payee.

In action by drawee bank on forged check paid through defendant bank, *held* latter's use of its clearing house stamp in indorsing check would not support finding that it represented to plaintiff that it knew payee, that indorsement was his genuine signature, and that defendant had identified him.

12. Banks and banking ⚡174—Restrictive indorsement conveys no information of payee.

A restrictive indorsement conveys no information to drawee concerning original payee, and does not purport to do so.

13. Banks and banking ⚡175(3) — Evidence held not to establish usage of banks in handling deposits by mail.

In action by drawee bank on forged check paid through defendant bank, wherein employees of other banks testified as to usage of banks respecting deposits received by mail, *held*, evidence did not show existence of any special custom.

14. Customs and usages ⚡3 — Requisites stated.

Custom or usage which will affect rights and liabilities of persons in dealings with each other must be certain, uniform, and either known to those sought to be charged, or so generally known that knowledge and adoption thereof must be presumed.

15. Banks and banking ⚡174—Liability of collecting bank not that of holder.

Law regarding liability of holder of check is not applicable to bank which has received check for collection only, in view of definition of "holder" stated in Civ. Code, § 3266, subd. (g).

16. Banks and banking ⚡148(1)—Drawee is bound to know depositor's signature.

Drawee is bound to know its depositor's signature, both by virtue of judicial decision and by Negotiable Instruments Law (Civ. Code, § 3143).

17. Bills and notes ⚡70—Payment of check includes acceptance.

Civ. Code, § 3213, providing "acceptance must be in writing and signed by the drawee," *held* not applicable where check is paid, because payment amounts to more than acceptance, and has all the efficacy of acceptance.

18. Banks and banking ⚡174—Bank held to have taken forged check for collection only.

Where bank received check in mail, indorsed it with clearing house stamp, sent it through clearing house, and did not pay it until it was honored by drawee, *held*, bank took check for collection only, and was not liable to drawee when it developed later that check was forgery.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by the Security Commercial & Savings Bank of San Diego against the Southern Trust & Commerce Bank. From a judgment for plaintiff, defendant appeals. Reversed.

Wright & McKee, of San Diego, for appellant.

Ray M. Harris, of San Diego, for respondent.

CRAIG, J. The principal question presented for decision upon this appeal is whether or not, under the facts of the case, a collecting bank is legally liable to a drawee bank for moneys paid upon forged checks by the former, which had no means of determining the payor's signature, after their submission to, and honor by, the latter, through the clearing house, in the regular course of business.

On September 13, 1920, the respondent bank was carrying the account of Thing Bros., a firm consisting of J. L. Thing and C. E. Thing, who maintained a commercial house at Potrero in the county of San Diego. On that date appellant received by mail a letter signed "E. E. Snyder," postmarked at Tecate, B. C., Mexico, inclosing two checks drawn on the Security Commercial & Savings Bank of San Diego, respondent herein, for a total of \$2,002, and signed "Thing Bros., by J. L. Thing." The writer requested that appellant collect the amount, and send him by the conductor of a passenger train the sum of \$1,700 in cash to pay his help, and that with the remaining \$302 it open a checking account in his name, send him a receipt, some blank checks, and accept "this letter signature as my regular signature to be used in checks." He also requested that remittance be made not later than the following Wednesday, as his men were waiting for the money. On the same day appellant opened an account in the name of E. E. Snyder, for \$2,002, and placed upon the checks its clearing house stamp, which was similar to that used for such purposes by all San Diego banks, and reading: "Paid. San Diego, Cal. Clearing House, Sept. 14, 1920. Southern Trust & Commerce Bank, No. 3." There is an abundance of evidence in the record tending to show that the clearing house stamp used by appellant was of a regulation form in wording and character, and that under the rules of the clearing house all checks passing through it from one bank to another for collection must be indorsed therewith. On the same day the checks were sent through the clearing house for collection, and were honored by respondent. Appellant wrote its depositor, inclosing signature cards for execution, and advising him that the bank's vaults would not open until 8 o'clock in the morning; that to send the funds by a conductor would necessitate leaving the money at the depot over night, and that they would therefore forward the money "in the usual way,

which is by registered mail and insured," and that he should call at the post office at Tecate and receipt for the package. Appellant forwarded no money, however, until the checks had been honored and credit transferred to it by the respondent. It then sent to its correspondent a package containing \$1,700, which was addressed to E. E. Snyder, Tecate, Cal., where mail was delivered on the American side of the international line; the package was registered and insured, and a receipt demanded. In due course of mail appellant received the usual card required by the government as a receipt in such cases, signed, "E. E. Snyder, By P. S. Zarate (Signature of Addressee's Agent)." On September 16, 1920, at the request of its depositor, appellant forwarded \$300 more in the same manner, for which a like receipt was received, signed, "E. E. Snyder, by F. Appel." No further deposits were made by Snyder with the appellant bank.

On or about November 19, 1920, more than two months thereafter, Thing Bros. discovered that \$2,002 had been charged to their account for which they had not issued checks; the Snyder checks were found among their returned vouchers, and respondent was immediately notified that they were forgeries. Representatives of the respondent bank thereupon demanded reimbursement from appellant. Zarate, alias Snyder, was arrested and convicted of the crime (54 Cal. App. 372, 201 P. 955), and the instant suit was commenced for \$1,402, respondent having collected about \$500 from the forger. The case was tried before the superior court without a jury, and judgment was rendered in favor of the plaintiff, from which the defendant appeals.

The substance of this action is embodied in certain statements contained in the findings of the trial court, which, if legally tenable, would require an affirmance. The lower court found that:

"The plaintiff, relying upon the fact that said checks *had each been cashed* in the regular course of business by defendant, and that the defendant had taken due precautions to *identify the person cashing same, and to determine the genuineness of his signature*, paid same to defendant."

And it is then recited that by the acts of appellant it represented to respondent that it knew the payee, that the indorsement was his genuine signature, and that appellant had identified him and knew him to be E. E. Snyder; that as a matter of fact, appellant did not determine the genuineness of said signature, and did not identify the payee; that he did not appear before any officer or agent of appellant bank, and was not known to it.

[1] A careful, thorough, and painstaking study of the evidence and of the cases cited by the respective parties impels us to conclude that the findings in question are not

supported by the evidence nor by the weight of authority. The defendant has two distinct lines of defense, either of which, holding true, must result in the denial of respondent's claims. If the finding that appellant's conduct constituted negligence is unsupported by the evidence, clearly no recovery can be had. Again, even though the appellant may have been negligent in the respect found, the respondent bank is still left without a cause of action if it also was negligent, unless it appears that respondent was misled by the appellant's negligence and induced to omit that degree of scrutiny which it would otherwise have used to detect forgery of the depositor's signature.

Counsel in their briefs have apparently agreed that their respective rights depend upon the comparative negligence of the banks. At any rate respondent so contends, and bases its claims for recovery upon the proposition that, although it was negligent, it was misled, and its carelessness was caused by the preceding and inducing negligence of the appellant. Numerous opinions are cited and excerpts therefrom quoted, in which the right of a drawee bank to recover money paid to another bank on the forged signature to a check of one of the former's depositors has been upheld. We have examined these cases and many others, and find that, with few exceptions, each possesses some element making it distinguishable from the one before us. These decisions will be discussed later.

Some conflict exists in the decisions, as to certain phases of the law, upon matters which, unless close scrutiny be applied, may be confused with the issues involved in the instant case. Therefore it will be well at the outset to state certain legal principles applicable here which are firmly established and cannot be the subject of doubt.

[2] A drawee bank of a negotiable instrument is chargeable, among other things, with knowledge of the signature of the drawer. If the drawee pays upon a forged signature of the drawer he cannot recover against an innocent payee, if such recovery would result in loss to the payee. *Price v. Neal*, 3 Burr, 1354, 97 Eng. Reprint, 971; *Crocker-Woolworth Bank v. Nevada Bank*, 139 Cal. 564, 73 P. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169; *Bank of U. S. v. Bank of Georgia*, 10 Wheat. 349, 6 L. Ed. 339; *Johnston v. Com. Bank*, 27 W. Va. 343, 55 Am. Rep. 315; *Stout v. Benoist*, 39 Mo. 277, 90 Am. Dec. 466; *Nat. Bank of Rolla v. First Nat. Bank of Salem*, 141 Mo. App. 719, 125 S. W. 513; *First Nat. Bank of Cottage Grove v. Bank of Cottage Grove*, 59 Or. 388, 117 P. 293; *First Nat. Bank v. U. S. Nat. Bank*, 100 Or. 264, 197 P. 547, 14 A. L. R. 479; *Dedham Nat. Bank v. Everett Nat. Bank*, 177 Mass. 392, 59 N. E. 62, 83 Am. St. Rep. 286; *Farmers' Nat. Bank v. Farm Trade Bank*, 159 Ky. 141, 166 S. W. 986, 14 L. R. A. 1915A, 77.

[3, 4] Where a bank, without inquiry or

identification of the person presenting a forged check, purchases it, indorses it generally, and presents it to the drawee bank, which pays it, the latter may recover in the event that its only negligence is its mistake in having failed to detect the forgery, for, in this instance, its mistake did not mislead the purchaser of the instrument or bring about any change in its position. *Crocker-Woolworth Bank v. Nevada Bank*, supra; *Canadian Bank v. Bingham*, 30 Wash. 484, 71 P. 43, 60 L. R. A. 955; *First Nat. Bank of Danvers v. Bank of Salem*, 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450; *First Nat. Bank of Crawfordsville v. First Nat. Bank of Lafayette*, 4 Ind. App. 355, 30 N. E. 808, 51 Am. St. Rep. 221; *First Nat. Bank of Pukwana v. Brule Nat. Bank of Chamberlain*, 38 S. D. 396, 161 N. W. 616, 12 A. L. R. 1079; *People's Bank of Springfield v. Franklin Bank of Clarksville*, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884. But the rule is otherwise if the check was received by the bank for collection only, and upon presentation to the drawee bank is paid by it. If the drawee bank has honored the check it cannot recover from the collecting bank which, in reliance upon the act of the drawee, has disbursed the amount required by the payee. *Bank of Williamson v. McDowell County Bank*, 66 W. Va. 545, 66 S. E. 761, 36 L. R. A. (N. S.) 605; *Bank of U. S. v. Bank of Georgia*, supra; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Bank of St. Albans v. Farmers' & M. Bank*, 10 Vt. 141, 33 Am. Dec. 188; *Nat. Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77, 7 Am. Rep. 310; *Morse, Banks and Banking*, § 466.

Of course, if the collecting bank is alone culpable, and on account of its negligence only the loss has occurred, the drawee may recover. But where the drawee is alone at fault it must stand the loss. And also, where the drawee and the collecting banks are equally at fault, the burden will be left where it is found, and the drawee bank cannot recover. *Bank of Williamson v. McDowell County Bank*, supra; *Com. & Savgs. Bank v. Citizens' Bank*, 68 Ind. App. 417, 120 N. E. 670; *San Francisco Nat. Bank v. Amer. Nat. Bank of L. A.*, 5 Cal. App. 408, 90 P. 558; *First Nat. Bank v. U. S. Nat. Bank*, 100 Or. 264, 197 P. 547, 14 A. L. R. 479; *Dedham Nat. Bank v. Everett Nat. Bank*, 177 Mass. 392, 59 N. E. 62, 83 Am. St. Rep. 286.

With the correctness of these principles we apprehend there can be no contest. The difficulty, if any, may arise in making application of them to the facts found, or which should have been found, from the evidence. Before attempting to do this, certain other principles must be taken into account, for they intervene between those above stated and the circumstances making up the transaction which is the subject of this litigation.

[5] Two of the classes of indorsements enumerated in our Civil Code are general and

restrictive. By a general indorsement the indorser warrants, among other things, to every subsequent holder, not liable to him, that the paper is in all respects what it purports to be, that he has good title to it, and that the signatures of all prior parties are binding upon them. An indorsement is restrictive which constitutes the indorsee an agent of the indorser. Civ. Code, § 3117.

[6] Banks may associate themselves together and make rules for their own government, which, as between the members of their association, will supplement and even supplant the law. *Crocker-Woolworth Bank v. Nevada Bank*, supra; *Davis v. First Nat. Bank*, 118 Cal. 600, 50 P. 666; *Luckehe v. First Nat. Bank*, 193 Cal. 184, 223 P. 547.

At first it will be well to eliminate from consideration any irrelevant matter contained in the facts as we have stated them. Both sides have given considerable attention to the conduct of the appellant bank in delivering the money through registered mail. This entire incident is beside the subject. Excepting only that appellant allowed the conditional credit to Snyder to become unconditional, and paid him the money as it did, whatever else was done subsequently to the payment of the checks by the respondent has no bearing upon the rights of the parties. No degree of negligence on the part of appellant after this act of respondent could have influenced the latter in the least or constituted any inducement to its lack of care in honoring the checks without making the usual effort to detect the possible forgery of Thing Bros.' signatures. It is upon the theory that some act or omission of appellant served as such an inducement, and upon that theory only, that the respondent can hope to recover. The question of appellant's want of care after the checks were honored by respondent is necessarily a false quantity.

Likewise it is unimportant to determine or consider whether E. E. Snyder is a real or fictitious person. It is conceded that Zarate indorsed the name "E. E. Snyder" on the checks; that Zarate was the person, and the only one, actually involved in the fraud. He forged the name of Thing Bros. to the checks; he wrote the indorsement "E. E. Snyder" on the back of each of them; and he received the money in question. For the purposes of this opinion, therefore, Zarate and Snyder are one and the same person, and he will be referred to herein as Snyder.

The essential facts, then, may be thus stated: Thing Bros. were customers of and maintained a checking account with the respondent bank; the signature of this firm was forged to two checks, drawn on respondent, purporting to be in favor of E. E. Snyder; the name of "E. E. Snyder" was written upon the backs of the checks by Zarate; they were sent by mail to the appellant bank, inclosed with a letter signed "E. E. Snyder," asking that they be collected, that a part of the

money be sent to E. E. Snyder, and that the balance be deposited in that name, and that the signature to the letter be retained as the regular signature of Snyder, to be used upon checks. On the same day on which this letter and the checks were received, appellant opened an account in the name "E. E. Snyder" in the amount of the checks, and sent them through the clearing house with its clearing house stamp imprinted on the backs thereof; they were honored by respondent, and, after being so honored and paid by respondent, appellant forwarded the money requested by Snyder, and two days later received and cashed a check upon the account of E. E. Snyder for \$300 additional.

[7] It is clear that unless there is some element contained within these facts to remove this case from the province of a general principle previously stated, respondent cannot recover. That principle provides that where a drawee has honored and paid a forged check presented to it by another bank for collection, the drawee bank cannot require repayment from the collecting bank, if this would result in loss to the latter. Respondent maintains that there are circumstances here present which withdraw this case from the application of that rule. First, it is said that, regardless of the fact that appellant did not irrevocably credit Snyder with the checks signed "Thing Bros.," or forward the money in part payment of them until after learning that the respondent had honored the same, still, that the wording of appellant's clearing house stamp amounted to a representation that appellant had purchased the checks, and that it knew the payee, had identified him, and that the indorsements upon them were his genuine signatures. It should be borne in mind that the other facts stated in the findings which legally justify recovery by the respondent are predicated on the proposition that the appellant's stamp indorsement constituted a representation that it had purchased the checks and had become the owner of them, and was not merely an agent for their collection. This the court found to be the fact. All of the other material findings either grow out of or derive their materiality from this pivotal proposition, that the Southern Trust & Commerce Bank cashed the checks before sending them through the clearing house, and indorsed them generally. The court found that by said acts appellant represented that it knew the payee of said checks, and that the signatures on the backs thereof were his genuine signatures, and that it had identified the party presenting said checks for payment, and knew that he was the payee thereof. Again, it found the existence of a well-established custom among the banks of San Diego that no check shall be "paid" to a stranger, but that in presenting a check for "payment" he shall be properly identified before any money is "paid" to him thereon. Obviously,

these findings would become immaterial if it were the fact that the appellant, instead of paying the amount of the checks to a stranger, merely took them for collection and so indicated by its indorsement. Again, the entire finding, beginning with the proposition that appellant "had special reason to have acted with caution in the cashing" of said checks and indorsing the same with its clearing house stamp, etc., springs from the idea and the fact previously found and unquestionably central in and essential to the respondent's cause of action, that appellant did *cash* these checks before sending them through the clearing house to the respondent for payment by it. Hence, the interpretation to be given the placing by appellant of its clearing house stamp indorsement upon each of the checks is vital to the rights of the parties. It is hardly open to dispute that these banks are bound by any interpretation which they have agreed upon between themselves and with other members of the clearing house association.

[8, 9] It is quite possible that a person ignorant of banking usages and rules might have been misled by the use of the word "paid" in appellant's clearing house stamp; but it is unthinkable that a bank, or any one at all conversant with the customary methods in which bank clearing houses function, would believe for a moment that any regulation clearing house stamp represents to another bank member of the clearing house association that the checks or other negotiable instruments upon which it is placed have been purchased by the bank whose stamp appears thereon. It is common knowledge that a clearing house is what its name indicates; it is an association composed of a number of banks for convenient and expeditious handling of certain claims and credits against and in favor of members. Instead of the collecting bank placing its formal general indorsement upon the back of a check and sending an employee to the drawee to receive the money, the check is stamped with the regular clearing house stamp, the form and legal effect of which have been agreed upon by all of the members, and is transmitted, with dozens of other similar instruments to the clearing house. The stamp is for clearing house purposes only. It is not a general indorsement. The word "paid" does not import or indicate to any drawee member that the holder member has purchased the paper. We repeat, this word "paid," as well as the entire stamp, for that matter, is used for clearing house purposes only. The stamp is a receipt, a conditional one, to become absolute when the check is honored by the drawee. It amounts to an acknowledgment that the drawee has paid the check. These facts are matters of common knowledge, known to business men generally. Some of them are recognized in the decisions, such as

the case of Crocker-Woolworth Bank v. Nevada Bank, *supra*. Some are stipulated in the rules of the San Diego Clearing House Association, and the testimony of witnesses established the usages of members of the association as to a part.

Among the findings is one to the effect that section 2 of rule 8 of the clearing house association provides:

"All negotiable paper deposited for clearance by members of this association shall bear the stamp of the depositing bank, which shall clearly indicate the name of the bank, its clearing house number, and the date of clearance. The stamp shall be for clearing house purposes only, and shall guarantee the validity and regularity of all prior indorsements on the paper so cleared except the indorsement of an original payee of a certificate of deposit, and shall not be construed to supply a missing indorsement."

In Crocker-Woolworth Bank v. Nevada Bank, *supra*, a clearing house rule which was identical in its language with the above was considered and construed, and it was held that the use of the clearing house stamp pursuant to its regulation resulted in a special and restrictive indorsement for clearing house purposes only, "and conveyed no 'representation' whatsoever to the plaintiff that the defendant claimed or asserted itself to be the owner of the check"; and further that this rule "eliminates, amongst other things, from the warranty of indorsement the Code provision that the instrument 'is in all respects what it purports to be.'" The wording of that stamp was precisely the same as here, but regardless of its wording, the rules fixing its meaning as between members of the association are also the same, and must govern. The language contained within the stamp is immaterial; it might be so worded as to be entirely meaningless when considered according to its ordinary acceptation; it might be in Code form, but, in any case, the rule of the association would govern as to its interpretation. Even if the stamp stated in so many words, "this check has been purchased by this bank and its genuineness is guaranteed," it could not be held to mean what that language ordinarily imports in the face of a rule agreed upon by members stipulating that this particular stamp made up of these exact words shall, as among member banks and when so used, have a different meaning and be for clearing purposes only, and shall constitute only a restrictive indorsement. Under clearing house rules of like language and import it was held in the case last cited that the use of the clearing house stamp indorsement conveyed no representation nor warranty to the drawee that the drawer's signature was genuine.

[10] Outside and independent of this rule, the usage and custom of banks taking paper drawn on other banks and passing it through the clearing house is well established, and must be regarded as having been known and

recognized by the respondent. This custom and its recognition was clearly stated in the opinion of our Supreme Court in Crocker-Woolworth Bank v. Nevada Bank, *supra*, in which it is said:

"Common knowledge and common experience inform us that in the case of local checks such as this, it is the uniform, if not the well-nigh universal, practice for banks to take them from their depositors and clients for collection only. They do not 'buy' them. They take them as agents. And if this common knowledge needed re-enforcement, it is abundantly furnished by the evidence of the officers of the banks testifying in this case, to the effect that if it was not the uniform practice never to buy local checks, it was certainly the general practice to take them only for purposes of collection. * * * It will not be assumed against the uniform practice of banks in this regard, and in the absence of any evidence at all upon the subject, that the plaintiff here, and in this sole and peculiar instance, put reliance upon the supposed ownership of the check by defendant. If indeed it did have such belief, then the complete answer is, that the restricted indorsement did not justify nor warrant it in that belief, nor make the defendant liable because such belief was entertained."

The above reasoning and pronouncement exactly fits the situation before us. It may logically be added that if the drawee bank did actually believe the collecting bank had purchased the checks, although such a belief was prohibited by usage, rule, and law, in view of the fact that it was so prohibited it was the drawee's duty before placing any reliance upon such a belief to have made inquiry and ascertained whether or not that belief was in accordance with the facts.

We must therefore conclude that, when construed by the rule of the association above quoted, the meaning and authority of which has been passed upon by our Supreme Court, and in the light of usage, the use of the clearing house stamp was a mere formality, placed there in compliance with the provision of the rule requiring it upon all negotiable paper deposited for clearing. It constituted a restrictive indorsement only, and, as such, it involved no representation that appellant was the owner of these checks.

[11] It obviously follows that the finding of the lower court that "the plaintiff, relying upon the fact that said checks had each been *cashed* in the regular course of business by defendant, and that the defendant had taken due precautions to identify the person *cashing* them, and to determine the genuineness of his signature, paid same to defendant," is entirely unsupported by the evidence. And it is equally clear that the further finding to the effect that by the acts of the appellant it represented to respondent that it knew the payee, that the indorsement was his genuine signature, and that appellant had identified him and knew him to be "E. E. Snyder," is unsupported by the evidence, since the only

act which could possibly be construed as constituting such representation is the use by appellant of its clearing house stamp on the checks.

[12, 13] Now, let up consider the significance of the fact that checks were received by appellant through the mail, and that information to this effect was not communicated to respondent. At the outset we are confronted with the proposition that, since the indorsement was of a restrictive character, it conveyed no information to the drawee concerning the original payee, nor did it purport to do so. Com. & Savings Bank Co. v. Citizens' Nat. Bank of Franklin, 68 Ind. App. 417, 120 N. E. 670, and cases there cited. Consequently, the drawee could not have been misled into believing that the payee had been identified by appellant. We might end the discussion of this point here, but if we turn to the testimony of the several witnesses who were interrogated as to the usage of banks in San Diego with respect to deposits received by mail, the result is an utter failure to show any special custom concerning the manner in which checks so received are transmitted through the clearing house to banks on which they are drawn. In the entire absence of any evidence of the existence of such usage, it cannot be said that the finding of the trial court that there was such a usage, and that a failure on the part of appellant to comply with it was negligence, has any support. The nearest approach to testimony which might justify such an inference is that of the witness Mueller, assistant cashier of the San Diego Savings Bank. In response to a hypothetical question, this witness testified on direct examination that in a case where the circumstances of the transaction were such as here involved the general custom among San Diego banks would "require the taking of the matter up" with the drawee bank. This answer is decidedly uncertain, but, assuming that the witness intended to convey the idea that the general custom was to inform the drawee under such circumstances that checks were received by mail, the force of the answer was destroyed by the witness' admission under cross-examination that he could not say whether or not this usage had been acceded to by each member of the clearing house association, nor was the witness able to mention a single instance where such a practice had been followed in a similar transaction, or a single bank, aside from the San Diego Savings Bank, which had ever recognized it as a custom. It is true that another witness Alexander Reynolds, vice president of the United States National Bank, called as witness for the plaintiff, in answer to the same general hypothetical question, on direct examination, testified that the general custom would be to notify the drawee bank of the circumstances under which the checks were received. But he also on cross-examination even more clearly than the witness

Mueller qualified the foregoing assertion by saying that there was no uniform custom among the banks as to the method of handling checks sent for collection through the mails, and again, "some banks fail to follow the custom I have just testified to; those who fail to follow don't adopt it."

[14] It is elementary that to measure up to the legal definition of a custom or usage which is binding upon all persons of a class it must have been universal, uniform, and undisputed. *Duval v. Farmers' Bank*, 9 Gill & J. (Md.) 31; *Greenfield Bank v. Crafts*, 2 Allen (Mass.) 269. A custom or usage which will enter into and affect the rights and liabilities of persons in their dealings with each other must be certain, uniform, and either known to those sought to be charged thereby, or so generally known and notorious that knowledge and adoption thereof must be presumed. *Russell's Ex. v. Ferguson*, 77 Vt. 433, 60 A. 802; *Baltimore B. B. & Ex. Co. v. Pickett*, 78 Md. 375, 28 A. 279, 22 L. R. A. 690, 44 Am. St. Rep. 304; *Citizens' Bank of Baltimore v. Grafflin*, 31 Md. 507, 1 Am. Rep. 66; *Harper v. Pound*, 10 Ind. 32; *Smith v. Gibbs*, 44 N. H. 335; *C. M. & St. P. R. Co. v. Lindeman*, 143 F. 946, 949, 75 C. C. A. 18. In the case last cited it was held that, where a plaintiff's witnesses testified that there was a custom of doing certain railroad work in a certain way, and defendant's witnesses testified that they did the same work at the same time in a different way, a finding of a uniform custom was not authorized.

The record contains positive testimony of other witnesses to the effect that there was no general custom among members of the clearing house association as to notifying a drawee bank when checks were received by mail. From the testimony of various witnesses it cannot be doubted that it is no unusual thing for banks in San Diego to receive checks for collection by mail, and the court so found; but the evidence does not support the finding that such checks are treated differently from any others in any way, and particularly in the matter of sending them through the clearing house, or giving special notice to the drawee bank of the fact that they came to the collecting bank by mail.

We must, then, eliminate as unsupported by the evidence the trial court's finding that "it is not customary among the banks in said city to indorse the same with the clearing house stamp of the receiving bank, and to send said checks so received and so indorsed through the clearing house for collection on a drawee bank." This finding referred to checks received for collection by mail. Also, as we have shown, the finding that "the plaintiff, relying upon the fact that said checks had been cashed in the regular course of business by defendant, and that the defendant had taken due precautions to identify the person cashing same, and to determine the genuineness of his signature,

paid same to defendant," has no support or justification in the evidence. The finding last quoted is based upon, and falls with the elimination of, the finding that appellant cashed the checks before sending them through the clearing house, since the checks were not cashed before being sent through the clearing house and before being paid by the drawee, and the stamp was no representation that they had been cashed. In other words, as they were not purchased, but only received and passed on under a delegation of authority from the payee for collection, it also necessarily follows that the further finding that there existed a well-established custom among San Diego banks that no checks shall be "paid" to a stranger without proper identification is immaterial. It may also be noted that the testimony of the various bank witnesses produced by respondent upon this point each alluded to the payment and purchase of checks, and not to their receipt, as these were, for purposes of agency only and for collection. The existence of a custom that banks will not purchase checks from strangers without identifying the payee is utterly worthless in bolstering up the claim that the same identification is customary or required of a bank which merely accepts employment as an agent to collect a check for a stranger. In this connection it is significant that the cashier of respondent bank testified:

"There is a difference between the payment of a check to a payee and the presentation of a check for collection through the clearing house. If there are no suspicious circumstances connected with the checks or the receipt of them by our bank, we would send the checks through the clearing house for collection against another bank in the city without first identifying the person presenting them. If a check came to the plaintiff bank through the mail drawn on another bank on an unknown account we would send it through the clearing house for collection, if there were no suspicious circumstances."

This being true, the fact that the defendant sent these checks through the clearing house with its regular clearing house stamp, including the word "paid" on the backs thereof, and the fact that no mention was made to the clearing house or the drawee that the checks had been received by mail, must be removed from consideration; and we have left merely a case of a bank receiving checks for collection, sending them through the clearing house in the ordinary manner, the drawee bank honoring and paying them without detecting or using the means within its hands to detect the fact that they were forgeries, and now asking the collecting bank to reimburse it, notwithstanding that the collecting bank would suffer the loss because of having paid the money out, relying upon the drawee's payment of the same. Such a case is clearly covered

by the principles which were stated in the early part of this opinion. They are amply sustained by the authorities there cited, and preclude recovery by the drawee bank.

As we have heretofore indicated, the decisions cited by respondent do not conflict with this conclusion. Many of them agree with and conform to it, and this follows as a logical consequence of the fact that the keystone of respondent's argument as set forth in its briefs consists of the proposition that the appellant's acts and conduct were such as to justify respondent in believing that the appellant had purchased the checks and owned them, rather than being merely an agent for their collection. In summing up its position, counsel for respondent begin by saying that the universally accepted rule is that the negligence of the bank "cashing" a check overcomes the constructive negligence of the drawee bank in failing to detect a forged signature of its depositor. And under the heading "It makes a difference whether the check is indorsed 'paid,' or 'for collection,'" respondent cites the following cases: *First National Bank of Belmont v. First National Bank of Barnesville*, 58 Ohio St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 748; *First National Bank of Pukwana v. Brule National Bank of Chamberlain*, 38 S. D. 396, 161 N. W. 616, 12 A. L. R. 1079; *Ellis v. Ohio Life Ins. & T. Co.*, 4 Ohio St. 628, 64 Am. Dec. 610. To this list may be added *Commercial & Sav. Bank Co. v. Citizens' Nat. Bank of Franklin*, 68 Ind. App. 417, 120 N. E. 670. These authorities fully sustain the point for which they are cited, but since the indorsements are to be construed as "for collection," and not "paid," these same decisions result in the point-blank holding against the respondent's right of recovery. In distinguishing authorities cited by respondent from the instant case, or of showing their confirmation of the principles announced, many of them may be grouped into well-defined classes: First, we find those where the bank presenting checks for payment had cashed and purchased them, and which are consequently not in point, in which class are the following: *Canadian Bank v. Bingham*, 30 Wash. 484, 71 P. 43, 60 L. R. A. 955; *First Nat. Bank of Danvers v. Bank of Salem*, 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450; *First Nat. Bank of Crawfordsville v. First Nat. Bank of Lafayette*, 4 Ind. App. 355, 30 N. E. 808, 51 Am. St. Rep. 221; *First Nat. Bank of Pukwana v. Brule Nat. Bank of Chamberlain*, 38 S. D. 396, 161 N. W. 616, 12 A. L. R. 1079; *People's Bank of Springfield v. Franklin Bank of Clarksville*, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884; *Redington v. Woods*, 45 Cal. 406, 13 Am. Rep. 190; *Citizens' National Bank of Evansville v. Reynolds*, 72 Ind. App. 611, 126 N. E. 234; *Ellis v. Ohio Life Ins. & T. Co.*, 4 Ohio St. 628, 64 Am. Dec. 610; *Farmers'*

National Bank v. Farm Trade Bank, 159 Ky. 141, 166 S. W. 986, L. R. A. 1915A, 77; Newberry Savings Bank v. Bank of Columbia, 91 S. C. 294, 74 S. E. 615, 38 L. R. A. (N. S.) 1200; Third Nat. Bank v. Allen, 59 Mo. 311; Williamsburgh Trust Co. v. Tum Suden, 120 App. Div. 518, 105 N. Y. S. 335; Woods v. Colony Bank, 114 Ga. 683, 40 S. E. 720, 56 L. R. A. 929; and Bank of Italy v. First Bank of Kern (Cal. App.) 231 P. 44. It may be added that in none of these cases was the indorsement restrictive. Several reasons are given for distinguishing this type of cases from those where one bank has taken for collection only checks drawn on another, where, as here, the issue is one of comparative negligence. The reason most clearly indicated as applicable is that, if a bank receives a check from a stranger, cashes and purchases it and becomes its owner, and thereafter passes it on to the bank on which it is drawn, and receives payment from the latter, and it later develops that the check was forged, the holder bank cannot defend in an action brought by the drawee to recover, upon the ground that any act of the drawee misled the other and induced it to part with the money. But, if the first bank, instead of purchasing the checks, had merely taken it for collection and refused to pay out money until confirmation of the genuineness of the signature of the drawer by the drawee, and then, after receiving such confirmation, had disbursed the money received from the drawee to an imposter, the drawee would be in no position to recover, because its negligence deceived and misled the collecting bank.

In these cases cited by respondent the issues were such, and the several opinions were so worded, as to uphold appellant's, rather than the respondent's, contention concerning the right of recovery of a drawee bank which has paid out moneys on a forged signature of a depositor. First Nat. Bank of Portland v. U. S. Nat. Bank of Portland, 100 Or. 264, 197 P. 547, 14 A. L. R. 479; Bank of Williamson v. McDowell County Bank, 66 W. Va. 545, 66 S. E. 761, 36 L. R. A. (N. S.) 605; Dedham Nat. Bank v. Everett Nat. Bank, 177 Mass. 392, 59 N. E. 62, 83 Am. St. Rep. 286; Trust Co. of America v. Hamilton Bank, 127 App. Div. 515, 112 N. Y. S. 84.

[15] The Civil Code (section 3266, subd. [g]) defines a "holder" as the "payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof." Many of the cases cited by respondent, and quoted as upholding the right of a drawee to recover money paid by mistake on a check where the drawer's signature has been forged, use language to the general effect that a drawee may recover against a "holder." Of course this cannot apply to cases like that before us, where recovery is sought against, not a holder, but a bank which has received the

check for collection only. One example of a case so cited is Farmers' Nat. Bank v. Farm & Trade Bank, 159 Ky. 141, 166 S. W. 986, L. R. A. 1915A, 77. One having the mere physical possession of a check for collection is not such "holder" as contemplated by the Code definition or the cited cases. The "holder," under circumstances such as there presented, is the principal who is entitled to the beneficial interest in the check rather than his incidental agent for collection only. Aurora State Bank v. Hayes-Eames Elevator Co., 88 Neb. 187, 129 N. W. 279; Rice v. Hogan, 38 Ky. (8 Dana) 135; Nat. Bank of Commerce of Lincoln v. Farmers' & Merchants' Bank, 87 Neb. 841, 128 N. W. 522; Nat. Exch. Bank of Tiffin v. Wiley, 195 U. S. 257, 25 S. Ct. 70, 49 L. Ed. 184; Scotland County Nat. Bank v. Hohn, 146 Mo. App. 699, 125 S. W. 539. McCall v. Corning, 3 La. Ann. 409, 48 Am. Dec. 454, is not in point. There the drawee was allowed to recover money paid to a holder and payee, and not as against one presenting for collection only. The element especially distinguishing it is contained in the following brief excerpt from the opinion:

"It is an important feature in this case that the holders were not induced to take the bill by any act of the plaintiffs, and the case is thus relieved from any equity which might be urged, in the case of a forged bill accepted by the drawee, and going after acceptance into the hands of a bona fide holder for value."

In the following cases the indorsement was unrestricted, thus differentiating them from the case at bar: Bank of Williamson v. McDowell County Bank, 66 W. Va. 545, 66 S. E. 761, 36 L. R. A. (N. S.) 605; Nat. Bank of North America v. Bangs, 106 Mass. 441, 8 Am. Rep. 349; Ford & Co. v. People's Bank of Orangeburg, 74 S. C. 180, 54 S. E. 204, 10 L. R. A. (N. S.) 63, 114 Am. St. Rep. 986, 7 Ann. Cas. 744.

Composing another class of cases where the issue involved was entirely different from that in the instant case, and in which the language involved in the several opinions could not have been intended to be applicable to such a condition as here presented, are the following: First Nat. Bank of Washington v. Whitman, 94 U. S. 343, 24 L. Ed. 229; Figuers v. Fly, 137 Tenn. 358, 193 S. W. 117; Nat. Bank v. Northwest Nat. Bank, 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 289, 43 Am. St. Rep. 247; First Nat. Bank of Belmont v. First Nat. Bank of Barnesville, 58 Ohio St. 207, 50 N. E. 723, 41 L. R. A. 584; Arkansas ex rel. Penitentiary v. Bank of Commerce, 133 Ark. 498, 202 S. W. 834, L. R. A. 1918F, 538; Snyder v. Corn Exch. Nat. Bank, 221 Pa. 599, 70 A. 876, 128 Am. St. Rep. 780. In each of the above the indorsement was forged, but not the signature; hence the entire decision is necessarily inapplicable to a case where the issue arises and the loss results from a forged signature.

First Nat. Bank v. U. S. Nat. Bank, 100 Or. 264, 197 P. 547, 14 A. L. R. 479.

Without discussing them, it may be said that the following cases have no bearing on the issues involved in the instant case: *Elyria Sav. & Banking Co. v. Walker Bin Co.*, 92 Ohio St. 406, 111 N. E. 147, L. R. A. 1916D, 433, Ann. Cas. 1917D, 1058; *Nat. Gold Bank & Tr. Co. v. McDonald*, 51 Cal. 64, 21 Am. Rep. 697. While having to do with the general subject at issue, the cases next enumerated are clearly not in point, nor are they in conflict with any principle herein said to bear on the issues of this case. *Rambo v. First State Bank of Argentine*, 88 Kan. 257, 128 P. 182; *Ryan v. Bank of Montreal*, 12 Ont. Rep. 44; *State Bank of Chicago v. Mid-City Trust & Sav. Bank*, 295 Ill. 599, 129 N. E. 498, 12 A. L. R. 989; *Arkansas ex rel. Penitentiary v. Bank of Commerce*, 133 Ark. 498, 202 S. W. 834, L. R. A. 1918F, 538.

In respondent's brief it is stated:

"The following cases hold that the drawee can recover from the holder because of his negligence, notwithstanding the fact that the checks were payable to bearer or to cash: *Dedham National Bank v. Everett National Bank*, 177 Mass. 392, 59 N. E. 62, 83 Am. St. Rep. 286."

The decision in that case is squarely the other way. It is there held that where forged checks made payable to cash were deposited with the Everett National Bank, and were paid to it through the clearing house by the Dedham National Bank, the latter being the drawee, and it appearing that the Everett National Bank required no indorsement of the checks, these facts did not render it liable in an action by the Dedham National Bank to recover the amount of the checks. This holding is based upon the proposition that the Dedham National Bank should have known the genuineness of the signature of the maker, and that the Everett National Bank owed no duty to, and in no way deceived, the plaintiff, Dedham National Bank.

Another of respondent's citations is *First National Bank of Belmont v. First National Bank of Barnesville*, 58 Ohio St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 748. The court there holds that an indorsement "for collection" is notice to the drawee that the indorsee is not the owner of the paper, but only the agent of the owner, authorized to receive payment for him; hence, that such an indorsement does not justify the drawee bank in relaxing its vigilance in determining whether or not the signature of the drawer is genuine. The effect of this decision is to squarely uphold the proposition that in the instant case the respondent had no right to relax its care in examining the drawer's signature and ascertaining as to its genuineness. For, as we have shown, under the clearing house rules, as well as the cus-

tom and general authority, the clearing house stamp indicates to member banks that the paper on which it is placed is presented for collection only, just as plainly as though the words "for collection" were written thereon. The same may be said of *Ford & Co. v. People's Bank of Orangeburg*, 74 S. C. 180, 54 S. E. 204, 10 L. R. A. (N. S.) 63, 114 Am. St. Rep. 986, 7 Ann. Cas. 744. *Greenwald v. Ford*, 21 S. D. 28, 109 N. W. 516, does sustain the respondent's contention in holding:

"When payment is made to the holder of paper who has come into possession of it without any fault on his part, and his situation would be rendered worse if compelled to refund than it was before receiving payment, the money cannot be recovered from him. If, however, he has been negligent in any regard, he cannot retain the money. To justify him in doing so the bank alone must have been negligent. If neither party has been negligent, or both have been, then the bank can recover the money."

But it will be noted that this quotation from *Cyc.* (vol. 5, p. 546), cited with the court's approval, refers to the holder of the paper, and also there is nothing to indicate that a restricted indorsement was contemplated. The indorsement with which the court was there dealing was one by which all prior indorsements were expressly guaranteed, and it was held that this was of such a character as to mislead the drawee bank. *First National Bank of Orleans v. First State Bank of Alma*, 22 Neb. 769, 36 N. W. 289, 3 Am. St. Rep. 294, is strongly relied upon by respondent. That case is easily distinguishable from the one before us, not only because the defendant bank had purchased the check of a stranger before presenting it to the drawee for payment, but also as the litigants did not belong to the same clearing house, and the first bank indorsed the check generally. There were no clearing house rules or restrictive indorsements involved.

Another case especially stressed by respondent deserves further mention. It is *First National Bank v. U. S. National Bank*, 100 Or. 264, 197 P. 547, 14 A. L. R. 479. While the language quoted therefrom by respondent is to be found in the opinion, a cursory examination shows that two facts were considered most vital in that connection: One was that the defendant bank had purchased the forged checks, the first indorsements upon which were forged, and the other, that the drawer's name was forged, but certain indorsements immediately preceding delivery to the collecting bank were genuine. The case expressly recognizes the rule in *Price v. Neal*, and cites numerous authorities affirming it. It states the further rule that, where a bank negligently purchases checks which afterward are found to have been forged, and secures payment of them

from the drawee bank, the former must refund. The opinion admits that even under such circumstances there is some conflict, and that four decisions have held to the contrary, going on to say that, to the extent that these four cases are to be regarded as authority for relieving a bank from its mistakes in negligently purchasing a check drawn on another bank, they are out of harmony with practically all else that has been written on the subject. The decision repeatedly indicates that what is there said is predicated on the assumed fact that the defendant bank had purchased the checks and had become their holder, and that the forged indorsement was not involved in consideration of the general principles discussed in that portion of the opinion. The decision itself is decidedly opposed to the respondent's recovery in the instant case. In this Oregon case the drawer's name had been forged to the checks, the forgers had then indorsed on the backs thereof the names of Rose and Shea, which were fictitious names, and had passed them upon a number of merchants, who, in turn, placed their respective indorsements upon the several checks and presented them to the United States National Bank; this bank placed its clearing house stamp on the backs of the checks and presented them through the clearing house to the First National Bank, in which the drawer was a depositor, for payment. The latter bank paid all of the checks to the United States National Bank. It was decided under clearing house rules similar to those existing in San Diego, that the indorsement of the checks by the collecting bank with its clearing house stamp and the presentment of them to the drawee bank was neither a representation nor a warranty to the drawee that the drawer's signature was genuine; further, that these acts of the collecting bank did not constitute representations as to the genuineness of the drawer's signature, either under the common law, Negotiable Instruments Act, or rules of the clearing house association. The decision also announces another principle which we have had occasion to state. Its position is best expressed in its own language:

"The clearing house rule which provides for the guaranty of prior indorsements refers to the signatures of indorsers and does not include drawers. *Farmers' & Merchants' Bank v. Bank of Rutherford*, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817; *National Bank of Rolla v. First Nat. Bank of Salem*, 141 Mo. App. 719, 125 S. W. 513; *State Bank v. Cumberland Savings & Trust Co.*, 168 N. C. 605, 85 S. E. 5, L. R. A. 1915D, 1138; *Cherokee Nat. Bank v. Union Trust Co.*, 33 Okl. 342, 125 P. 464. In the instant case it must be remembered that the checks were never at any time valid substituting orders; they were not orders originally valid but subsequently unlawfully changed by the addition of an invalid incident. The checks involved here as well as all their incidents were

invalid from the very beginning. The loss incurred by the plaintiff is traceable to the act which originated the checks. The loss sustained by the plaintiff was caused by its failure to detect the forgery of the drawer's signature. From the moment of their origin the checks were invalid because not bearing the genuine signature of the drawer. If the indorsements of Rose and Shea be treated as forgeries, the plaintiff is nevertheless precluded from recovering for the reason that the plaintiff failed to detect the forgery of Insley's signature. The forged indorsements of Shea and Rose, assuming them to be forgeries, put the plaintiff in no worse position than it would be left if the indorsements were genuine. The First National Bank cannot be called upon to pay again, and the United States National Bank has not received the proceeds of an instrument to which another had a better title."

On the whole, this case is very similar to the one before us, and upon every material element is against the recovery by the drawee bank under the circumstances here presented.

[16] There is much discussion in the briefs of the rule that a drawee is bound to know its depositor's signature, as announced more than 160 years ago in England (*Price v. Neal*, 3 Burr. 1354, 97 Eng. Repr. 871), wherein it was said:

"It was incumbent upon the plaintiff, to be satisfied 'that the bill drawn upon him was the drawer's hand,' before he accepted or paid it; but it was not incumbent upon the defendant, to inquire into it. * * * He made no objection to them, at the time of paying them. Whatever neglect there was, was on his side."

Respondent insists that such is not the modern rule, that there has been much conflict of authorities, throughout the country, and that in our own state it has been abandoned. We think from careful comparison and study of various authorities, including those cited, that the divergent holdings may generally be accounted for by the fact that each case presented its own peculiar circumstances, and was required to stand upon them. This undoubtedly has led to some confusion, but, as was said by the author in 12 A. L. R. 1089:

"The application of the proper rule to a given state of facts is seldom difficult, if the attention is fixed solely on the problem to be solved, but if a rule which is inapplicable is first stated and then an attempt made to show that it is unsound, conflict and confusion result, which, in most cases, are entirely unnecessary."

Prior to the enactment of our Negotiable Instruments Law, the case of *Crocker-Woolworth Bank v. Nevada Bank*, 139 Cal. 564, 73 P. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169, was decided, wherein it was said:

"Thus, it is the law beyond controversy that the drawee of a negotiable instrument is chargeable with knowledge of the genuineness of the signature of the drawer, of the condition of his funds, and of the state of his credit. If the

drawee pays upon the forged signature of the drawer, he cannot recover against an innocent payee, if the recovery would subject such payee to loss. Such has been the rule since *Price v. Neal*, 3 Burr. 1354, decided by Lord Mansfield in 1762."

Such was the holding in *Bank of Williamson v. McDowell County Bank*, supra, the Supreme Court of West Virginia there saying:

"It was the duty of the drawee to determine, at its peril, the genuineness of the signature of its depositor, and its sole right to demand reimbursement from the defendant rests upon technical fault in the latter. * * * Though the forged name and the genuine signature are very similar, even the slight difference might have been noticed had a comparison been made at the time."

A judgment for the defendant was affirmed, and one of the learned justices of that court wrote a concurring opinion especially emphasizing the fact that the majority opinion is really in line with *Price v. Neal*, and should have so stated. Many other authorities cited by both parties to the instant case, decided before and after the advent of the Negotiable Instruments Law, adhere to the same rule. Some of these are *National Bank of Rolla v. First Nat. Bank of Salem*, 141 Mo. App. 719, 125 S. W. 513; *Dedham Nat. Bank v. Everett Nat. Bank*, 177 Mass. 392, 59 N. E. 62, 83 Am. St. Rep. 286; *Ellis v. Ohio Life Ins. & T. Co.*, 4 Ohio St. 525, 64 Am. Dec. 610; *Farmers' & M. Bank v. Bank of Rutherford*, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817; *Farmers' Nat. Bank v. Farm & Trade Bank*, 159 Ky. 141, 166 S. W. 986, L. R. A. 1915A, 77; *Figuers v. Fly*, 137 Tenn. 358, 193 S. W. 117; *Minnehaha Nat. Bank v. Pence*, 42 S. D. 525, 176 N. W. 37; 5 R. C. L. 556.

In *Utah Nat. Bank v. Smith*, 180 Cal. 1, 179 P. 160, it was said by our own Supreme Court:

"It is generally held that it is the duty of the courts in construing this law to have in mind the purpose of securing uniformity in the law of commercial paper. *State Bank, etc., v. Bilstad*, 162 Iowa, 433, 136 N. W. 204, 144 N. W. 363, 49 L. R. A. (N. S.) 132; *Felt v. Bush*, 41 Utah, 462, 126 P. 688; *Union Trust Co. v. McGinty*, 212 Mass. 205, 98 N. E. 679, Ann. Cas. 1913C, 525; *Broderick v. McGrath*, 81 Misc. Rep. 199, 142 N. Y. Sup. 497; *Rockfield v. First Nat. Bank*, 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842. As the view of the Supreme Court of Utah on this rule of interpretation is of special interest, we quote from the case of *Felt v. Bush*, supra, as follows:

"The question, therefore, it seems to us, has passed beyond the domain of judicial discussion. As we understand it, the Negotiable Instruments Law was intended to give legislative sanction to the majority rule, to which reference has been made, and was conceived by its authors and adopted by the different state Leg-

islatures for the express purpose of harmonizing the conflicting decisions which had been rendered on the subject of negotiable instruments and the rights of those interested therein whose rights were acquired before maturity. As we view it, therefore, it is our plain duty to follow the numerous decisions that have directly passed upon the negotiable instruments law, and have construed it in accordance with the majority rule."

It will be seen, therefore, that the majority rule has expressly been adopted in this state, and that since by almost unanimous judicial action in all jurisdictions drawee banks are held liable for payments made upon forged instruments and charged to the accounts of their depositors, that uniformity sought to be secured by enactment of the Negotiable Instruments Law must be said to have continued in force the rule announced in *Crocker-Woolworth Bank v. Nevada Bank*, supra. *Union Tool Co. v. Farmers' & Merchants' Nat. Bank*, 192 Cal. 40, 218 P. 424, 28 A. L. R. 1417, involved the question of direct liability of a drawee bank to its depositor, but the same question of diligence in comparing signatures was discussed, and it was said that:

"Assuming that the plaintiff was negligent in not making a more thorough examination of the returned checks, although the trial court found it was not negligent, still the depository bank may not escape liability for the payment of amounts paid on forged checks unless it has itself been free from negligence. Here the finding of the trial court that the bank was negligent is clearly sustained by the evidence."

And in *Glassell Development Co. v. Citizens' Nat. Bank*, 191 Cal. 375, 216 P. 1012, 28 A. L. R. 1427, where, as in the case last cited, the drawee bank failed to make the comparison, it was held that:

"When by the exercise of proper care it could have discovered the alteration or forgery, it must bear the loss notwithstanding that the depositor failed in his duty to examine the accounts."

In the case at bar, the drawee had in its files for convenient immediate reference the genuine signatures of its depositors; it was testified that the forgeries were unlike the specimen signatures, and dissimilarities were pointed out during the trial, yet respondent's president said that he did not think any comparison was made in this instance.

The Uniform Negotiable Instruments Law of this state (Civ. Code, § 3143), provides as follows:

"The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits—

"(1) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and

"(2) The existence of the payee and his then capacity to indorse."

[17] Appellant contends that, had the plaintiff bank discovered the forgeries, the funds would not have been forwarded, and that no loss would have occurred; but that by payment to appellant and cancellation of the checks respondent accepted them, represented to appellant that they were genuine, and caused the latter to change its position. Respondent, relying upon section 3213 of the Civil Code, that "acceptance must be in writing and signed by the drawee," insists that it did not accept the checks, within the express intendment of said section, and that therefore its cancellation and credit to appellant was subject to repudiation upon discovery of the forgery two months later.

An engagement by one party to perform some act under the Negotiable Instruments Law, such as to honor a bill of exchange when presented in future, or to meet the paper of another, must concededly be in writing, and be signed; such is the plain language of the statute, and it facilitates notice and other steps that may be found necessary. But we are not aware of any rule requiring that payment of a check by a drawee bank shall be confirmed by a simultaneous written acceptance. This question was decided by the Supreme Court of Oregon, in *First National Bank of Cottage Grove v. Bank of Cottage Grove*, 59 Or. 388, 117 P. 293, where it was said:

"The payment of a bill or check by the drawee amounts to more than an acceptance. The rule, holding that such a payment has all the efficacy of an acceptance, is founded upon the principle that the greater includes the less. *Bank v. Bank*, 141 Mo. App. 719, 125 S. W. 513; *Neal v. Coburn*, supra [92 Me. 139, 42 A. 348, 69 Am. St. Rep. 495]. * * * Under the provision in section 6021, L. O. L. that, where the holder of a check procures it to be accepted or certified, the indorsers are discharged from liability, the plaintiff, when it paid the checks in question, precluded itself from setting up that the check was a forgery on any want of authority of the person affixing the signature it purported to bear, within the meaning of section 5856, L. O. L. The following cases, in which the negotiable instruments law is applied, sustain this view: *Bank of Com. v. Mech. Nat. Bank*, 148 Mo. App. 1, 127 S. W. 429; *Title Guarantee & T. Co. v. Haven*, 126 App. Div. 802, 111 N. Y. S. 305; *Bank of Rolla v. Salem Bank*, 141 Mo. App. 719, 125 S. W. 513; *Farmers' & Mer. Bank v. Rutherford Bank*, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817."

It is further argued by appellant, and denied by respondent, that the checks in controversy, having been worded "Pay to E. E. Snyder, or order," were in a measure not unlike checks payable "to cash," and so required no indorsement, and that identification of the payee was therefore unnecessary. As we have shown, whether or not Snyder, alias Zarate, indorsed his true name upon these instruments, there can be no question

that the purported payee and indorser received the money. Respondent admits that the checks were forgeries, and that it honored them as the genuine paper of Thing Bros. Having done so, it transmitted the funds or credit to the collecting bank, which thereupon sought out and paid the identical person who had opened an account and deposited the checks. Hence, we think the question as to whether or not appellant would have been absolved from liability had it proceeded without indorsement or identification is beside the issue and need not here be decided.

[18] In conclusion, we hold that, since it was the custom among members of the San Diego clearing house association to accept business by mail, the fact that the checks in question were received by the collecting bank in that manner does not constitute a suspicious circumstance; also that the indorsements upon these checks did not constitute a representation that they had been paid, or a guaranty of their genuineness, but were placed thereon only for the purposes of collection. Therefore the conduct of the appellant was free from any negligence which could possibly have induced the respondent to relax the scrutiny required of it as a drawee to detect the forgery of its depositor's signature. On the other hand, failure of the respondent bank to make comparison of the signatures upon the checks with their exemplars was a negligent omission. Under these circumstances, the collecting bank, having paid the checks only after they had been honored by the drawee bank, cannot be held liable to reimburse the latter for its loss in having paid its customers' money on the purported drawers' signatures, which subsequently were shown to have been forgeries.

The judgment is reversed.

We concur: FINLAYSON, P. J.; WORKS, J.

MEMORANDUM DECISIONS

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74 Cal. App. 798

PEOPLE of the State of California, Plaintiff and Respondent, v. Frank LAMBLE, Defendant and Appellant. (Cr. 866.) (District Court of Appeal, Third District, California. Oct. 14, 1925.) Appeal by defendant from a judgment of the Superior Court of Sacramento County, Charles O. Busick, Judge, of conviction of maintaining a nuisance. Reversed. Hale Day, of Los Angeles (George E. Foote, of Sacramento, of counsel), for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was charged with and convicted of maintaining a common nuisance in a certain building, "in that the said defendant did then and there willfully and unlawfully possess and keep on the premises aforesaid certain intoxicating liquor for beverage purposes, and not for sacramental or medicinal purposes." This appeal is from the judgment and the order denying a new trial. The questions presented by the appeal are identical with those considered by this court in *People v. Mehra*, 238 P. 802, in which case the judgment was reversed and the defendant discharged, and in which respondent's petition for a hearing in the Supreme Court was denied. The information is in the same language as that in the *Mehra* Case. The instructions are the same, and the evidence shows mere possession of the liquor in the defendant's residence. The defendant, prior to the trial herein, had been convicted and punished for such possession. No brief has been filed by the respondent, and the case is not distinguishable in any respect from the *Mehra* Case. It would serve no useful purpose, therefore, to repeat the discussion fully set forth in that case, and no reason appears why the decision therein should not be followed in this. The judgment is reversed, and defendant's bail is exonerated.

We concur: HART, J.; PLUMMER, J.

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197 Cal. 598

KELLEY v. HODGE TRANSPORTATION SYSTEM. (L. A. 8194.)(Supreme Court of California. Dec. 11, 1925.
Rehearing Denied Jan. 7, 1926.)**1. Negligence** $\S$ 93(1)—Guest in automobile held not engaged in joint enterprise with driver.

Guest riding in automobile, having no right of control and management of automobile, was not engaged in common or joint enterprise with driver thereof so as to be responsible for his negligence, if any, contributing to collision causing injury to guest.

2. Pleading $\S$ 403(2) — Failure of complaint for injuries in automobile collision to jointly charge driver of automobile, in which plaintiff was riding, with negligence with defendant held not to impeach judgment for variance.

Insufficiency of evidence to support judgment for plaintiff in action for injuries suffered in automobile collision while riding as guest in one of cars cannot be predicated on variance because of plaintiff's allegation that collision was solely due to defendant's negligence, where answer put in issue negligence of plaintiff's driver, and case was fully developed on both issues.

3. Appeal and error $\S$ 1001(1)—Finding of jury, supported by evidence, not disturbed on appeal.

In action by guest riding in automobile for injuries in automobile collision, where substantial evidence pointed to defendant's negligence, and there was no evidence of plaintiff's negligence, finding of jury for plaintiff cannot be disturbed on appeal.

4. Pleading $\S$ 166—Pleadings of negligence of driver of plaintiff's automobile held new matter in avoidance or constituting defense, and deemed controverted on trial by opposite party.

In action by guest riding in automobile for injuries in collision, answer pleading negligence of driver of plaintiff's automobile was new matter in avoidance or constituting defense, and must, on trial, be deemed controverted by opposite party, under Code Civ. Proc. $\S$ 462.

5. Trial $\S$ 296(3)—Prejudice, if any, in instruction as to negligence from violation of provisions of State Motor Vehicle Act, held cured by another instruction.

In action by guest riding in automobile for personal injuries in automobile collision on city streets, instruction that if defendant violated any of provisions of Motor Vehicle Act to find it guilty of negligence, if error for failure to limit it to violations of such act on which plaintiff relied, was cured by instruction that law did not prohibit defendant from driving across street into filling station, if it exercised due care in operating motor truck and otherwise complied with law regulating operation of motor vehicles, and other instructions concerning Motor Vehicle Law.

6. Trial $\S$ 232(5)—Instructions defining terms "a man of ordinary prudence" and "ordinarily prudent person" and "reasonable man" held not confusing.

In action by one injured in automobile collision, instruction as to meaning of terms "a man of ordinary prudence," and "ordinarily prudent person," and "reasonable man," stating that conduct must be compared with that of average man or ordinary man, and that question for jury to determine was whether, under facts and circumstances, parties whose conduct was under consideration acted as ordinarily prudent men would act, was not confusing, because court, in defining term "a man of ordinary prudence," closed one sentence with interrogatory, "What would I have done under such circumstances?"

7. Trial $\S$ 219—Leaving meaning of terms "man of ordinary prudence" and "reasonable man" to understanding of average man held ordinarily better than to attempt to amplify.

Meaning of terms "man of ordinary prudence" and "reasonable man" is understood by average person, and ordinarily it is better to leave their meaning with average man than to hazard difficulty and danger of amplifying them.

8. Damages $\S$ 132(1)—\$15,000 for injuries, causing disfigurement of young woman's features, held not excessive as matter of law.

In action for personal injuries in automobile collision to unmarried woman 27 years of age, verdict for \$15,000, largest part of which must have been for permanent scars on face and neck, was not excessive as matter of law.

9. Appeal and error $\S$ 1004(3)—Verdict not set aside for excessive damages, unless result of passion, prejudice, or corruption.

Verdict awarding damages and sustained by trial court should not be set aside on appeal as excessive, unless it shocks sense of justice, and raises presumption that it was result of passion, prejudice, or corruption.

In Bank.

Appeal from Superior Court, Los Angeles County; Victor R. Lucas, Judge.

Action by Edna Kelley against the Hodge Transportation System. Judgment for plaintiff, and defendant appeals. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

A. G. Ritter and Joseph Scott, both of Los Angeles, for respondent.

SEAWELL, J. The jury in this case awarded the respondent the sum of \$15,000 as damages for injuries suffered by her from cuts made upon her face and neck by glass as the result of a collision between a Ford coupé driven by James Fisher, a salesman and "courtesy man" in the employ of the Hubbard Auto Sales Company, at the city of Los Angeles, with whom she was riding as a guest, and a very large truck carrying five and one-half tons of freight, and drawing a trailer carrying three tons of freight, owned

and operated by appellant. The facts of the case are brief, and are as follows:

Miss Edna Kelley, the respondent herein, was an unmarried woman of the age of 27 years, a stenographer by occupation, in the employ of the Associated Supply Company in the city of Los Angeles, at a salary of \$100 per month, and who had, for several months prior to the day of the collision, to wit, Sunday evening, December 10, 1922, been accustomed to take pleasure rides upon each Sunday into the suburban districts and country with said James Fisher. During the week preceding the day last mentioned they had been told by a mutual friend that holly berries were obtainable in the vicinity of Saugus or Newhall, and accordingly, as they had intended to go in some direction on their usual Sunday outing, upon the suggestion and invitation of Mr. Fisher, planned a trip to Saugus, where it was expected that they would be able to gather, and bring to Miss Kelley's home, holly berries to be used for Christmas decorations.

Upon passing through the city of San Fernando at about 6 o'clock p. m. on their return trip, Mr. Fisher, in obedience to the traffic laws, paused on Porter street, which extends in a northerly and southerly direction, before crossing Brand avenue at the point where it intersects Porter street at right angles. The lot on the southwest corner of Porter street and Brand avenue is used by the Standard Oil Company as a gas and oil filling station. The station is located in the center of the lot. The entrance into and exit from the station is on Porter street, near the southerly boundary of the lot, and is some distance southerly from Brand avenue. The station is illuminated by a system of reflectors so arranged upon poles as to concentrate the light rays upon the station. The illumination is quite bright at the intersection of Brand avenue and Porter street, as well as at the station, but the light zone ceases within the limits of the station going southerly. Therefore, a person traveling in a northerly direction would have the benefit of the street and station lights, while one going southerly would, upon reaching the station, be facing an unlighted highway. Southerly from the station, and a few feet distant therefrom, building improvements were being made, and building materials were piled into the street at the curb line, and lighted lanterns had been placed thereon to warn the traveling public of the partial obstruction to travel. While it was not raining at the time the collision occurred, which was at the hour of about 6 o'clock, an overcast sky added to the darkness that had set in.

The collision occurred at a point on the street which would have been included within the limits of the driveway had its exterior lines been projected into the street. Fisher,

after having crossed Brand avenue, proceeded down Porter street at a rate of speed variously estimated as ranging from 10 to 15 miles per hour. He was on the west side of Porter street, which is about 45 feet wide, and it was his claim that he was proceeding southerly on said street about 5 feet distant from the westerly curb line. He observed the headlights of several machines approaching him on Porter street, and also saw the rear lights of machines traveling ahead of him. As he approached the driveway of the oil station he was on a lookout for outgoing machines, and his attention was also directed to the obstruction which extended into the street some 30 feet south of the oil station, upon which lights had been placed as a warning signal. When he arrived at a point practically opposite to the entrance of the driveway, he suddenly found himself confronted with the truck drawing a trailer which had turned from its course on the easterly side of the street to enter the oil station premises. The truck and trailer were approaching the station practically at a right angle. Fisher was then about 5 feet distant from the truck, and both were moving. The truck and trailer were traveling at a speed estimated at not less than 9, nor more than 15, miles per hour. Fisher applied his brakes, but could not avoid the impact. The truck and Ford came together in such a manner that the front fender of the truck came in contact with the radiator of the Ford. No horn was sounded or signal given in any way by the driver of the truck to warn Fisher of his intention to enter the station, although the driver of the truck admitted that he saw Fisher some time before the accident, and supposed he would stop, as he thought it easier for the Ford to stop than it would be to stop the truck. The impact caused the Ford to rebound 5 feet. Miss Kelley, who was seated to the right of Mr. Fisher, was thrown forward with such violence that her face and the upper portion of her body went through the glass windshield. The blood flowed so profusely from the wounds and cuts which she received upon the face and neck as to have almost resulted in her death before medical attendance could be procured. By reason of her extreme weakened condition no anæsthetic was administered during the time that the 35 or 40 stitches were taken to close up the several wounds made upon her face. She remained in a hospital for some 2 weeks under the treatment of a physician, and was later taken to her mother's home, where she remained in a convalescent state for another period of 2 weeks. At the expiration of a month she resumed her duties as a stenographer.

[1] That respondent was not guilty of contributory negligence and that she was not engaged in a common or joint enterprise with Mr. Fisher, under the undisputed evidence in

the case, there is not room for a difference of opinion. She was clearly the guest of Fisher. In *Pope v. Halpern*, 193 Cal. 168, 223 P. 470, this court very clearly pointed out the difference between persons who are engaged in a joint enterprise with another, within the meaning of the law of negligence, and a guest who has no right to be heard in the control and management of an automobile in which he or she is riding. It was there said that—

"In order that there be such a joint enterprise it is not sufficient merely that the passenger of the machine indicate the route, or that both parties have certain plans in common, such as a 'joy ride,' but the community of interest must be such that the passenger is entitled to be heard in the control and management of the vehicle."

Quoting from *Bryant v. Pacific Electric Ry. Co.*, 174 Cal. 737, 164 P. 385, and making reference to *Wentworth v. Town of Waterbury*, 90 Vt. 60, 96 A. 334, the Court in *Pope v. Halpern*, continuing, said that the doctrine of imputed negligence should not be applied to those cases, where—

"The only basis for the imputation of negligence of the driver of an automobile to the plaintiff was the circumstance that they were both engaged in the common purpose of taking two ladies for an afternoon's drive to view a lake. * * * To do so leaves the law in an uncertain state. The better view is expressed by *Nonn v. Chicago City Ry. Co.*, 232 Ill. 378 (122 Am. St. Rep. 114, 83 N. E. 924): 'There can be no such thing as imputable negligence, except in those cases where such a relation exists as that of master and servant or of principal and agent. In order that the negligence of one person may be properly imputed to another, they must stand in such relation of privity that the maxim *qui facit per alium facit per se* directly applies.' Indeed, no other rule is consistent with section 1714 of the Civil Code, wherein it is declared that every one is responsible for an injury occasioned to another by his want of ordinary care 'except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.'"

The respondent did not drive the automobile at any time, nor did she exercise any control or management over it whatsoever. Therefore the contributory negligence attributable to Fisher, if any, would not bar her right of recovery against appellant, unless it was shown that she was guilty of negligence. There is no evidence in the record that would indicate that respondent was guilty of independent negligence in the remotest degree. She violated no duty to herself or to others, and it is not shown that she neglected to do anything that a reasonable person in her situation should have done or that she did anything that could be regarded as negligence on her part under the circumstances of the collision.

The questions presented by the appeal are that the evidence is not supported by the al-

legations of the complaint; that there was a variance between the allegations of the complaint and the proof; that the evidence does not support the verdict; erroneous instructions on the part of the court; and excessive damages. No reference is made to the part Fisher played in the complaint. The allegation as to appellant is that, while plaintiff was riding in a Ford coupé in the city of San Fernando, and was proceeding in a southerly direction on Porter avenue, near the junction of Porter avenue and Brand boulevard in said city, the defendant, its agents, servants, and employees, so negligently, carelessly, and unlawfully operated its motor truck in approaching the automobile in which plaintiff was riding that said motor truck ran into and collided with said automobile, thereby shattering the glass in said machine, and injuring plaintiff, as described in the complaint. The complaint contains the following allegation, which is made the basis of an attack upon the theory that it is not supported by the proofs:

"That in said collision, *caused alone* by the negligence of defendants, aforesaid," etc. (Italics supplied.)

In addition to the permanent facial disfigurements, it was alleged that she was hurt in her health, strength, and activities, and received a severe shock to her nervous system, and from the injuries received she has suffered great physical pain and mental anguish on account of the disfigurements which she has and will sustain, and that by reason of her injuries she has been unfit and unable to work at the usual duties of her employment, or any employment since the time of her injury. Appellant forthwith answered, specifically denying each of the material allegations of the complaint, and in addition thereto alleged affirmatively that respondent was engaged in a joint and common enterprise with the aforesaid James Fisher, and that each of them exercised joint and common control as to the places that Fisher visited and the speed at which they were driving, and that each of them was careless and negligent, in that they failed to keep a proper lookout for automobiles, and that the automobile in which they were riding was carelessly and negligently driven by Fisher, with the consent and knowledge of plaintiff, and that such negligence directly and proximately contributed to the happening of the accident in question.

[2-4] That which has been heretofore said disposes of the contributory negligence claim imputed to respondent by appellant. The objections made to the allegation of the complaint that the injuries were caused alone by the negligence of appellant loses much of the force it may otherwise have had but for the affirmative allegations of the answer which *ex industria* brought into the case the issue of Fisher's alleged negligence.

By the answer it is alleged that his negligence wholly caused the collision, and that, as both he and respondent were engaged in a joint and common enterprise, his negligence was attributable to respondent. But there are two answers to appellant's claim of prejudicial error arising from the pleadings. First, appellant specifically put in issue the alleged negligence of Fisher as a defense, and the case was tried upon the theory that Fisher's negligence and his relation to respondent were material factors in the case. Second, the jury was fully and correctly instructed as to the extent that Fisher's negligence should be made referable to respondent if it should find that they were engaged in a joint or common enterprise. If the jury believed that both Fisher and appellant were negligent, but that respondent was a guest of Fisher, and, further, that she was not guilty of negligence, such joint negligence would, if it contributed proximately to the injuries, render either or both liable in damages. If the injuries of respondent were caused by the negligent act of appellant, its liability would not, so far as respondent is concerned, be lessened by the fact that the negligence of Fisher was also a contributing cause. There being at least substantial evidence pointing to negligence on the part of appellant, and there being no evidence whatever of respondent's negligence, the finding of the jury cannot be disturbed. The pleading of Fisher's negligence was new matter in avoidance, or constituting a defense, and must, on the trial, be deemed controverted by the opposite party. Code Civ. Proc. § 462; *Platner v. Vincent*, 94 Cal. 436, 229 P. 24; *Moore v. Copp*, 119 Cal. 429, 51 P. 630; *Peck v. Noe*, 154 Cal. 351, 97 P. 865; *Jose Realty Co. v. Pavlicevich*, 164 Cal. 613, 130 P. 15; *Curtiss v. Sprague*, 49 Cal. 301; *Wendling, etc., Co. v. Glenwood, etc., Co.*, 153 Cal. 411, 95 P. 1029; 2 Cal. Jur. 1017. We conclude that the appellant could not have been misled to its prejudice by the omission to jointly charge Fisher with negligence. The case was tried upon the issue as tendered by appellant.

[5] The court instructed the jury that—

"If they should find from the evidence in the case that defendant at the time and place of the collision herein complained of violated any of the provisions of the state Motor Vehicle Act, then it is your duty to find that defendant was guilty of negligence."

The portion of the instruction objected to contains the words "violated any of the provisions of the state Motor Vehicle Act." It is argued that the words within the quotation marks were not limited to those violations of the Motor Vehicle Act (St. 1915, p. 397, as amended by St. 1917, p. 382, St. 1919, p. 191) upon which respondent relied as the cause of her injuries. It is insisted that by the instruction as given the jury was told

that any violation of the Motor Vehicle Act, whether or not it had any causative relation to the injuries inflicted, might be considered as a material element in the determination of the question of liability. It is scarcely conceivable that the jury should have been thus misled. Practically the only question in the case was whether or not the driver of the truck was guilty of negligence by continuing his course from one side of the street into the other in the face of the admitted fact that he saw Fisher at some distance prior to the collision, and knew, or ought to have known, that he would soon be in his path without giving an alarm of any kind whatsoever. But if it may be said that appellant suffered prejudice by the criticized instruction standing alone the prejudice was removed by the giving of other instructions. The court later told the jury that, under the provisions of the Motor Vehicle Act in force at the time of the collision, there was no provision of law which prohibited the defendant from operating its truck so that it might be driven into the oil station as described by the testimony, provided the defendant exercised due care in thus operating his truck so that it might be driven into the oil station, and by otherwise complying with the law regulating the operation of motor vehicles upon public highways. "Therefore if you shall find that the defendant was otherwise operating his truck in a careful and prudent manner, and in accordance with the law, you would not be justified in finding for the plaintiff solely for the reason that the defendant operated its truck across the street and into the oil station." As to those violations of the act which the court said constituted negligence per se under the Motor Vehicle Act, there was none which was not germane to the duty of the defendant in making the street crossing at the time of the collision. The jury could not have been led into the realm of surmises as to other violations of the Motor Vehicle Act inasmuch as none other was claimed to have occurred.

[6] The court at considerable length instructed the jury as to the meaning of the terms, "a man of ordinary prudence," and "ordinarily prudent person," and a "reasonable man." These terms, like the term "reasonable doubt," are easily understood, but are difficult to define. It is claimed that by giving the instruction the court violated the rule laid down in the case of *Freeman v. Adams*, 63 Cal. App. 225, 218 P. 600. In that case the court gave the following instruction:

"In determining what a reasonable and prudent man would do under the circumstances you will remember that presumably a jury is composed of such reasonable and prudent persons, and you may each ask yourself, did the defendants do, or fail to do, anything which under the circumstances, I would not have done or would have done."

It is difficult to understand how jurors, if not men of reasonable understanding, would be able to determine whether others whose conduct is under investigation acted in a reasonable manner. The instruction considered in its entirety does not run counter to the instruction given in the Freeman Case, nor is it open to the interpretation that, if there be two or more lawful modes or methods by which a lawful act may be performed, a person who in good faith selects one of said modes, and injures another in the performance of said act, while acting as a reasonably prudent and cautious person, will, nevertheless, be held liable in damages therefor merely because it should thereafter appear that, had he selected one of the other lawful modes or methods, the injury would not, in all human probability, have happened.

It is true, as pointed out by appellant, the court, in its effort to enlarge upon the meaning of the term "a man of ordinary prudence," etc., did close one sentence with the interrogatory, "What would I have done under such circumstances?" but the phrase was used relative to the conduct of "a person of ordinary prudence," or "a reasonable man." But immediately preceding the clause last above mentioned the court said:

"In other words, in measuring the conduct of men and determining whether or not they are negligent in those cases which do not arise from contract, * * * we must compare their conduct with that of the average man, or, to use the language we are accustomed to, the ordinary man."

And later it instructed as follows:

"The question for you to determine is: 'Under all the facts and circumstances as shown you by the evidence did the parties whose conduct is under consideration act as ordinarily prudent men would act?' If they did not they were negligent and if either failed in this particular he was negligent. It should be observed that the care to be exercised by a person of ordinary prudence varies with the condition under which he is called upon to act. In other words, the care that an ordinarily prudent person must use in the exercise of ordinary prudence in dealing with agencies that because of power of momentum or for any other reason are liable to do great injury is very much greater than under other circumstances."

[7] The same general thought runs through the entire charge. We see nothing in the criticized instruction that should have confused the jury as to what was meant by the well-known terms. The meaning of said terms is well understood by the average person, and ordinarily it is better to leave their meaning with the understanding of an average man than to hazard the difficulty and danger of an amplification thereof.

[8] The last and most serious question for consideration is whether or not the verdict is as a matter of law excessive. Three surgeons, one of whom treated the respondent,

testified that in their opinion the cuts made upon respondent's face by broken glass had left permanent scars. The nature of the wounds and the extent to which they disfigured the face of the respondent we are unable to determine, as she has not been in our presence for observation. We are therefore compelled to defer to the opinions of the three physicians who examined her, and the judgment of the court and jury to whom the injuries were exhibited. Doctor J. G. Mackey, who attended respondent immediately after she received the injuries, gave a description of the same. We quote from appellant's brief a short but fair résumé of his testimony:

"If she (respondent) will come here, I can show the jury a whole lot more than I can describe. There is one cut here, extending—you cannot see for the hair now—extending from here down to here. There is a scar on the left side of the face, extending from about an inch in the hair line, down over the ramus of the superior maxilla or superior jaw. I mean the cheek bone. Carrying it down through the muscles here, cutting the nerve, one branch of the seventh nerve, that comes across to supply the eyebrow here, and then on the left side of the face again there was a cut here, over the jaw, and one just below the jaw on the same side, a very irregular cut there. Under the chin there was a horse-shoe incision here, about —oh, it was about an inch wide, and about an inch and a half long, as I remember. It is hard to see it in this light. On the other side of the face there was another deep cut here, extending thus—pretty near to the ear, clear across underneath the jaw, and coming over the jaw to very nearly even with the mouth, you see, here; and then another one on the right cheek, which is very deep; and then there were numerous little cuts. I think I took about 35 stitches, all told, in the face. It was very extensive."

[9] In addition to the foregoing, it was testified to by one of the witnesses that she received numerous cuts upon the neck. The doctor who attended her testified that the accident was a severe shock to her nerves at the time, and that she lost a large amount of blood, and was in his hospital for a period of about two weeks. Of course, she suffered pain, and there was some evidence that her nervous system had not, at the time of trial, entirely recovered from shock. Evidently the facial disfigurements constitute the largest element of damages sustained by the respondent. She was a young woman—27 years of age—unmarried, and doubtless has suffered, and will continue to suffer, mortification and humiliation such as naturally comes to one of her sex by reason of permanent scars or blemishes upon her face. Both the jury and the trial court had ample opportunity to observe the natural features and comeliness of the respondent, and the extent of the facial blemishes and disfigurements which she sustained. The court, in passing upon a motion for a new trial, was

in a position to have reduced the damages allowed by the jury's verdict had it, in the exercise of a sound discretion, believed the damages excessively large, but instead permitted the verdict of the jury to stand as its appraisal of the damages sustained, and we are not in a position to intelligently challenge the judgment of court and jury with nothing of a substantial character before us to support a contrary conclusion. It is true that no organs of the body were permanently disabled, so far as we are advised. No contradictory evidence was offered by the defense as to the permanent character of the scars which are the result of said injuries. Unless we are able to say that the award of damages made by the jury and sustained by the trial court were grossly disproportionate to any compensation reasonably warranted by the facts as presented to us on appeal as to shock the sense of justice and raise at once a presumption that it was the result of passion, prejudice, or corruption, rather than an honest and sober judgment, this court may not exercise the power of revision. 8 Cal. Jur. 834; *Holmes v. California Crushed Fruit Co.* (Cal. App.) 232 P. 178; *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 P. 513. The judgment appealed from is affirmed.

We concur: MYERS, C. J.; RICHARDS, J.; SHENK, J.; LAWLOR, J.; WASTE, J.; LENNON, J.

75 Cal. App. 148

SVOBODA v. PURKITT, Judge. (Civ. 5393.)

(District Court of Appeal, First District, Division 1, California. Nov. 7, 1925.)

Criminal law §982—**Mandamus** §61—Granting probation is discretionary, and discretion of court as to hearing application not reviewable by mandamus.

Where one guilty of robbery in second degree, who was possessed of loaded revolver at time of crime, moved for order placing him on probation, *held*, in view of Pen. Code, § 1203, court had power to hear application, but whether he would do so was entirely in discretion of court, which cannot be controlled or reviewed by mandamus.

Application by Charles Svoboda for writ of mandate to be directed to Claude F. Purkitt, Judge of the Superior Court of the City and County of San Francisco. Writ denied.

Milton T. U'Ren, of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., and William W. Murphy, Asst. Dist. Atty., both of San Francisco, for respondent.

CASHIN, J. An application for a writ of mandate directing respondent, as judge of

the superior court in and for the city and county of San Francisco, to hear and determine a motion for an order placing petitioner upon probation.

Petitioner was charged by information filed in the court mentioned with the crime of robbery, to which charge he entered a plea of guilty, and respondent thereupon made a finding determining the degree of the crime of which petitioner was guilty to be robbery of the second degree. Petitioner thereupon moved for the order mentioned, which motion respondent declined to hear or consider, for the reason stated in respondent's answer to the petition herein, which is as follows:

"That the sole and only reason for the refusal and failure of said defendant (respondent) to entertain said motion for probation was based upon the belief of this defendant that this defendant was wholly without jurisdiction or power to entertain and/or hear and/or determine said motion for probation by reason of the fact that certain information was given to this defendant that said petitioner was possessed of a deadly weapon, to wit, a loaded revolver, at the time of the commission of said crime, and in this connection defendant alleges that he was ready and willing to assume jurisdiction of said motion for probation and to determine and consider the same provided he, the said defendant, had jurisdiction to entertain said motion and to hear and determine the same."

It is provided by section 1203 of the Penal Code that, "after the conviction by plea or verdict of guilty of a public offense, where discretion is conferred upon the court or any board or commission or other authority as to the extent of the punishment, the court or board or commission or other authority before judgment and sentence and except as hereinafter provided, may upon oral suggestion of either party or of its own motion when it appears that there are circumstances which may properly be taken into view either in aggravation or mitigation of the punishment, may in its discretion refer the same to the probation officer directing said probation officer to investigate and to report, * * * at a specified time, and the court shall hear the same summarily at that specified time and upon such notice to the adverse party as it may direct, * * *" and, further, that nothing contained in the section shall apply to certain cases, including robbery, where the person convicted of such crime was at the time of the commission thereof armed with a deadly weapon. It is contended that the above provisions not only limit the power of the court to grant probation, but also its power to hear and determine a motion therefor, and that, having received the information mentioned in the answer before the making of a motion for relief under the statute, the court is precluded thereby from hearing or acting thereon.

While we are satisfied, in view of the facts in the instant case, that the court has power to hear and determine the application for probation, whether any proceedings to that end shall be entertained is a question resting entirely in the discretion of that court (Pen. Code, § 1203; *People v. Dunlop*, 27 Cal. App. 460, 470, 150 P. 389), which cannot be controlled or reviewed by mandamus (*Kerr v. Sup. Ct.*, 130 Cal. 183, 62 P. 479; *Richards v. Sup. Ct.*, 145 Cal. 38, 78 P. 244; *Realty Construction Co. v. Title, etc., Co.*, 165 Cal. 543, 132 P. 1048; *Bender v. Hatton*, 160 Cal. 372, 117 P. 322; *Tomkin v. Harris*, 90 Cal. 201, 27 P. 202), and the petition for writ of mandate will therefore be denied.

We concur: TYLER, P. J., KNIGHT, J.

75 Cal. App. 91

COLMA VEGETABLE ASS'N v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 5388.)

(District Court of Appeal, First District, Division 1, California. Nov. 4, 1925.)

1. Prohibition ⚡11—Writ not available to restrain substitution of new attachment bond.

As superior court has jurisdiction under Code Civ. Proc. § 1057, to grant motion for substitution of new bond for attachment bond given under section 540, writ of prohibition is not available to prevent such action, which would amount to no more than error committed in exercise of jurisdiction.

2. Prohibition ⚡3(3)—Writ will not lie to prevent substitution of new attachment bond, if appeal affords complete and adequate remedy.

Writ of prohibition will not lie to prevent substitution of new attachment bond, if appeal affords complete and adequate remedy and will accomplish same ends, though question of jurisdiction be involved in determination of motion.

3. Appeal and error ⚡81—"Final judgment" from which appeal lies applies to final determination of collateral matter.

"Final judgment," as used in Code Civ. Proc. § 963, authorizing appeal from such judgment, is not limited to final or last judgment in action, but applies to final determination of collateral matter, affecting only parties to, and finally settling, particular controversy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

4. Appeal and error ⚡81—Order in collateral proceeding finally disposing of controversy therein, is "final judgment."

Order requiring doing of some act by or against aggrieved party, not merely conditional or interlocutory in nature or reviewable with or as part of final judgment in action, and made in

collateral proceeding finally disposing of matter there in controversy, is final judgment, and hence appealable under Code Civ. Proc. § 963.

5. Appeal and error ⚡81—Order granting motion to substitute new attachment bond appealable.

As order on motion to substitute new attachment bond would not become part of judgment roll under Code Civ. Proc. § 670, and such bond constitutes contract in which parties to action are beneficially interested, granting of motion would finally determine certain legal rights and obligations not subject to adjudication in action itself, and hence could not be reviewed on appeal from judgment therein, so that aggrieved parties could appeal from order and give stay bond under section 943, thus precluding use of prohibition to restrain substitution.

Application by the Colma Vegetable Association for writ of prohibition to the Superior Court in and for the City and County of San Francisco and George H. Cabaniss, Judge thereof, to prevent substitution of personal for surety bond. Alternative writ discharged, and petition denied.

Harry H. Baier, of San Francisco, for petitioner.

Howard Harron, of San Francisco, for respondents.

KNIGHT, J. This is an application for a writ of prohibition. The material facts alleged in the petition and in the affidavit attached thereto are not disputed, and may be stated as follows:

The petitioner, Colma Vegetable Association, a corporation, brought suit in the superior court in and for San Mateo county to recover from G. Bonetti and G. Bonetti & Co., a copartnership, the sum of \$1,000 as liquidated damages for the alleged breach of a marketing agreement. A writ of attachment was issued and directed to the sheriff of the city and county of San Francisco for service. Pursuant to said writ an automobile truck belonging to said defendants was attached by said sheriff, and thereupon, but prior to the return of said writ or the appearance of the defendants in said action, said defendants, availing themselves of the provisions of section 540 of the Code of Civil Procedure, caused to be delivered to and deposited with said sheriff a bond or undertaking in the principal sum of \$1,500, executed by the Royal Indemnity Company, a corporation, as surety, which bond or undertaking, it is alleged, was "accepted by the said sheriff after approval by the court pursuant to section 540" of said Code, and the property seized by virtue of said writ, which is alleged to be of a value greater than \$1,000, was thereupon released from said attachment. The trial of the action followed, and on July 28, 1925, the trial court announced its decision award-

ing damages in favor of plaintiff for the sum of \$500 only. At the time this proceeding was instituted findings in the action had not been made, and judgment had not been entered. On August 14, 1925, defendants served notice that they would move the superior court in and for the city and county of San Francisco, Department 3 thereof, "for an order directing the substitution of a personal bond in lieu and place of the bond of the Royal Indemnity Company." Said motion was heard on August 21, 1925, petitioner appearing therein and objecting to the proceeding upon the ground "that said court had no jurisdiction to entertain, pass upon or grant said motion." The petitioner avers that said court overruled said objection, and "announced in open court" that the motion would be granted. It does not appear, however, that the order granting said motion has ever been made or entered. In the supporting affidavit, filed with defendants' notice of motion for the substitution of said bond, it is set forth that at the time defendants procured said indemnity company to qualify and act as surety on said bond they deposited with said indemnity company the sum of \$1,500 in cash, which deposit defendants now desire to withdraw "and have said bond canceled and annulled, and in lieu thereof a personal bond in the sum of fifteen hundred (\$1,500) dollars substituted therefor"; and in this connection petitioner alleges that "the said surety company, upon the substitution of said bond, will return to the defendants the said collateral security, and the bond heretofore executed by the said surety company will be returned to the said surety company and will be canceled, annulled, lost, and destroyed."

It is the contention of petitioner that the jurisdiction of a superior court, or of a judge thereof, in regard to a bond given upon release of an attachment, is limited by statute to the acts of approving said bond (Code Civ. Proc. § 540; *Ayres v. Burr*, 132 Cal. 125, 64 P. 120), and of requiring a new bond to be given if it appears "to the satisfaction of the court that any surety upon such undertaking has for any reason become insufficient" (Code Civ. Proc. § 1057); that since it is not claimed by the moving party herein that the surety on said bond has become insufficient, the court is without jurisdiction to entertain a motion or to grant an order for the substitution of the bond for any other purpose. We are of the opinion that whether the proceeding which the petitioner seeks to arrest is or is not without or in excess of the jurisdiction of said court, the writ of prohibition herein applied for ought not to issue, for the reason that the petitioner has a plain, speedy, and adequate remedy by appeal from any order the court may make by which it would be injuriously affected.

[1, 2] By virtue of section 1057 of said Code of Civil Procedure, the superior court

is expressly vested with jurisdiction to entertain and to grant a motion for substitution of a new bond upon certain grounds. Its authority therefore to decide such a motion correctly or incorrectly is beyond question. Assuming, then, as petitioner contends, that said court intends to and will decide such motion erroneously, it follows that its action in that respect would amount to no more than error committed in the exercise of its jurisdiction (*Department of Public Works v. Superior Court* [Cal. Sup.] 239 P. 1076), and it is well settled that a writ of prohibition is not available to restrain the commission of error (*Van Hoosear v. Railroad Commission*, 189 Cal. 228, 207 P. 903; *High on Extraordinary Remedies*, § 772). As above suggested, even though a question of jurisdiction be involved in the determination of such motion the writ will not lie if an appeal affords a complete and adequate remedy and will accomplish the same ends. *Glougie v. Superior Court*, 169 Cal. 675, 147 P. 972; *Lindley v. Superior Court*, 141 Cal. 220, 74 P. 765; *Jacobs v. Superior Court*, 133 Cal. 364, 65 P. 826, 85 Am. St. Rep. 204; *White v. Superior Court*, 110 Cal. 54, 42 P. 471; *Agassiz v. Superior Court*, 90 Cal. 101, 27 P. 49; *Johnston v. Superior Court*, 4 Cal. App. 90, 87 P. 211.

[3] That petitioner has such right of appeal from any adverse order that might be made in the determination of said motion is quite certain. Section 963 of said Code of Civil Procedure, in declaring when an appeal may be taken, provides in part:

"An appeal may be taken from a superior court in the following cases: 1. From a final judgment entered in an action, or special proceeding, commenced in a superior court, or brought into a superior court from another court."

[4] The term "final judgment," as used in said section, is not limited, however, to final judgment in the action, or to the last judgment necessarily rendered therein. *Sharon v. Sharon*, 67 Cal. 185, 7 P. 456, 635, 8 P. 709. "It applies also to a final determination of a collateral matter distinct from the general subject of litigation, affecting only the parties to the particular controversy and finally settling the same." 2 Cal. Jur. p. 144, and authorities therein cited; *Cline v. Superior Court*, 35 Cal. App. 150, 169 P. 453. "A judgment that is conclusive of any question in a case is final as to that question. The Code provides for an appeal from a final judgment, not from the final judgment in the action." *Sharon v. Sharon*, supra. If the order requires the doing of some act by or against the aggrieved party, and is not merely conditional or interlocutory in its nature, or one that may be reviewed with or as a part of the final judgment in the action, and is made in a collateral proceeding which finally disposes of the matter there in con-

troversy, the order is in effect a final judgment, and therefore appealable. *Title Ins. & Trust Co. v. Cal. Development Co.*, 159 Cal. 484, 114 P. 838; *Hildebrand v. Superior Court*, 173 Cal. 86, 159 P. 147; *City of Los Angeles v. Los Angeles Water Co.*, 134 Cal. 121; *Cline v. Superior Court*, supra; *Sharon v. Sharon*, supra. The order that might be made in the instant proceeding would not become a part of the judgment roll. Code Civ. Proc. § 670. And a bond such as we have here under consideration is not given alone for the protection of the sheriff, but constitutes a contract in which the parties to the action are beneficially interested. *Ayres v. Burr*, 132 Cal. 125, 64 P. 120.

[5] The granting of the motion herein for the substitution of the bond would therefore have the effect of finally determining certain legal rights and obligations of these parties, arising out of said bond which are not subject to adjudication in the trial of the action itself, and, consequently, could not be reviewed upon an appeal from any judgment which might be rendered therein. In view of that situation, and having in mind the authorities hereinabove cited, it would seem obvious that either the petitioner or the sheriff (*Cline v. Superior Court*, supra), if they be the aggrieved parties, would have the right of appeal from any adverse order the court may choose to make in the premises, and, upon taking such appeal, may give a stay bond (section 943, Code Civ. Proc.), so as to prevent the surrender of the bond now held by the sheriff, and thus protect the interests of all parties concerned until the appeal is heard and determined.

The alternative writ is discharged, and the petition is denied.

We concur: TYLER, P. J.; CASHIN, J.

75 Cal. App. 138

PEOPLE v. DUTRO et al. (Cr. 1241.)

(District Court of Appeal, Second District, Division 1, California. Nov. 6, 1925. Rehearing Denied Dec. 5, 1925. Hearing Denied by Supreme Court Jan. 4, 1926.)

1. Criminal law § 1158(4)—Trial court's finding on conflicting evidence that confession was voluntary not interfered with.

Trial court's finding on conflicting evidence that confession was made voluntarily, without hope of reward or promise of immunity, and hence admissible, will not be interfered with by appellate court.

2. Criminal law § 736(2)—Whether confession is voluntary for court to decide at outset.

Whether confession is free and voluntary is for court to decide at outset.

3. Criminal law § 736(2), 741(3)—Whether confession was voluntary for jury, though admissibility is for court in first instance, and jury is judge of its weight.

Admission of confession is for court to decide in first instance, but it should finally go to jury to determine whether it was free and voluntary act and what weight should be given to it.

4. Criminal law § 530—Admission of confession, not stating name of complaining witness nor place of robbery, held not error.

Admission of confession, not stating name of victim nor place of alleged robbery, held not error, where time of act and amount obtained were clearly stated, and it appeared from testimony on voir dire that subject of discussion between defendant and officers at time of confession was robbery of such victim.

5. Criminal law § 531(2)—Officer's testimony as to mask found and as to defendants' planning a bank robbery held immaterial and incompetent.

Officer's testimony, on voir dire examination concerning admission of confession of robbery, as to mask found and bank robbery planned, held immaterial and incompetent as respects case in chief.

6. Criminal law § 1169(1)—Admission of officer's testimony as to mask found and planned bank robbery held not prejudicial error.

Admission of officer's testimony, on voir dire examination concerning admission of confession of robbery, as to mask found and planned bank robbery mentioned in officer's conversation with defendant immediately before signing of confession, which defendants had testified was obtained by threats and coercion, held not prejudicial error.

7. Criminal law § 875(2)—Verdict held not void because of foreman's failure to insert word.

Verdict reciting that jury finds defendant guilty of robbery, "and find it to — robbery of the first degree," held not void because of foreman's failure to insert word "be" after "to"; verdict clearly showing that jury intended to and did find defendant guilty of first degree robbery.

8. Criminal law § 875(3)—Error in grammar or use of words in verdict immaterial, when language clearly shows intent.

Any error in grammar or use of words in verdict is immaterial, when language clearly shows what is intended.

9. Criminal law § 726—District attorney's reference to defendant's failure to deny charge on witness stand held justified by argument of defendant's attorney.

Where defendant's attorney in argument to jury asserted that defendants, who testified only in voir dire on question whether confession was voluntary, had denied on witness stand any complicity in robbery charge, district attorney had right to ask jury whether there was any evidence from lips of either defendant on witness stand in denial of or concerning robbery.

10. Criminal law $\S$ 1037(2)—Defendant, not requesting instruction to disregard district attorney's remarks, cannot complain thereof on appeal.

Where defendant did not request instruction to disregard district attorney's remarks concerning defendant's failure to deny robbery on witness stand, and evidence overwhelmingly pointed to guilt, defendant cannot complain of such remarks on appeal.

11. Robbery $\S$ 24(1)—Conviction held supported by evidence.

Conviction of robbery *held* supported by evidence.

12. Criminal law $\S$ 1165(1)—Conviction supported by evidence not reversed for error in rulings by which jury was not misled.

Conviction supported by abundant evidence will not be reversed for error in rulings by which jury was not misled.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Arthur Dutro and Marion D. Stuart were convicted of robbery, and they appeal. Affirmed.

Hearing denied by Supreme Court; CURTIS, J., disqualified and not participating.

Marshall A. Stutsman, of Los Angeles, for appellant Dutro.

L. G. McArthur and Earl W. Wood, both of San Francisco, for appellant Stuart.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

HAHN, Justice pro tem. Appellants, Arthur Dutro and Marion D. Stuart, were jointly charged by information filed by the district attorney of Los Angeles county with the crime of robbery. From the judgment upon a verdict of guilty, and the order denying their motion for a new trial, appellants prosecute this appeal.

Appellant Stuart alone has filed briefs; it being stipulated, however, that the appellant Dutro rests his appeal upon the points and authorities filed on behalf of appellant Stuart.

The complaining witness, one Lionel Gardner, testified that at about 7 o'clock on the evening of October 24, 1924, while walking along Seventh street, in the city of Long Beach, he was met by Dutro and Stuart, appellants herein, coming from the opposite direction. As they met, one of the appellants addressed Gardner with the inquiry, "Where are you going?" Upon the failure of Gardner to immediately reply, defendant Dutro stepped back of Gardner, while defendant Stuart drew a revolver, and, pointing it at him, demanded, "Have you got anything?" Under the influence of the revolver, Gardner replied, "Yes;" and handed over to Stuart three \$1 bills. Thereupon Gardner was told to "Beat it," which advice he proceeded to obey with alacrity. As soon as possible thereafter,

Gardner communicated the fact of the holdup to the police of Long Beach, giving a detailed description of both Dutro and Stuart.

On the following morning Gardner was called to the Long Beach Police Station where he at once identified the defendants, who had been arrested that morning upon the description given the night before by him.

It further appears from the record that within a few hours after the arrest of the defendants, through the efforts of the police, defendant Dutro was induced to write out and sign an alleged confession, which paper was subsequently shown to the defendant Stuart and signed by him. The offer and admission of this alleged confession over appellant's objection is the first point urged as a ground for reversal. Appellant Stuart in his brief uses the following language in stating this point:

"The court erred in admitting the alleged written confession of Marion D. Stuart, for the reason that the voir dire evidence conclusively shows that this alleged confession was not voluntarily signed. The alleged confession was procured by indirect promises of reward, threats, and the beating of the defendant Stuart and torturing of the defendant Dutro, as is conclusively shown by the evidence."

[1, 2] An examination of the voluminous transcript, some 400 pages of which is devoted to the examination of witnesses, and more or less bickering on the part of several of the counsel in the case, in connection with the admission of the alleged confession in evidence, discloses the fact that the evidence upon the question as to whether or not the confession was made voluntarily and without hope of reward or promise of immunity and not under duress, is in marked conflict, and, under the well-established rule, this court will not interfere with the finding of the trial court on this question. *People v. Fouts*, 61 Cal. App. 242, 214 P. 657. It is well settled that the question as to whether or not a confession is free and voluntary is at the outset one for the court to decide. *People v. Castello*, 194 Cal. 595, 229 P. 855; *People v. Black and France* (Cal. App.) 238 P. 374.

We do not deem it necessary, under the circumstances, to discuss the relative weight or merit of the testimony offered on this point, but we are moved to observe in passing that the evidence cannot under any circumstances justify the use of the word "conclusively," as used by appellants in stating their point.

[3] The second point urged is that error was committed by the trial court in giving to the jury the following instruction:

"You are instructed that the action on the part of the court in admitting the alleged confession or statement into evidence does not bind you to accept the court's conclusion, and that the question as to whether such alleged confession, or statement, if made, was voluntary

or not, is for you to determine. If you conclude that it was not made voluntarily, then you have the right to, and it is your duty to, disregard the same altogether. In other words, you have the right to reconsider the question as to whether the same was voluntary or not, and in this connection you are the judges of the effect and value of the evidence and of the credibility of the witnesses as the same pertains to such alleged confession or statement."

It is the well-settled rule in this state that the question of the admission of an alleged confession is in the first instance one for the court to decide. It is, however, a matter that should finally go to the jury, which body has the right to determine what, if any, weight is to be given to the alleged confession, and whether or not the confession was a free and voluntary act of the defendant. *People v. Castello*, 194 Cal. 595, 229 P. 855; *People v. Black and France* (Cal. App.) 238 P. 374.

[4] Appellants further urge that error was committed in admitting the alleged confession written by the appellant Dutro, for the reason that nowhere in the writing does the name of the complaining witness Gardner appear as the person from whom the \$3 was taken, nor does the confession designate the place where the alleged holdup occurred. It is true that these matters of information do not appear in the writing, and yet the language clearly states the fact that the act was committed the night before, and the amount obtained by the holdup men was \$3. Furthermore, it appears from the testimony given on voir dire that, prior to and at the time the confession was written by the appellant Dutro, the subject under discussion between him and the officers was the robbery of Gardner, and it was the robbery of Gardner with the statements as to time and place it occurred that was charged to the appellants. There can be no doubt that, at the time Dutro wrote and signed the confession, as well as at the time Stuart attached his name to it, both appellants knew that the affair referred to in the written confession was the holdup of the complaining witness Gardner.

[5, 6] Another point urged by appellants as a reason for reversal of the judgment is the fact that, during the voir dire examination relating to the admission of the written confession, the court permitted certain testimony to be given by one of the officers relating to a mask found and also a planned bank robbery. It appears from the record that, during the conversation had by this officer with the defendant Dutro prior to the writing of the confession, mention was made of a certain mask which the officers questioned appellant Dutro about, and which the officers claimed belonged to Dutro. In this same conversation reference was also made to an alleged plan or attempt to rob a bank by the appellants. Questions and answers relating to these matters were objected to by appellants and overruled by the court. The admis-

sion of this testimony, it is urged, was a serious error operating to the disadvantage of the appellants, particularly in view of the fact that the complaining witness Gardner testified that neither of the appellants wore a mask at the time of the holdup. Manifestly the evidence relating to the mask and to any planned bank robbery was immaterial and incompetent so far as this case in chief was concerned. But we are not prepared to say that there was prejudicial error in admitting this testimony, which was received after the defendants had testified to the effect that the confession had been obtained by means of threats and coercion. The matters objected to formed a part of the conversation and discussion between the appellants and the officers at the time that the officers were endeavoring to ascertain information concerning the history and conduct of appellants in and about Long Beach, and all of this conversation took place immediately prior to the signing of the confession and at the time that the appellants claimed they were being subjected to brutal treatment and undue influence which resulted in the confession. That the court intended to and did limit the testimony to the voir dire examination appears from the fact that the court gave to the jury the following instruction:

"The court instructs the jury that all the evidence in this case pertaining to a mask, the larceny of an automobile, and an intent or attempt to rob a bank, if you find that there is any such evidence in this case, should be entirely disregarded by the jury in determining the guilt or innocence of the defendants as to the offense charged in the information."

[7] The verdict brought in by the jury, finding Marion D. Stuart guilty, reads as follows:

"We, the jury in the above-entitled action find the defendant Marion D. Stuart guilty of robbery, a felony as charged in the information, and find it to — robbery of the first degree."

[8] Appellant Stuart contends that the verdict is null and void, because of the failure of the foreman to insert the word "be" between the words "to" and "robbery." There is absolutely no merit in this contention. The verdict clearly shows that the jury intended to find and did find the defendant guilty of robbery in the first degree. Any error in grammar or the use of words when the language clearly shows what is intended is wholly immaterial. The record shows that in the verdict found against the defendant Dutro the foreman did insert the word "be," but apparently overlooked this in the Stuart verdict.

[9] It is urged that prejudicial error was committed by the district attorney, in that during his argument in connection with this matter he used the following language:

"And he was afraid they were going to kill him. That is why he signed it. Did they ask him if the confession was true or false? No. They begged the issue. If it had been false,

do you not think there would have been some testimony, when they were on the voir dire proceeding, to that effect? Mr. Stutsman said that 'they denied to the Long Beach officers at the time of their arrest; they denied it on the 25th; and they have denied it; and they denied it on the witness stand.' Is there a single bit of evidence from the lips of either of these defendants on the witness stand in denial? Is there a single bit of evidence in this record from the lips of the defendant or either of them concerning the robbery?"

[10] An examination of the record discloses the fact that the attorney for defendant Dutro, in his argument to the jury, asserted that the defendants had denied upon the witness stand any complicity in the robbery. It was evidently this statement of defendant's counsel that the district attorney was answering. It appears that the defendants took the witness stand only for the purpose of testifying in voir dire on the question of whether the confession had been given freely and voluntarily. Evidently counsel for the defendant in his argument, referring to the fact that the defendant had denied the commission of the offense while on the witness stand, referred to the testimony given on the voir dire examination. But the appellants now contend, even if that be true, the district attorney had no right to refer to it in his argument. This contention might have been upheld were it not for the fact that the attorney for the appellant Dutro invited the district attorney to use the language he did, by making the assertions that the defendants had denied that they were implicated in the offense. Without question the district attorney had a right to answer or reply to any assertion of fact made by the defendant's counsel in his argument to the jury, and the record clearly shows this is all that the district attorney did or attempted to do. It does not appear that the district attorney made any further reference to the matter after the controversy which took place at the time that the district attorney made the statement in question had closed. Nor did appellant request the court to instruct the jury to disregard the remarks made by the district attorney. In the light of the overwhelming evidence produced in the case pointing to the defendant's guilt, we do not believe, from any standpoint in considering this question, the appellant can be heard to complain. *People v. Nakis*, 184 Cal. 105, 193 P. 92.

[11, 12] Other points are urged by appellants in support of their request for a reversal of the judgment, but we do not deem them of sufficient importance to merit detailed attention. Conceding that there may have been a deviation by the court from a correct course in some of its rulings, we do not feel that any such error justifies a reversal of the judgment. The record shows an abundance of evidence to support the verdict, and we are sat-

isfied that the jury was not misled by any error in the court's ruling.

The judgment of the court and the order denying defendant's motion for a new trial are affirmed.

We concur: CONREY, P. J.; CURTIS, J.

75 Cal. App. 115

PEOPLE v. LINDSAY. (Cr. 1274.)

(District Court of Appeal, First District, Division 2, California. Nov. 5, 1925. Rehearing Denied Dec. 1, 1925. Hearing Denied by Supreme Court Jan. 4, 1926.)

1. Criminal law §1144(13)—On appeal from conviction, conflicts in evidence assumed resolved against defendant.

On appeal from conviction of embezzlement, appellate court will assume that jury resolved all conflicts in evidence against defendant.

2. Embezzlement §44(6)—Evidence held to show embezzlement by real estate agent.

Evidence, showing that real estate agent falsely represented to principal that purchaser had not paid a note due and juggled accounts so as to lead principal to believe that there was nothing further due her from agent who retained principal's money for himself, and that he misappropriated rents, made false entries, and claimed same credits twice, held to warrant conviction for embezzlement.

3. Indictment and information §176—Allegation of embezzlement on date of false accounting by agent with principal held to conform to proof.

Indictment, alleging embezzlement on day when real estate agent procured receipts from principal and purported to make a settlement in full while concealing and misrepresenting facts with relation to his collections and disbursements to principal's damage, held to conform to proof as to date of embezzlement and demand at later date by principal's attorney for money due did not change date of embezzlement.

4. Embezzlement §30—Allegation as to ownership of embezzled money by both husband and wife held supported by proof and in any event immaterial.

Information, in embezzlement against agent, alleging that money was property of both principal and her husband, held to be supported by proof; it being immaterial to defense whether money embezzled was separate property of principal or community property.

5. Criminal law §1167(1)—Proof of receipt of part of money by check under information charging receipt of lawful money of United States held not to warrant reversal of conviction.

Conviction of embezzlement held not reversed for technical inaccuracy, in that information charged receipt of lawful money of United States while proof showed some of money to have been received by check.

6. Criminal law *§* 829(1)—Refusal of requested instruction already covered by those given held proper.

Refusal of requested instruction already covered by those given held proper.

7. Criminal law *§* 14—Statute at time of commission of embezzlement held to apply, though later statute raised sum necessary to constitute felony embezzlement.

Under Pol. Code, *§* 329, providing that repeal of statute does not bar prosecution for violation thereof unless such intent is expressly intended by repealing act, instructions, in prosecution for embezzlement, applying law in effect at date of offense, held proper, notwithstanding Pen. Code, *§* 487, as amended by St. 1923, p. 271, increased value of property embezzled necessary to constitute felony; the rule being the same though later statute ameliorates punishment for same offense subsequently committed.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

A. B. Lindsay was convicted of embezzlement, and he appeals. Affirmed.

John W. Bantz, of San Francisco, and Peck, Bunker & Cole and W. B. Bunker, all of Oakland (Henry G. Tardy, of Oakland, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Chas. A. Wetmore, Jr., Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant from a judgment entered upon a verdict of a jury finding him guilty of embezzlement.

[1] It is contended that the evidence is insufficient to support the verdict in several particulars, and also that there is a variance between the information and the proof. At the outset let us state that there are numerous conflicts in the evidence, and we shall not concern ourselves with these conflicts, but proceed upon the assumption that the jury resolved all conflicts against the defendant.

The information charged that on or about November 24, 1922, and before July 11, 1923, in the county of Alameda, state of California, the defendant was the clerk, agent, servant, and bailee of Clara Hellesto and Emil Hellesto, her husband, and by virtue of such employment came into possession of the sum of \$1,250, the personal property of the said Clara and Emil Hellesto, and that defendant unlawfully and fraudulently converted, embezzled, and appropriated said personal property to his own use.

[2] The proof was that the defendant was a real estate agent in Oakland, Cal., and about June, 1920, sold a house on Miles avenue in Oakland for Mrs. Hellesto. The purchaser, Mrs. Hayes, made a cash payment of \$2,500 on this property, assumed a first mortgage, and gave a promissory note for \$1,200, secured by a deed of trust to Mrs.

Hellesto. In July, 1920, Mrs. Hellesto purchased another house on Manila avenue, Oakland. She paid \$1,000 down and gave a note secured by a deed of trust for the balance, which note was payable at the Bank of Italy at the rate of \$50 a month. Mrs. Hellesto arranged with the defendant to act as her general agent and collect the money upon the Hayes note and the rent from the property on Manila avenue and to make the payments upon her note at the Bank of Italy, pay the taxes upon the Manila avenue property and such other bills as he was authorized to pay, and to pay the balance to her. The defendant received \$250 as his commission upon the sale of the property to Mrs. Hayes, which sum was taken out of the initial payment. He also sold the Manila avenue house to one Van Dyke, and later Van Dyke deeded the property back to Mrs. Hellesto and continued to occupy it as a tenant, paying the sum of \$1,025 to defendant as the agent of Mrs. Hellesto. Defendant also rented this house to one Cardinet in 1922 for six months at the rate of \$75 a month and to a tenant named Genelly for eleven months at \$75 a month. The defendant collected money from these various sources for the account of Mrs. Hellesto from July, 1920, to November 24, 1922. In November, 1922, Mrs. Hellesto, not having received an accounting of the proceeds of the Hayes note, asked defendant if Mrs. Hayes had made any more payments upon it. The defendant replied that she had not and asked Mrs. Hellesto to come to his office. She did so on November 24, 1922, and was told that there was then due \$542 upon the Hayes note, but that defendant would give Mrs. Hellesto \$100 if she needed money and take an assignment of the Hayes note and remit the balance due thereon in monthly payments. At that time the entire amount of the Hayes note had been paid, but Mrs. Hellesto, believing defendant's statement to the contrary, assigned the note to him, which assignment recited a consideration of \$542 paid to Mrs. Hellesto and her husband by defendant. Defendant then gave Mrs. Hellesto his check for \$100 and his promissory note for \$442, as a payment of this Hayes note, although he had collected the full amount thereof from Mrs. Hayes. Before Mrs. Hellesto left defendant's office, defendant's wife, who assisted him in his business, entered, and, upon her suggestion, defendant stated that there was about \$242 due him for payments upon the Manila street property and had Mrs. Hellesto indorse that amount as paid upon the back of the note which he had given her. He then had Mrs. Hellesto sign a receipt for \$342, received upon the note for \$442, leaving a balance of about \$99 due thereon. It is to be observed that by these maneuvers defendant secured credit twice for his \$100 check. He credit-

ed himself with it as a payment upon the Hayes note before he gave his note for the balance, which he said was due—\$442. Later, he included it in a receipt for money to apply upon that \$442 note. Apart from this, he had two indorsements acknowledging the same amount of money—one on the back of the note and another in a separate receipt. Apart from this, he had falsely represented that the Hayes note had not been paid, and had thus retained for himself the money paid upon it and induced Mrs. Hellesto to accept his unsecured note for this amount and to assign to him a note secured by deed of trust. By this "juggling" of accounts Mrs. Hellesto was led to believe there was nothing more due her on the note, and in the statement compiled by the defendant and his wife, and used by them in the trial of this case, Mrs. Hellesto is given credit for no further sum with reference to this transaction. It thus appears that in this one transaction, in which, according to the defendant's statement, he was to pay Mrs. Hellesto \$542, he gave her \$100 and credit for \$242 owed by her, a total of \$342, making a balance due to her of about \$200. In addition to this, it appears from the evidence that he collected over \$100 interest upon the Hayes note for which he never accounted to Mrs. Hellesto. In his statement used at the trial he mentions only \$1,250 as being received upon this note and makes no attempt to account for the interest which he received and which amounted to over \$100. Defendant accounted for only \$800 rent received from the tenant Van Dyke and for \$675 received from Genelly. Van Dyke testified that he had paid \$1,025 to the defendant for the account of Mrs. Hellesto, and Genelly testified that he had paid \$825. The jury believed the testimony of these men, and this constituted a further embezzlement of \$375. In defendant's accounting he charged Mrs. Hellesto with an item of "Check to Mrs. Hellesto \$33.90." Defendant claims this item as an offset to the money he collected for Mrs. Hellesto. Mrs. Hellesto stated that this check for \$33.90 was given her as change for \$100 in currency which she had given to defendant to pay a bill of \$66.10, and this is corroborated by documentary evidence in the record. This false entry was another embezzlement.

There is also an item, "Receipt from Mrs. Hellesto \$163." Defendant credited himself with this amount in accounting to Mrs. Hellesto. She testified she signed this receipt at the request of the defendant, but that she received no money at that time, but was told by defendant that he had paid this amount upon the Van Pelt paint bill. In another place in the account defendant credited himself with the amount of this bill, thus making two credits for the same item.

If the jury believed Mrs. Hellesto and the other witnesses on behalf of the people, as it had a right to do, it could only conclude that the defendant had misrepresented many

things to Mrs. Hellesto and had made false entries in the statement of account and had contrived, by duplication of receipts and misrepresentations as to the amount of money he had collected, to defraud Mrs. Hellesto of many hundreds of dollars. Besides the evidence regarding the specific items mentioned, Mrs. Hellesto testified that defendant had collected about \$3,600 for her and had accounted for but \$2,400.

It is also to be remarked that the testimony of the defendant, in many respects, is unconvincing. Upon his preliminary examination he stated that in his settlement with Mrs. Hellesto he had represented that the Hayes note in her favor was unpaid at a time when he had collected the full amount thereof. At the trial of the action he contradicted this testimony and insisted that he had told Mrs. Hellesto that the Hayes note had been paid in full. No reasonable explanation is given of the fact that he required an assignment of it to himself. If it had been paid in full and Mrs. Hellesto was so informed, it was only necessary to mark the note paid and return it to the maker. But if the proceeds thereof had been collected by the defendant and not accounted for and the facts had been misrepresented to Mrs. Hellesto as she testified, the reason defendant desired the assignment becomes apparent.

[3] We see no merit in appellant's contention that the proof does not correspond with the allegation in the information that the embezzlement occurred on the 24th day of November, 1922. It was on that date that defendant procured receipts from Mrs. Hellesto and purported to make with her a settlement in full, while concealing and misrepresenting the facts with relation to his collections and disbursements to her damage and loss as hereinbefore set forth. It is true that at a later date Mrs. Hellesto's attorney made a demand upon defendant for the money due her, but this does not change the date of the embezzlement.

[4] Appellant complains that there is a variance between the information and the proof, in that the information alleges the money was the property of Mrs. Hellesto and her husband and that the evidence does not establish that the husband had any interest in the money. Mrs. Hellesto testified that she made the assignment of the Hayes note for herself and her husband, and the assignment recites that this note was executed and delivered to Mrs. Hellesto and her husband. There is also in evidence the complaint in a civil action wherein Mrs. Hellesto and her husband sought to recover the money due them from defendant. While the proof might have been fuller upon this subject, it is, nevertheless, sufficient, and even its entire absence would not prejudice the defendant, as it would be immaterial in the preparation of his defense whether the money was the separate property of Mrs. Hellesto or prop-

erty of the community. He was misled in no way in the trial of the action.

[5] There are a number of minor objections made which are too trifling to be considered in detail, such as the objection that the information charged the receipt of lawful money of the United States and the proof showed that some of the money had been received by check. Judgments are no longer reversed for such technical inaccuracies.

[6] Appellant complains of the refusal of the trial court to give certain instructions. Most of these were refused upon the ground that the jury was fully instructed as to the matters covered thereby and an examination of the instructions as a whole confirms this position.

[7] The only other contention made, while presented as an attack upon certain instructions of the court, is that section 487, Penal Code, prior to its amendment in 1923 (St. 1923, p. 271), making an embezzlement of a sum in excess of fifty dollars a felony embezzlement, is not applicable here. In 1923, this section was amended by raising the value of the property from \$50 to \$200. The instructions of the court proceeded upon the theory that the statute, as it existed at the time of the commission of the offense, was the law to be applied. Section 329 of the Political Code of California meets the situation. It reads as follows:

"The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of any act already committed in violation of the law so repealed, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act."

The cases of *People v. Pratt* (Cal. App.) 228 P. 47, *People v. Davis* (Cal. App.) 227 P. 494, *People v. Vincent*, 95 Cal. 425, 30 P. 581, and *People v. McNulty*, 93 Cal. 427, 26 P. 597, 29 P. 61, are in point. Appellant contends, however, that a different rule should apply where the amending statute ameliorates the punishment. No authorities are cited in support of this contention, and such a situation is not excepted from the general rule stated in section 329, Political Code.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

75 Cal. App. 765

WISE v. RADIS. (Civ. 4063.)

(District Court of Appeal, Second District, Division 2, California. Oct. 28, 1925.)

1. Brokers ⇨42—Contract of unlicensed real estate broker to act for another in capacity of broker held illegal and unenforceable.

Under Real Estate Brokers Act, as amended by St. 1921, p. 1294, contract of unli-

censed real estate broker to act for another in capacity of such broker for compensation is illegal and unenforceable.

2. Brokers ⇨42—Failure of one of two brokers to obtain license until after sale of property had been negotiated held to render acts of brokers in negotiating sale of property illegal.

Under Civ. Code, §§ 1608 and 1667, relating to unlawful contracts, failure of one of two real estate brokers, who had agreed to carry on business and divide profits, to obtain license required by Real Estate Brokers Act as amended by St. 1921, p. 1294, until after negotiation of deal, rendered acts jointly performed by such brokers illegal, and would have rendered recovery against owner of property impossible.

3. Partnership ⇨20—Agreement of real estate brokers to carry on joint enterprise and to divide "profits" and losses held to constitute "partnership."

Profits resulting from joint venture, in which two real estate brokers were engaged, and of which each was to receive equal share, were "profits" in strict sense of such term, and did not constitute compensation to be paid by one to other for services rendered, and such joint venture in general constitutes a "partnership," under Civ. Code, § 2395.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Partnership; Profit.]

4. Brokers ⇨66—Real estate broker not licensed held not entitled to recover share of commission against broker with whom he acted.

Where real estate brokers agreed to share profits of transactions, and one did not have license required by Real Estate Brokers Act, as amended by St. 1921, p. 1294, until after negotiation of sale he could not recover his share of commission from other broker.

5. Contracts ⇨138(1)—Party to illegal contract or transaction cannot enforce rights arising thereunder.

Party to illegal contract or transaction cannot enforce rights arising thereunder.

6. Brokers ⇨66—Defendant may set up illegality of contract as defense.

Courts will not enforce contract between brokers, one of whom did not procure broker's license required by Real Estate Brokers Act, as amended by St. 1921, p. 1294, and will permit defendant, sued for share of profits arising thereunder, to defend thereon because of public policy, regardless of whether defendant was in *pari delicto*.

7. Contracts ⇨140—Defendant cannot set up as defense to action for accounting of legal transactions that some other transactions are illegal.

Defendant cannot set up as defense to action, based on legal transactions, fact that some other transactions were illegal, especially where transactions were distinct and not so connected as to require court to pass on those which were illegal.

8. Contracts $\hookrightarrow$ 140—If, after execution of illegal contract, parties thereto make new one settling rights, latter contract governs.

If, after illegal contract has been executed, parties thereto make new one, settling their rights as between themselves, latter governs, and original contract becomes *functus officio*, and no longer is to be reckoned with.

9. Brokers $\hookrightarrow$ 66—Principle that execution of new contract, after entry into illegal contract settling parties' rights, governs relations held not to apply to party seeking recovery on executory illegal contract.

Doctrine that, after illegal contract has been executed, if parties make new one settling rights between themselves, latter governs, and former is not to be reckoned with, does not apply in action by real estate broker to enforce contract with another broker to pay him share of profits of joint enterprise, defended on ground that plaintiff had failed to procure broker's license required by Real Estate Brokers Act, as amended by St. 1921, p. 1294.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by Charles H. Wise against W. F. Radis to recover a real estate broker's commission. From a judgment for plaintiff, defendant appeals. Reversed.

Clark, Law & Clay, of Los Angeles, for appellant.

C. C. Mishler, John F. Keogh, and Julius V. Patrosso, all of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action to recover a sum which plaintiff claims is due him as his share of a commission jointly earned by himself and defendant in negotiating the sale of certain real property on behalf of the owner. The commission was paid to the defendant by the owner of the property. The complaint, which is cast in the form of a common count for money had and received, alleges that defendant is indebted to plaintiff in the sum of \$875 for money received by the former to and for plaintiff's use. From a judgment for plaintiff in the sum sued for the defendant appeals.

It is the theory of plaintiff that he and defendant were partners in the real estate transaction in which was earned the commission that was paid to defendant, and that therefore he is entitled to recover from defendant one-half of the commission so received by the latter. Briefly, the facts are these: During the year 1921 each of the parties to the action was a real estate broker engaged in business as such in the city of Los Angeles. Each maintained an office at his own residence, and each had obtained a real estate broker's license for the year 1921, issued to him individually. In the early part of that year they orally agreed to

work together as brokers in negotiating the purchase and sale of real properties. They agreed to divide equally all profits and losses made or incurred by them in each deal. Plaintiff testified that "each deal would be closed up separately"; that, upon closing each deal, they "would divide the profits after the expenses had been paid," and that they "arranged to and did work together" on each deal. Some time in the month of November, 1921, the property, the sale of which resulted in the payment of the commission here in question, was listed by the owner with the parties to this action to negotiate a sale thereof as real estate brokers. Thereupon plaintiff and defendant caused a painted sign to be placed upon the premises, which read in part:

"For Sale. See Radis & Wise, * * * exclusive agents."

On January 6, 1922, plaintiff and defendant commenced the negotiations with the prospective buyer who later purchased the property, and on January 10, 1922, that person and the owner, who meanwhile had been introduced to one another by the parties to this action, came to an agreement upon the terms of the sale. On that date, therefore (January 10, 1922), plaintiff and defendant earned the commission which the vendor had agreed to pay them for their services. Thereafter, and prior to the commencement of the action, the vendor paid the full amount of the commission, amounting to \$1,750, to defendant, who keeps it and refuses to pay any part of it to plaintiff. It is a fair inference from all the evidence in the case that defendant, before the commencement of the negotiations with the person who later bought the property, had applied for and had received his real estate broker's license for the year 1922. Plaintiff, however, did not apply for his license for the year 1922 until January 28th of that year, and none was issued to him until the 31st day of that month, or about three weeks after the sale of the property and the accrual of any right of action against the owner for the agreed commission. It may reasonably be inferred from all the testimony in the case that at no time did plaintiff or defendant apply for or receive a copartnership real estate broker's license, i. e., a real estate broker's license issued to the copartnership, as such, in the firm name. Whatever license either possessed was one which had been issued to him individually and not as a member of a copartnership.

Appellant contends: (1) That, since he and respondent earned the commission as copartners, the latter must fail in this action, for the reason that one partner cannot maintain assumpsit for moneys received by his copartner, but must resort to equity for an accounting; and (2) that to succeed in his action respondent must rely upon a contract which is

illegal under the provisions of the Real Estate Brokers Act. Stats. 1919, p. 1252; amended 1921, Stats. 1921, p. 1294. In reply to appellant's first point, respondent contends that each real estate "deal," jointly participated in by them, was a separate partnership transaction, and that, while it is the general rule that one partner cannot maintain an action at law for moneys received by his copartner, but must resort to equity for an accounting, there is an exception to this rule which permits an action in assumption where the right of action is based upon a single partnership transaction and the facts are such that no complex account, involving a variety of partnership transactions, is necessary. As bearing upon this reply to appellant's first point, *Jepsen v. Beck*, 78 Cal. 540, 21 P. 184, and the authorities cited in the note to *Martin v. McBryde*, 21 A. L. R. 57, 60, and 64, may be consulted. However, if appellant's second point is well taken, and we think it is, it will not be necessary to determine the question presented by his first point. We shall proceed, therefore, to a consideration of appellant's second point. This point involves two main questions: (1) Was the contract for a commission which was made with the owner of the property illegal under the terms of the Real Estate Brokers Act? Or, what in effect amounts to the same thing, was the transaction under which the commission was earned an illegal transaction? (2) If the contract or transaction was illegal, must respondent rely upon it in order to make out a case against appellant for his share of the commission?

The Real Estate Brokers Act contains these provisions:

Section 1: "It shall be unlawful for any person, copartnership or corporation to engage in the business, or act in the capacity of a real estate broker * * * without first obtaining a license therefor."

Section 2: "A real estate broker within the meaning of this act is a person, copartnership or corporation who, for a compensation, sells, or offers for sale, buys, or offers to buy, or negotiates the purchase or sale or exchange of real estate * * * for others, as a whole or partial vocation. * * * One act, for a compensation, of buying or selling real estate of or for another, or offering for another to buy or sell * * * real estate * * * shall constitute the person, copartnership or corporation making such offer, sale or purchase * * * a real estate broker within the meaning of this act."

Section 10: " * * * If the licensee be a copartnership, the license issued to it shall entitle one member of said copartnership to engage in the business of real estate broker within the meaning of this act. For each other member of such copartnership who engages in the business of real estate broker within the meaning of this act the annual fee shall be two dollars * * * all licenses shall expire on December thirty-first of each year."

Section 11: " * * * Each person, firm or corporation licensed as a broker under the pro-

visions of this act shall be required to have and maintain a definite place of business in the state of California which shall serve as his [or its] office for the transaction of business."

By section 9 of the act it is provided that each application for a license shall not only state the name of the person, copartnership or corporation applying for the same, but shall also state "the location of the place or places of business for which such license is desired."

Section 11a provides that every individual, firm, or corporation licensed as a broker "shall erect or maintain a sign on the premises wherein is located his [or its] place of business, on which shall be plainly stated that he [or it] is a real estate broker."

Section 18: "It shall be unlawful for any licensed broker to pay a commission for performing any of the acts herein specified to any person who is not a licensed broker, or a licensed salesman."

Section 20: "No person, copartnership or corporation engaged in the business or acting in the capacity of a real estate broker or a real estate salesman within this state shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any of the acts mentioned in section two hereof without alleging and proving that such person, copartnership or corporation was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose."

The provision in section 2 to the effect that a single act, for a compensation, of buying or selling real estate of or for another, or offering for another to buy or sell real estate, constitutes the person, copartnership, or corporation making such offer, sale, or purchase a real estate broker, means precisely what it says. The particularity with which the clause is phrased "leaves no room for any other interpretation than that which its plain terms import." *Haas v. Greenwald* (Cal. Sup.) 237 P. 38.

The licenses required by the act do not run from year to year. They automatically expire at the close of each calendar year, and a new license must be applied for and issued for the ensuing year. Section 10, subd. 4; *Firpo v. Murphy* (Cal. App.) 236 P. 968.

[1,2] The contract of an unlicensed real estate broker to act for another in the capacity of such broker, for a compensation, is, without doubt, illegal and unenforceable. *Houston v. Williams*, 53 Cal. App. 267, 200 P. 55; *Gardner v. Tatum*, 81 Cal. 370, 22 P. 880. It has been held in analogous cases that no subsequent compliance with the statute will cure the illegality of the previous contract. *Gardner v. Tatum*, supra; *Luce v. Cook*, 227 Pa. 224, 75 A. 1093. Section 20 of this act, however, does, in effect and somewhat as an act of grace, permit a recovery by the broker, though he possessed no license when his contract was entered into with the person agreeing to pay the commission, if he

in fact became a duly licensed broker by the time his cause of action arose, i. e., at the time when his commission was earned and became payable. *Houston v. Williams*, supra. That, however, is not this case. No license was issued to respondent for the year 1922 until after the "deal" was closed and the commission was earned.

With the above provisions of the statute in mind, we proceed now to a consideration of the legality of the transaction which the parties to this action carried on with the buyer and the seller of the property. It is obvious that the acts performed by appellant and respondent in bringing buyer and seller together and in negotiating the sale of the property on behalf of the latter were acts performed by them as real estate brokers for an agreed compensation. Those acts, therefore, constituted an illegal transaction, unless the requisite license had been issued at the times when the negotiations were being conducted. Equally obvious is it that, if the requisite license was not issued, the commission which was paid by the owner to appellant was paid as the result of an illegal transaction.

[3] Under the facts of this case the transaction was illegal whether we regard the relation between appellant and respondent as that of partners, in the true sense of that term, or not, though we incline to the view that they were partners in the full meaning of the word. The profits resulting from the joint venture in which they were engaged, and of which each was to receive an equal share, were "profits" in the strict sense of that term, and did not constitute a compensation to be paid by one to the other for services rendered. Their joint venture was an association of two persons to carry on a definite joint enterprise and to divide the profits and losses. This, in general, constitutes a partnership. Civ. Code, § 2395. See *Gray v. Janss Investment Co.*, 186 Cal. 642, 200 P. 401; *Quinn v. Quinn*, 81 Cal. 14, 22 P. 264; *Hendy v. March*, 75 Cal. 569, 17 P. 702; *Westcott v. Gilman*, 170 Cal. 562, 569, 150 P. 777, Ann. Cas. 1916E, 437; and *Sullivan v. Sullivan*, 122 Wis. 326, 99 N. W. 1022. However, as we have stated, the result must be the same whether the relation between appellant and respondent was or was not that of copartners.

If the relation between appellant and respondent was such that a copartnership existed between them, then, if the strict letter of the Real Estate Brokers Act must prevail, it may be gravely doubted whether a copartnership license, issued to the firm as such, was not an essential prerequisite to the validity of the negotiations which appellant and respondent conducted in bringing the buyer and seller together. The language of section one of the act is that it "shall be unlawful for any * * * copartnership to engage in the business, or to act in the capacity, of a real estate broker * * * without first ob-

taining a license therefor." There would seem to be some reason to believe that this language, when read in connection with other provisions of the act, means that, when a copartnership is acting as a real estate broker, its acts are illegal, unless a copartnership license has been issued to it, and that the issuance of a license to each copartner as an individual real estate broker will not alone suffice to legalize acts done by them for their firm as copartners. Not only does the statute expressly declare that it shall be unlawful for any copartnership to engage in the business, or act in the capacity, of a real estate broker without first obtaining a license therefor, but it also is provided in section 10 that, "if the licensee be a copartnership, the license issued to it shall entitle," etc. And in section 11 it is declared that "each * * * firm licensed as a broker * * * shall be required to have and maintain a definite place of business" in the state "which shall serve as his [its] office for the transaction of business"; and by section 11a that "each * * * firm * * * licensed as a broker * * * shall erect and maintain a sign on the premises wherein is located his [its] place of business, on which shall be plainly stated that he [it] is a real estate broker." We confess that we are unable to perceive how a compliance with these regulatory provisions would be possible where the business is conducted by a firm to which no copartnership license has been issued, even though each of its members may have procured the issuance to him of an individual license, particularly where, as here, the individual copartners have separate and distinct places of business.

However, it is not necessary to decide whether a copartnership license is necessary in a case such as this, and we expressly refrain from doing so, for here one of the joint adventurers neglected to secure a license for the year 1922 until some time after the close of the negotiations which resulted in the sale of the property; i. e., until some time subsequent to the earning of the commission and the accrual of any cause of action therefor. Respondent's failure to secure such license until after the sale of the property had been fully negotiated and the stipulated commission had been earned rendered the transaction illegal and void, so far as it affects the parties to this action as real estate brokers, even if a copartnership license was not necessary. The performance of services jointly by both respondent and appellant constituted the consideration for the commission which the owner of the property agreed to pay. If any part of this consideration was illegal, the entire contract was void. Civ. Code, § 1608. The rendition of services by respondent subsequent to January 1, 1922, was, as we have seen, unlawful, because those services were rendered in direct violation of an express provision of the law, and likewise in direct

contravention of the express policy of the statute, Civ. Code, § 1667. It follows, therefore, that, even if the parties to this action were not copartners in the strict sense of the term, and even if the procurement of a copartnership license in the firm name was not a necessary prerequisite, still, since appellant and respondent had agreed to render their services jointly, the contract for the payment of a commission became illegal and void after January 1, 1922; or, if the contract did not become illegal, the acts jointly performed by appellant and respondent subsequent to that date—acts which culminated in the sale of the property through their joint efforts and which constituted the consideration for the commission agreed to be paid them—were illegal, and no recovery of the commission could have been enforced by the parties to this action against the owner of the property. See *Haas v. Greenwald*, supra; *McIver v. Clarke*, 69 Miss. 408, 10 So. 581; *Hittson v. Browne*, 3 Colo. 304, and *Central Trust & S. D. Co. v. Respass* (Ky.) 56 L. R. A. 479. This brings us to the second phase of the question: Can respondent recover his share of the commission from appellant notwithstanding the illegality of the transaction?

[4] It may be conceded, for the purpose of this decision only, that the "commission" referred to in section 18 of the act means a commission paid by one real estate broker to another for services performed by the latter for the former in the way of assistance rendered in bringing buyer and seller together or in otherwise helping in the negotiations, and that it does not include money sought to be recovered by one partner, as his share of the partnership profits, in an action by him against a copartner who has received the profits. It also may be conceded, for the purpose of this decision only, that the "compensation" referred to in section 20 of the act means the compensation which is due from the principal to the broker, and that it does not include a partner's share of such compensation after it has been paid by the principal to one of the members of the brokerage firm which has effected the sale. It is claimed by respondent that, if it be conceded, as it is, for the purposes of this decision, that there is nothing in either of these sections of the statute which directly inhibits the recovery by him of his share of the commission paid to his copartner, then he is entitled to such recovery, notwithstanding the illegality of his acts in earning the commission. His argument is substantially this: The contract which he and appellant made with the owner of the property was fully executed on the part of the latter, who paid appellant the agreed commission, notwithstanding the illegality of the transaction; where an illegal contract or an illegal transaction has been fully executed, and one of the parties has the avails thereof, all the

harm that can be done to public policy has been done, and therefore, so respondent argues, the party who has the avails can be compelled to pay them, or a proportionate share thereof to the other party.

[5] We are unable to agree with respondent's reasoning. No principle of law is better settled than that a party to an illegal contract or an illegal transaction cannot come into a court of law and ask it to carry out the illegal contract or to enforce rights arising out of the illegal transaction. He cannot set up a case in which he necessarily must disclose the illegal contract or the illegal transaction as the basis of his claim. In *Moore v. Moore*, 130 Cal. 110, 62 P. 294, 80 Am. St. Rep. 78, our Supreme Court quotes Judge Duncan in *Swan v. Scott*, 11 Serg. & R. (Pa.) 164, as follows:

"The test whether a demand connected with an illegal transaction is capable of being enforced is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot establish his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant."

If the issuance of a copartnership license was a necessary prerequisite to the legality of the firm transactions which appellant and respondent jointly carried on as copartners, then, since no such license was ever issued, or was ever even within the contemplation of the partners, the partnership contract was illegal from its inception, for in that case the partnership contract necessarily would involve the performance of illegal acts. And since respondent, in order to establish his case, necessarily must invoke the partnership contract, it follows that, if the issuance of a copartnership license was requisite, the court will not lend its aid to assist either party to the contract in an action against the other, notwithstanding the receipt by the latter of partnership profits, but will leave both parties where it finds them. *Chateau v. Singla*, 114 Cal. 91, 45 P. 1015, 33 L. R. A. 750, 55 Am. St. Rep. 63; *Moore v. Moore*, supra; *Woodson v. Hopkins*, 85 Miss. 171, 37 So. 1000, 38 So. 298, 70 L. R. A. 645, 107 Am. St. Rep. 275; *Kennedy v. Lonabaugh*, 19 Wyo. 352, 117 P. 1079, Ann. Cas. 1913E, p. 133; *McMullen v. Hoffman*, 174 U. S. 639, 19 S. Ct. 839, 43 L. Ed. 1117; *Vandegrift v. Vandegrift*, 226 Pa. 254, 75 A. 365, 18 Ann. Cas. 404; *King v. Winants*, 71 N. C. 469, 17 Am. Rep. 11. In *Chateau v. Singla*, supra, our Supreme Court held that a partnership formed to carry on the business of letting furnished apartments for the purpose of prostitution is illegal, and that therefore one partner could not maintain an action against the other for an accounting of the rents collected by the latter.

The same result must follow if it be held that the issuance of an individual broker's license to each partner would satisfy the re-

quirements of the statute, and that the issuance of a copartnership license in the firm name was not a sine qua non. If, in a case like this, the issuance of each partner of an individual broker's license satisfies the requirements of the statute, then, even though the contract of copartnership may have been valid at its inception, and during all of the balance of the year 1921, nevertheless the real estate transaction in which the partners engaged in January, 1922, and out of which grew the payment of the commission to appellant, was an illegal transaction, for the reasons stated in *Haas v. Greenwald*, supra. And with respect to that transaction respondent was in *pari delicto*. Indeed, he was, if anything, more guilty than appellant, for it was he who failed to make timely application for a license for the year 1922. According to respondent's testimony, it was agreed, when the partnership was formed, that the two should work together on each deal. This agreement, therefore, if we assume that a firm license was not essential, involved the implied undertaking on the part of each that at all times during the existence of the partnership he would maintain his status as a duly licensed real estate broker. But this respondent failed to do for the period of almost a month, and it was during this period that the partners initiated and consummated the deal out of which grew respondent's claim to a share of the commission paid to appellant. It was because of respondent's delinquency that the real estate transaction, in so far as it affected appellant and respondent as real estate brokers, was an illegal and void transaction.

Respondent testified that each of the transactions in which he and appellant jointly participated was treated separately, and that upon the termination of each "deal" the net profit was divided between them. Hence there was, in effect, a separate oral partnership contract as to each transaction. To entitle respondent to a recovery in this action he must rely upon the contract which he had with appellant to co-operate with the latter in this particular "deal," and to share equally in the commission to be earned, after deducting all expenses. But on January 1, 1922, this contract, as an agreement by two persons, one of whom was not a licensed real estate broker, to jointly negotiate the sale of real property became, and until the final consummation of the deal between the buyer and the seller continued to be and was, through respondent's fault, an illegal contract—a contract which involved the doing of an unlawful act. Respondent's cause of action grows directly out of this illegal contract between himself and appellant. Only through it and by proving it can he get at his share of the commission. There is nothing collateral, in respect of which, the partnership contract being out of the question, a collateral demand arises, as was the case in

some of the decisions cited by respondent. "Here," as was said by the master of the rolls in *Sykes v. Beadon*, 11 Ch. D. 170, "you cannot stir a step but through that illegal agreement." In it respondent's case is inextricably entangled.

[6] Our conclusion from the foregoing is that whether the partnership contract be regarded as illegal from the beginning because of the failure of the joint adventurers to take out a partnership license, or whether it became illegal on and after January 1, 1922, by reason of respondent's failure to maintain his status as a duly licensed real estate broker, in either case the action must be regarded as one to enforce an illegal contract. The courts refuse to enforce such a contract, and permit the defendant to set up its illegality as a defense. While the defense is not an honorable one, yet the courts permit it to be set up even though in doing so the defendant may allege his own moral turpitude. Violators of the law who are parties to such illegal contracts are repudiated by the courts because of the great supervening principle of public policy involved, without reference to the attitude which one of the parties may occupy to the other, where both are in *pari delicto*. As pungently put in *McMullen v. Hoffman*, supra:

"The court refuses to enforce such a contract and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum."

[7] The decisions relied upon by respondent, and now to be adverted to, are clearly distinguishable from this case. In *Walker v. Kremer*, 29 Fed. Cas. No. 17,076, the complainant sued upon an account stated, and the action was based, not upon the illegal contract, but upon a collateral contract; namely, the implied agreement to pay the balance shown to be due by the account stated. In *Penn Mut. L. Ins. Co. v. Bradley*, 66 Hun, 635, 21 N. Y. S. 876,¹ the complaint alleged, and the answer admitted, facts which showed that the contract was not an illegal one. In *Decell v. Hazlehurst, etc., Co.*, 83 Miss. 346, 35 So. 761, complainant sought an accounting from its agent for moneys received by him in that part of complainant's business which was confessedly legal. It is well established that, where there have been both legal and illegal transactions, the de-

¹ Reported in full in the New York Supplement; not reported in full in Hun Reports.

fendant cannot set up, as a defense to an action for an accounting of the legal transactions, the fact that some other transactions are illegal, especially where the transactions are distinct and not so connected as to require the court to pass upon those which are illegal. *Central Trust & S. D. Co. v. Respass*, supra. See, also, note to *Fryer v. Harken*, 23 L. R. A. (N. S.) 485. *Baldwin v. Potter*, 46 Vt. 402, is more nearly but not quite in point. It was a case where an agent, in the course of his agency, received from third parties for his principals the proceeds of illegal contracts to which his principals were parties, and who, therefore, were in *pari delicto*. The agent likewise was a participant in the making of the illegal contracts, and he, therefore, also was in *pari delicto*. It was held that the agent could not set up the illegality of the contracts to defeat a recovery by his principals of the moneys which he had received for the latter's use. This Vermont case, though it is in line with a number of decisions from other jurisdictions which support the doctrine there announced, is opposed by such well-reasoned cases as *Woodson v. Hopkins*, supra, where the authorities on both sides of the question are collected and exhaustively analyzed. See, also, 15 Am. & Eng. Ency. of Law (2d Ed.) pp. 1009, 1010. However, the Vermont case is not strictly in point, for the reason that here both appellant and respondent were principals in their contract with the owner of the property, and the money was paid to appellant, not as an agent to receive it for respondent, but as one of the principals to that contract. In *Woodson v. Hopkins*, supra, the court says:

"The other misconception is in confusing the case of a suit by one of two parties to an illegal contract against the other with a suit by one of the parties against a third party, *no way connected with the illegal contract* [italics ours], to collect money paid by the other party to the illegal contract, which has been executed, to such third person for the use of the party suing. This principle is clearly stated at page 1007 [2] A. & E. Ency. of Law, par. 9, and it is stated there, with great exactitude of statement, that the reason that the third person cannot defend an action by the latter is 'that in such a case the action is not based on the illegal contract, but, instead, upon the independent contract of such third person to deliver over the property received by him.'"

We may add that the author of the article in the American & English Encyclopædia of Law states with equal exactitude the rule which obtains where, as here, one partner is suing another for his share of the profits of an illegal transaction. The author says:

"Where an illegal contract entered into by a partnership as a party of the one part is fully executed, and profits arising therefrom come into the hands of one of the partners, the *general rule* [italics ours] seems to be that he will not

be compelled to account to his copartners for their share of such profits; and where the agreement of partnership is illegal on account of the consideration moving between the partners, or the character of the business to be transacted, the court will not, if business has been transacted and the profits of the transaction have been received by one partner, compel him to account to the others for their share of the profits. In *some cases* [italics ours], however, the proposition has been advanced that if the illegal purpose of the partnership has been accomplished the courts may direct a division of the profits." 15 Am. & Eng. Ency. of Law (2d Ed.) p. 1011.

Referring to the last sentence in this quotation, the court, in *Woodson v. Hopkins*, supra, says of it that "the text repudiates this as unsound." And the Mississippi court is right. The doctrine referred to in the last sentence of the quotation is unsound. The doctrine which has the support of reason and the weight of authority, and the one which has been recognized by our own Supreme Court in such cases as that of *Chateau v. Singla*, supra, is the doctrine which is set forth in the preceding sentence of our quotation from the American & English Encyclopædia of Law.

[8, 9] It is a generally recognized doctrine that if, after an illegal contract has been executed, the parties thereto make a new one settling their rights as between themselves, the latter contract governs their relations and the original becomes *functus officio* and no longer is to be reckoned with. That was the doctrine announced and applied by the district court of appeal in *Johnson v. Davidson*, 54 Cal. App. 251, 202 P. 159. That doctrine, however, is not applicable to the facts of this case. Here respondent is seeking to enforce a contract which he says he had with appellant. As between the parties to this action that contract is yet executory, and appellant has repudiated it.

We do not deem it necessary to prolong this discussion by referring further to specific cases. It is sufficient to say that the better reasoning and the great weight of authority condemns the doctrine of an implied promise in the matter of the division of the profits of an illegal contract between partners or joint adventurers who are in *pari delicto*.

The judgment is reversed.

I concur: WORKS, J.

CRAIG, J. I concur, but am not prepared to say that, where two brokers engage in a partnership for the sale of a single unit of property, and each at the time holds a broker's license which he retains throughout the transaction, the law requires these brokers to secure a license in the name of a firm to be organized for that particular transaction. This point is in no way involved in the instant case, and I therefore expressly reserve judgment upon it.

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CAREY v. PACIFIC GAS & ELECTRIC CO. (Civ. 2963.)

(District Court of Appeal, Third District, California. Nov. 6, 1925. Rehearing Denied Dec. 5, 1925. Hearing Denied by Supreme Court Jan. 4, 1926.)

1. Trial ☞139(1)—Weight of negative testimony that witness did not see street car nor hear bell before collision for jury.

Weight of negative testimony that witnesses did not see street car nor hear bell or other signal before collision of automobile therewith is for jury.

2. Evidence ☞586(2)—Finding of company's negligence held sustained by evidence.

Negative evidence that signals were not heard held sufficient to sustain jury's implied finding that street railway company, sued for damages from collision between automobile and street car at street intersection, was negligent notwithstanding positive testimony that warning was sounded.

3. Street railroads ☞112(3)—Burden on company to prove contributory negligence.

In action against street railway company for damages from collision between automobile and street car at street intersection, burden of proving contributory negligence was on defendant.

4. Street railroads ☞117(29)—Contributory negligence of automobile driver held for jury.

Contributory negligence of driver of automobile colliding with street car at street intersection, on dark, foggy night, held for jury on conflicting evidence.

5. Negligence ☞136(9)—Contributory negligence law question when reasonable man can draw but one inference.

Contributory negligence is question of law only when court is compelled to say that reasonable man could draw from facts but one inference pointing unerringly to plaintiff's negligence contributing to his injury.

6. Street railroads ☞85(4), 99(10)—Pedestrians and drivers crossing or using tracks not bound to stop, look, and listen.

Duty of one about to cross right of way of steam railroad to stop, look, and listen does not govern rights of pedestrians and vehicle drivers crossing or using tracks of street railroad; their duty being no higher than that of street railway company except that they must give way to clear passage of car because latter is confined to tracks.

7. Trial ☞194(17)—Instruction referring to street car as car "which collided with plaintiff's automobile" held not error; "collide."

In action for damages from collision between automobile and defendant's street car, instructions referring to latter as car "which collided with the automobile," held not inconsistent with defendant's instructions referring to automobile as in collision with street car; "collide" meaning "to strike or dash against each other, to come into collision," and material

question for jury being whether plaintiff, defendant, or both, approached point of collision negligently.

8. Trial ☞191(8)—Instruction in action for damages from collision between automobile and street car held not erroneous as assuming disputed facts.

Instruction to find for plaintiff, if he was exercising reasonable care, and defendant operated street car which collided with plaintiff's automobile at excessive speed, and plaintiff did not know, and in exercise of ordinary care could not have learned, of car's approach until automobile was on tracks, held not erroneous as assuming existence of disputed facts.

9. Street railroads ☞90(2)—Speed may be negligent, though not exceeding legal limit.

Mere fact that street car was not exceeding speed limit fixed by statute or ordinance at time of collision with automobile is not conclusive on question whether it was running at negligently excessive rate of speed.

10. Trial ☞253(4)—Instruction on street car motorman's right to assume that automobilist would exercise due care held properly refused, as ignoring issue whether motorman gave warning of car's approach.

In action for damages from collision between automobile and defendant's street car, instruction that defendant's motorman had right to assume that plaintiff would exercise due care in approaching tracks, and stop or turn aside until his conduct was such as should reasonably have led motorman to apprehend contrary, held properly refused, as ignoring issue whether motorman gave warning of car's approach.

11. Street railroads ☞90(4)—Motorman, giving no warning, cannot assume automobile would stop or turn aside.

Motorman, giving no warning of car's approach to street intersection, could not act on assumption that automobile driver approaching tracks would stop or turn aside, in absence of any indication that he was aware of street car's approach.

12. Trial ☞260(1)—Refusal of instructions covered by instructions given not error.

Refusal of instructions containing statements of law included in instructions given was not error.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by John C. Carey against the Pacific Gas & Electric Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Thos. J. Straub, Leo. H. Susman, and John P. Coghlan, all of San Francisco, and V. L. Hatfield and W. H. Hatfield, both of Sacramento, for appellant.

Martin I. Welsh and Robert H. Schwab, both of Sacramento, for respondent.

FINCH, P. J. The plaintiff was given judgment for damages resulting from a collision between his automobile and one of the

defendant's street cars in the city of Sacramento. The defendant prosecutes this appeal from the judgment. Appellant contends that the evidence not only fails to show that it was negligent, but that it shows conclusively that the plaintiff was guilty of contributory negligence.

At the time of the collision the plaintiff was driving his automobile south along Fourteenth street and near the west curb line thereof, and defendant's street car was going west along the north car tracks of K street. Both streets are 48 feet wide from curb to curb. Photographs of the automobile and of the street car, taken after the accident, indicate that they were both moving with considerable velocity at the time of the impact. The evidence is sufficient to warrant the inference that the street car ran into the automobile rather than that the automobile ran into the street car. The front bumper of the automobile was not bent or injured, but the left front wheel was demolished, and the left front fender and the left door were badly crushed and broken. The front wheels of the street car were forced off the rails of the track, and, according to the testimony of the motorman, the street car thereafter moved forward about four and a half feet before coming to a stop. The automobile was a new Stephens roadster, and the side curtains were in place and the windshield was closed. There is no contention that the plaintiff was not severely injured. The evidence bearing upon the questions of negligence and contributory negligence is sharply conflicting.

[1, 2] The plaintiff testified that he did not see or hear the street car until the instant of the collision; that it sounded no bell that he could hear; that he heard no bell or signal of any kind; and that his sight and hearing were good. He also testified that the night was "very foggy." Another witness testified that he was driving a Ford touring car west on K street, and had reached a point "about 16 or 17 feet" west of the west curb line of Fourteenth street when he heard the collision; that it was a "very foggy and dark" night; that he was driving with his head "outside the windshield" because he could not see through the glass "on account of the fog"; that he heard no bell or signal; and that his hearing was "all right that evening." The motorman and the conductor on the street car testified that the former rang the bell as he approached the intersection, and rang it violently while passing through the intersection; he having seen plaintiff's automobile when the street car was about 25 feet east of the crossing. The weight to be given to negative testimony of the character of that produced by the plaintiff is a question for the jury, and "It has frequently been held that negative evidence of this character is sufficient to sustain a verdict, * * * even though it conflict with other evidence to the effect that a warning was actually given."

Keena v. United Railroads of San Francisco (Cal. Sup.) 239 P. 1061; *Thompson v. Los Angeles, etc., Ry. Co.*, 165 Cal. 748, 134 P. 709; *Jones v. Southern Pacific Co.* (Cal. App.) 239 P. 429. Whatever opinion may be entertained as to the preponderance of the evidence upon the issue of negligence, it is clear that there is sufficient evidence to sustain the implied finding of the jury that the defendant was negligent.

[3] The burden of proving contributory negligence was upon defendant.

"Where contributory negligence is set up as a defense, it seldom happens that the question is so clear from doubt that the court can undertake to say as a matter of law how the jury should find upon the issue." 19 Cal. Jur. 735, and cases there cited.

[4] The plaintiff testified that he had driven south for the length of three blocks on Fourteenth street before the accident; that the night was "very foggy"; that the windshield "was covered with fog to some extent"; that it was equipped with a hand-wiper, which he used before starting, but not afterwards; that his headlights were adjusted to official requirements, and were turned on; and he could see objects ahead "possibly 15 or 20 feet"; that he was traveling 8 or 10 miles an hour, and could have stopped his automobile in 8 feet; that from a point 25 feet north of the north curb line of K street he "could see just past the corner" of a building at the northeast corner of the intersection, which appears to have been some 50 feet distant; that from the time he reached said point he looked to his left up K street for "quite a while," but saw no street car; that he then looked to the right, then "straight ahead"; and that as he was turning to look to the left again the collision occurred. The plaintiff also testified that it was "relatively quiet on the inside" of his automobile; that his eyesight and hearing were good; but that he did not see or hear the street car or hear the bell thereof or other signal. The driver of the Ford touring car referred to testified that, on hearing the collision, he "pulled up to the curb," and looked back, and that he could "just barely see the light in the street car," but could not see "the form of the street car." The plaintiff testified that it was dark "at the intersection." Several witnesses for defendant testified that there were street lights at the intersection, and that the street car and other objects could be seen from points a block or more distant therefrom; that as the plaintiff approached the intersection he was traveling at a high and unlawful rate of speed; that at the time the street car entered the intersection it was moving, with the power turned off, at a speed of about 15 miles an hour. The motorman testified that at that time he applied the brakes and stopped the car "just as soon as I could"; and that, when running

at the rate of 15 miles an hour, the street car could not be stopped under 80 feet.

It was stipulated at the trial that the ordinances of the city of Sacramento permitted street cars to run at not to exceed 25 miles an hour in that part of the city where the accident occurred, and gave street cars "the right of way over vehicles" at intersections.

[5, 6] While there is ample evidence upon which to have based a finding of contributory negligence, it cannot be held as a matter of law, contrary to the implied finding of the jury, that the plaintiff was guilty of negligence. The jury may have inferred from the foregoing evidence that the plaintiff was proceeding with due care; that he reasonably looked to the left to see if a street car was approaching along K street; that he did not see defendant's car, by reason of the dimness of the lights thereof in the fog, or hear its approach; and that the motorman did not sound the bell or give any warning of the approach thereof. "Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury." *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 208 P. 125.

"The duty of stopping, looking, and listening made incumbent upon one about to cross the right of way of a steam railroad is not the rule governing the rights of foot passengers and vehicle drivers in venturing upon, crossing, or using the tracks of a street railroad. The duty of such is no higher than or different in law from the duty of the company operating the electric car, saving in the one particular so often pointed out that, because the car is confined to its tracks, vehicles and foot passengers must give way to clear its passage." *Runnels v. United Railroads*, 175 Cal. 528, 531, 166 P. 18, 20.

In a case involving a collision between a street car and an automobile it is said:

"The failure of plaintiff to look and listen * * * was * * * not, as a matter of law, negligence on his part, but at most, a question to be determined by the jury." *Bidwell v. Los Angeles, etc., Ry. Co.*, 169 Cal. 780, 783, 148 P. 197, 199.

[7] In some of the instructions the court referred to defendant's street car as the car "which collided with the automobile" of plaintiff. Appellant argues that such language "tended to create in the minds of the jury an impression that the court believed that appellant's street car did collide with the automobile rather than the automobile with the street car." In another instruction framed by defendant's counsel and given at defendant's request the automobile is referred to as in "collision with the defendant's street car." There is no inconsistency be-

tween the two expressions. The definition of "collide" is "to strike or dash against each other; to come into collision," and the jury doubtless so understood the language criticized by appellant. Counsel for both parties must have so understood the terms employed by them in framing their respective instructions. It is not of great importance whether the street car or the automobile first reached the intersection of their paths, they having arrived at that point at approximately the same instant, but the material question for the jury to determine was whether the plaintiff or the defendant or both approached that point negligently.

[8, 9] Appellant contends that the court erred in instructing the jury that, if they believed from the evidence that the plaintiff "was exercising reasonable care for his own safety, and that the defendant operated said car which collided with said automobile * * * at a rate of speed in excess of what a prudent person would have operated said car under like circumstances toward said automobile," and plaintiff "did not know, and in the exercise of ordinary care could not have learned, of the approach of said car until his automobile was on the northerly tracks of said defendant, * * * and too late for him to have avoided the accident, and the said defendant failed to give" plaintiff "any warning whatsoever of any kind of the approach of said car towards said automobile in sufficient time to enable" plaintiff "to get out of the way of said approaching car, and by reason thereof, and without any contributory negligence of any kind on the part of" plaintiff, "said car collided with said automobile and inflicted injuries" upon plaintiff, then a verdict should be returned in his favor. There is evidence sufficient to warrant the inference that the facts were as enumerated in the instruction. The instruction does not, as appellant contends, assume the existence of any disputed fact, but tells the jury, in effect, that, if they find the facts to be as stated therein, their verdict should be for plaintiff. The photographs of the wrecked automobile and of the street car, and the testimony of witnesses to the effect that the night was dark and foggy, that plaintiff looked for, but did not see, the approaching car, or hear any bell sounded or warning given, and that the motorman, after seeing plaintiff's automobile, was unable to stop the street car in time to avoid the accident, considered together, are sufficient to justify the inference that the street car was being run "at a rate of speed in excess of what a prudent person would have operated said car under like circumstances," and that the other facts were as enumerated in the instruction. The mere fact that the street car was not exceeding the speed limit fixed by statute or ordinance is not conclusive upon the question whether it was running at a negligently excessive rate of speed. *Gross v. Burnside*,

186 Cal. 467, 469, 199 P. 780. No error appears in the instruction.

[10] Complaint is made of the court's refusal to instruct the jury as follows:

"The defendant's motorman had the right to assume that the plaintiff would exercise due care in approaching defendant's car tracks. He had the right to presume that plaintiff would stop or turn aside, until the conduct of plaintiff was such as should reasonably have led him to apprehend the contrary. So long as it appeared that plaintiff, with reasonable care, could stop his automobile or turn it to one side or the other, so as to avoid a collision, and there were no obvious indications that he might not do so, the motorman had the right to assume that he would do so and upon that assumption to proceed along the track."

The proposed instruction is substantially in the language of the decision in *Arnold v. San Francisco-Oakland T. Rys.*, 175 Cal. 1, 5, 164 P. 798. As said in *Hall v. San Francisco*, 188 Cal. 641, 643, 206 P. 459:

"The instruction is an illustration of the dangers of attempting to frame a charge to the jury upon isolated extracts from opinions of this court."

In the *Arnold* Case the driver of the automobile saw the approaching car in time to have avoided the collision by the exercise of reasonable care on his part. Negligence of the defendant in that case, therefore, could not be based upon failure of the motorman to give warning of the approach of the car. In this case the plaintiff's main reliance was upon defendant's failure to give such a warning. The proposed instruction entirely ignores that issue. The case of *Wallis v. Southern Pacific Co.*, 184 Cal. 662, 673, 195 P. 408, 413, was an action for damages for the death of the driver of a team of horses in a railroad crossing accident. When the engineer rounded a curve "some four or five hundred feet from the crossing he saw the heads of decedent's horses some ten feet from the tracks." The court said:

"He immediately sounded the warning whistle. He doubtless believed, and had a right to believe, that the driver would at once stop his team and not attempt to cross the track. * * * He was justified in assuming that at the distance from which he sounded the warning, and with the headlight and noise of the approaching train, the driver would be warned of his danger."

[11, 12] In this case there is sufficient evidence to justify the inference that no warning was given. The motorman certainly had no right to act upon the assumption that the plaintiff would stop or turn aside if no warning was given of the approach of the car, in the absence of any indication that the plaintiff was aware of its approach. The statements of law contained in other proposed instructions which the court refused to give

were included in other instructions which were given. Other points made by appellant are sufficiently disposed of by what has already been said, and need not be discussed separately.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

74 Cal. App. 681

BOTTOMS et al. v. MADERA IRR. DIST.
(MILLER & LUX, Inc., Intervener).
(Civ. 2977.)

(District Court of Appeal, Third District, California. Oct. 27, 1925. Hearing Denied by Supreme Court Dec. 24, 1925.)

1. Waters and water courses ⚡228—Irrigation districts possess only powers given by Legislature.

Irrigation districts are public corporations or agencies, and have only such powers as are expressly given them by act of Legislature, under and by virtue of which they exist, or are necessarily implied to carry out purposes of district.

2. Waters and water courses ⚡228½, New, vol. 10A Key-No. Series—Board of directors of irrigation district without power to dispose of property other than as provided by law.

While board of directors of irrigation district, in performance of their duties, have power to construct, acquire, or purchase water rights, canals, ditches, dams, etc., property so acquired is property of district, and board of directors possesses no power to dispose of any property other than as provided by law.

3. Waters and water courses ⚡228½, New, vol. 10A Key-No. Series—One dealing with irrigation district chargeable with knowledge of powers.

Any one dealing with a public corporation, such as irrigation district, a state agency, or an "executive arm of the state" is chargeable with knowledge of all powers that officers of such corporation or state agency possess or may legally exercise, and all contracts or purported contracts beyond scope of power vested in such officers are void, and knowledge must be taken, not only of extent of power, but also mode in which it may be exercised.

4. Waters and water courses ⚡230(4)—Expenditure for payment of claims for services in settlement of differences between owners and irrigation district held unauthorized.

Irrigation District Act, § 30, as amended by St. 1919, p. 662, does not authorize expenditure of money raised from sale of bonds of irrigation district towards payment of claims for services rendered in settlement of differences existing between owners of land within district and the district, irrespective of Bond Certification Act, § 3b, as amended by St. 1921, p. 1198.

5. Waters and water courses ☞230(4)—Otherwise carrying out purposes of act as applied to bonds issued by irrigation district construed.

Irrigation District Act, § 30, as amended by St. 1919, p. 662, authorizing issuance of bonds by irrigation district for purpose of constructing or purchasing necessary irrigation canals and works, " * * * and otherwise carrying out provisions of this act," or any other act, etc., held to authorize expenditure of moneys derived from sale of bonds in any construction work authorized by that act or any other act authorizing the district to acquire property to construct works, etc.

6. Waters and water courses ☞228½, New, vol. 10A Key-No. Series—Irrigation Act held to prohibit contract to pay for services in settlement of dispute.

General grant of powers to board of directors of irrigation districts, in Irrigation Act, § 15, as amended by St. 1919, p. 661, is relative only, and must be exercised in accordance with limitations found in sections 30, 30a, 37, 39, 55, 59, 61 (St. 1897, p. 254, as amended [see Gen. Laws 1923, pt. 1, p. 1447 et seq.]) and hence board of directors could not contract to compensate plaintiffs for services rendered in settlement of dispute, without having first made provision for payment thereof in manner prescribed in Irrigation Act.

7. Waters and water courses ☞228½, New, vol. 10A Key-No. Series—Compromise agreement between irrigation district and landowner held ultra vires.

Under Irrigation Act, as amended by St. 1915, p. 859, and Act May 19, 1919 (St. 1919, p. 660), agreement between irrigation district and landowner for settlement of disputes by formation of water storage district, with boundaries to be fixed by parties' engineers, and board of directors to be selected as therein provided, the dissolution of the irrigation district, and the turning over of its property to the water storage district, held, beyond power of board of directors, ultra vires, and void.

8. Waters and water courses ☞227—Powers of board of directors of irrigation districts limited.

Board of directors of irrigation districts have only such powers as are expressly granted or necessarily included in exercise of powers granted.

9. Work and labor ☞2—Agreement held not settlement authorizing recovery for services in negotiating it.

Agreement between irrigation district and landowner, with whom it was in litigation for formation of water storage district and dissolution of irrigation district, held, not a settlement so as to authorize recovery on quantum meruit by persons employed to effect settlement, in that it merely pointed out method by which settlement might be reached.

10. Appeal and error ☞1170(1)—That order allowing intervention by owners in action against irrigation district was erroneous held not to require reversal.

In action for services rendered irrigation district in settling dispute between district and

owner of land therein, any error in order allowing intervention by such owner did not constitute grounds for reversal, in view of Const. art. 6, § 4½, where plaintiffs were not in any event entitled to recover.

Appeal from Superior Court, Madera County; Eugene P. McDaniel, Judge.

Action by P. H. Bottoms and another against the Madera Irrigation District, with intervention by Miller & Lux, Incorporated. Judgment for defendant, and plaintiffs appeal. Affirmed.

Lindsay & Conley, of Fresno, for appellants.

Haven, Athearn, Chandler & Farmer, of San Francisco, for respondent.

J. E. Woolley, of San Francisco, for intervenor.

PLUMMER, J. Action to recover the sum of \$176,000, alleged to be due the plaintiffs from the defendant for services rendered by the plaintiff for the uses and purposes of the defendant. The defendant had judgment, and the plaintiffs appeal.

The record shows the existence of the Madera irrigation district, organized and existing under and by virtue of the act commonly referred to as the Wright-Bridgford Act (St. 1897, p. 254), and the acts amendatory thereof and supplemental thereto; that prior to the 10th day of July, 1922, the qualified voters of the Madera irrigation district had voted bonds in the sum of \$28,000,000 for the purpose of effectuating and carrying out the plans of said irrigation district to appropriate, impound, store, and distribute the waters of the San Joaquin river upon the lands situated within the boundaries of said district for the purpose of irrigation. It also appears from the record that, during all of the times mentioned in this proceeding, the intervenor, Miller & Lux, Incorporated, was a corporation owning a large tract of land lying within the exterior boundaries of said Madera irrigation district; that between said Madera irrigation district and Miller & Lux, Incorporated, much litigation was pending (some 29 actions in all). The complaint alleges that this pending litigation seriously impaired, retarded, and threatened to subvert the purposes for which the district had been formed, and that the initiation of additional actions against the district were threatened by the said Miller & Lux, Incorporated. It further appears: That on or about the 8th day of July, 1922, the board of directors of the Madera irrigation district, having in view the litigation to which we have referred, adopted the following resolution:

"Whereas, this board of directors of Madera irrigation district has heretofore placed itself on record as favorable to any fair and equitable composition and settlement of any adverse

claims of riparian owners and appropriators on the San Joaquin river; and

"Whereas, it appears that it is necessary and advisable to constitute a particular authority for initiating and for receiving such proposals of settlement and composition:

"Now, therefore, be it resolved: That there be and there is hereby created a committee to be known as the 'conciliation and settlement committee.' That said committee shall have four members and shall consist of the president of the board, the general manager of the district, and two members of the board of directors to be appointed by the president. That said committee continue in existence during the pleasure of the board. That the duties of said committee be to enter into negotiations and endeavor to compromise the differences now existing between Madera irrigation district and any other parties having or asserting any riparian or appropriation or other claims adverse to the right of the Madera irrigation district to divert and store waters of the San Joaquin river and its tributaries, and to do all things that may seem, in the judgment of the committee, necessary or proper in the premises. provided, however, that said committee shall in no way do or agree to do anything that may delay, impair, or abate any legal proceedings now under way or that hereafter may be instituted, and provided further that the committee, before agreeing finally to any proposition of settlement, must have the approval of the board of directors thereto. That said committee be authorized to call the board in session as a committee of the whole, at any reasonable time or place, whenever any of the negotiations shall reach the point requiring any further approval of this board; and that the said committee shall have authority in their discretion, and on such terms as they may deem proper, arrange to employ any person or persons as mediators in effecting or negotiating any settlement, and may call upon the legal and engineering departments or any other department of the district for any matter required by them."

That thereafter, and on or about the 10th day of July, 1922, the committee referred to in the resolution adopted by the board of directors of the Madera irrigation district entered into a contract with the plaintiffs purporting to employ the said plaintiffs to negotiate a settlement and composition of all matters of controversy between the Madera irrigation district and Miller & Lux, Incorporated. This memoranda of agreement reads as follows:

"This memorandum of agreement, made this 10th day of July, 1922, at Madera, Cal., by and between P. H. Bottoms and Tom F. Saunders, of Fresno, Cal., hereinafter referred to as 'mediators,' and J. W. Schmitz, N. E. Sanders, J. L. Davis, and Walter C. Maloy, the conciliation and settlement committee of Madera irrigation district, a public corporation, thereunto authorized by resolution No. 457 of the board of directors of said district, hereinafter referred to as the 'committee,' witnesseth:

"That the committee, on behalf of Madera irrigation district, do employ the mediators to negotiate a settlement and composition, satisfactory to the committee and to the board of

directors of Madera irrigation district of all conflicting claims and rights and all pending litigation and controversies now existing, or that may arise prior to a settlement, between Miller & Lux, Incorporated, and its subsidiary corporation, as parties on one side, and Madera irrigation district as the party on the other side, and the committee by the authority above set forth agrees that Madera irrigation district will pay to the mediators, on the negotiation of such a settlement on the conditions and in the time, place, and manner hereinafter set forth, the compensation hereinafter mentioned.

"And the mediators agree to undertake to negotiate a settlement and composition, satisfactory to the committee and to the board of directors of Madera irrigation district, of all conflicting claims and rights and all pending litigation and controversies now existing or that may arise prior to settlement between Miller & Lux, Incorporated, and its subsidiary corporations as parties on one side and Madera irrigation district as party on the other side, and said mediators agree to receive and accept as full compensation for their services and expenses the compensation hereinafter mentioned.

"And it is agreed between the committee and the mediators that, within 30 days after the conclusion of a settlement and composition of said claims, rights, litigation, and controversies between said parties, and after the approval of the same by the California bond certification commission, the Madera irrigation district will pay to the said mediators, in consideration of the negotiation of such settlement and composition, and in full payment for their services and expenses and of all fees and sums by them paid or agreed to be paid to any attorneys, engineers, or other persons, a fee to be determined as follows: That is to say, 50 cents for each acre of land in Madera irrigation district under the terms of such settlement; said fee being payable in cash in lawful money of the United States.

"The parties hereto further agree as material conditions and considerations hereof: That such settlement shall be negotiated within six months from date hereof, unless such time shall be further extended by the committee. That the mediators shall communicate all proposals of settlement to the committee, and that the same shall not be otherwise communicated to the Madera irrigation district until the same shall be approved by the committee. That, in case a settlement shall not be negotiated within six months from date hereof satisfactory to the committee and to the board of directors of Madera irrigation district, nothing shall be due or payable to the mediators hereunder, and the said district shall not be liable in any case for any fees or other compensation agreed by the mediators to be paid to any attorneys, engineers, or other persons, nor for any expenses of the mediators."

While the plaintiffs count upon an area of 353,000 acres as the basis of computing the value of their services, the trial court found that the contemplated water district would include only 284,000 acres, and was the ultimate acreage within the contemplation of the parties when entering into the agreement dated July 10, 1922. Thereafter, and on or about the 30th day of July, 1922, the board

of directors of said irrigation district passed a resolution purporting to ratify and approve the execution of the foregoing agreement, and the following day, to wit, the 31st day of July, 1922, the agreement purporting to settle and compose the differences between the Madera irrigation district and Miller & Lux, Incorporated, and procured by the plaintiffs, was signed by the defendant, Madera irrigation district, and the intervenor, Miller & Lux, Incorporated. This instrument is worded as follows:

"In order to compose all of the differences existing between Miller & Lux, Incorporated, the proposed West Side water storage district and the Madera irrigation district, the following course of procedure is hereby agreed upon:

"(1) A water storage district shall be formed, including all of the territory included in the proposed West Side water storage district and the territory petitioned to be included therein, and such parts of the Madera irrigation district, Webster irrigation district, and Medano irrigation district situated south of the Chowchilla river as are found to be susceptible of economical irrigation in view of their character and available water supply. The boundaries of the proposed district shall be immediately determined by two engineers, one selected by Miller & Lux, Incorporated, and one by the Madera Irrigation District, who shall co-operate with the state engineer, or his representatives, so as to fix the boundaries of the said district in such manner as will meet with the approval of the state engineer. The said work shall be completed within 30 days from the date hereof. The said district shall be known as the San Joaquin river water storage district.

"(2) The parties hereto shall immediately co-operate through their respective engineers, in making such investigations as to water supply of the San Joaquin river, Fresno river, and Chowchilla river, of dam sites and reservoirs and land susceptible of economical irrigation as shall be necessary in order to prepare a petition for the formation of said district, to establish the boundaries thereof, the sources of water supply, and the location of dam sites and reservoirs, and in order to determine whether the said Fresno river and Chowchilla river shall be developed by said water storage district as well as the said San Joaquin river and be made a part of the general project.

"(3) Immediately upon fixing the boundaries of the said district, the parties hereto shall jointly prepare a petition for the formation of said water storage district, circulate the same for signatures, and present the same to the state engineer for approval, and take all other actions and steps necessary for the approval of said petition and the formation of said district.

"(4) An agreement shall be entered into between Miller & Lux, Incorporated, and other landowners in said water storage district so to be formed, providing that the board of directors of such district shall consist of nine directors, four of whom shall be selected by Miller & Lux, Incorporated, four by the other landowners in said district, and one by the eight directors thus selected. Such agreement shall be of the same general tenor as the agreement heretofore entered into between Miller

& Lux, Incorporated, and the other landowners on the west side of the San Joaquin river. The district shall be divided into nine divisions, four of which shall be situated on the west side of the San Joaquin river, four on the east side of the San Joaquin river, and one partly on the east side and partly on the west side, and two of the directors selected by Miller & Lux, Incorporated, shall represent divisions on the west side and two divisions on the east side, and two of directors selected by the other landowners shall represent divisions on the west side and two divisions on the east side, and the ninth director shall represent the division situated partly on the east side and partly on the west side. During the period of 3 years from date hereof, unless said Madera irrigation district shall be sooner dissolved, that the board of directors of said district may secure, hold, and exercise the proxies and powers of attorneys of the landowners of said water storage district, situate within the area thereof now embraced within said Madera irrigation district, or any portion thereof, authorizing said board of directors, on behalf of said landowners, to cast the ballots or votes of said landowners on any matter submitted to the voters of said proposed water storage district, or at any election of officers thereof.

"(5) Pending the formation of said district, all actions and proceedings and all litigation pending between the parties hereto shall stand in abeyance, and no proceedings shall be had or taken therein by either party, except such proceedings as are necessary to preserve during said time the rights of the parties therein. It is the intention that no additional liability shall be imposed upon Miller & Lux, Incorporated, with respect to the assessments now involved in litigation during said period, and no penalty for nonpayment thereof, accruing during said period, and after the date hereof, shall be collected. But, if the action involving said assessments should become final by the denial of the pending petition for rehearing and for a writ of error or otherwise during said period, the said Miller & Lux, Incorporated, agrees to forthwith pay said assessments.

"(6) Pending the formation of said district, no further expenditures shall be incurred by the Madera irrigation district in connection with its dam site or in connection with construction, engineering, litigation, or the acquisition of property or property rights, except by agreement between the directors of the Madera irrigation district and Miller & Lux, Incorporated, and, after the formation of said water storage district, all such expenditures shall be made by said water storage district, but nothing herein contained shall prevent the said Madera irrigation district from carrying out any outstanding contracts or from paying its necessary expenses of administration, including such legal and engineering expense as may be necessary in carrying out the provisions of this agreement or in preserving during said time the rights of the parties in pending litigation. The contract made by said district for making borings at its dam site shall be modified so that said work shall be done jointly by the parties hereto.

"(7) Upon the formation of said district, the present petition now before the state engineer for the formation of the said West Side water storage district shall be withdrawn and dis-

missed and all other litigation, cases, and proceedings now pending between the parties hereto shall likewise be dismissed without prejudice to either party and without costs for or against either party, and proceedings shall at once be taken for the dissolution of the said Madera irrigation district and the reclamation districts heretofore formed in said territory by Miller & Lux, Incorporated, and the turning over to said water district of all property and property rights of Madera irrigation district and the assumption by the said water storage district of all indebtedness of the said Madera irrigation district and said reclamation districts and all expenses of Miller & Lux, Incorporated, in litigation with said Madera irrigation district and all expenses incident to the formation of said West Side water storage district, and all expenses of the parties hereto in carrying out this agreement. All the indebtedness of, and expenses incurred by, said Madera irrigation district, and so assumed, shall be assessed to the portion of the territory included in the said proposed water storage district now included in said Madera irrigation district, and all the expenses of the said West Side water storage district and said Miller & Lux, Incorporated, and said reclamation districts thus assumed shall be assessed on the balance of the territory in said proposed water storage district. The petition for the dissolution of the said Madera irrigation district shall be circulated and signed at the same time as the petition for the formation of said water storage district, but said petition shall not be filed with the board of directors until and when said water storage district has been formed and there has been formed and there has been turned over to said district the water rights, as hereinafter provided, and plans and specifications for the irrigation and drainage of lands within said district have been duly approved and adopted by said board of directors, and the voters of said district shall have, pursuant to the provisions of said California Water Storage District Act, voted that said project shall be completed, and said petition shall state said conditions as to filing thereof.

"(8) Upon the formation of said water storage district, the said Miller & Lux, Incorporated, shall convey to the said district all of its water rights and all water rights of its subsidiaries in the San Joaquin and Fresno rivers, and all canals and other works connected therewith. It is intended hereby that said water rights shall be so turned over that the lands now irrigated, or entitled to be irrigated, by the canals of the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, and other existing canals, shall continue to have a prior right to irrigation therefrom from the gravity flow of said streams, but sharing with other lands in the district in any water stored, pumped, or acquired by said district. Said Miller & Lux, Incorporated, as a riparian owner, in turning over said rights, shall also consent to the diversion and storage by said water storage district of all water of the San Joaquin river and the Fresno river necessary for the irrigation of the land within said water storage district, in excess of the amount needed for the irrigation of riparian lands of Miller & Lux, Incorporated, now irrigated, or entitled to irrigation therefrom. The question as to the quantity of water reasonably needed for the irrigation of the lands of Miller & Lux, Incorporated,

already irrigated, or entitled to be irrigated, is hereby delegated to the board of directors of said water storage district and may be determined by said board. The valuation at which such rights shall be so turned over to said water storage district shall be agreed upon between the directors of said water storage district and the owners of such rights. In the event that the said parties cannot agree upon such valuation, the parties hereto agree that the value of such rights may be established by condemnation proceedings.

"(9) The parties hereto pledge themselves to carry out the provisions of this agreement and to form the said district and proceed with the said irrigation project with all reasonable speed and with due diligence until completed. Unless the said water storage district is formed and work commenced by it on said irrigation project within one year from the date hereof or within such further time as may be agreed upon by the parties, this agreement shall terminate and all parties shall be restored to their present position."

Upon the transaction herein referred to becoming public, the then board of directors of the Madera irrigation district was compelled to resign and another board of directors was elected. The record shows that the new board of directors is pursuing a procedure in the settlement of the difficulties facing the district similar to that pointed out in the memorandum signed by the defendant and intervener of date of July 31, 1922. Plaintiffs claiming under the writing hereinbefore set forth that their services had been fully performed, presented their bill in the sum of \$176,000, and, payment being refused, this action was instituted. Payment is resisted on three grounds: (1) That no composition or settlement of differences between the district and Miller & Lux, Incorporated, has been effectuated; (2) that the board of directors of the Madera irrigation district had no authority to enter into the contract first set out herein by reason of the fact that there was no money in the treasury of the district applicable to the payment of the plaintiffs' fee for any services they might perform; (3) that the agreement alleged to have been procured by the services of the plaintiffs between the Madera irrigation district and Miller & Lux, Incorporated, was ultra vires and void, and therefore could not constitute the basis for any legal claim against the defendant district. The intervener also sets forth the further defense that the employment agreement was kept secret and information thereof withheld from the intervener, with the knowledge and consent of the plaintiffs, and consequently void, by reason of the trust relation which the board of directors of the district hold to all landowners, and that the lands of the intervener were being charged with several thousand dollars as the intervener's pro rata share of the 50 cents an acre agreed to be paid the plaintiffs in violation of the trust relation existing between the board of directors of

the district and the intervener; in other words, that the lands belonging to the intervener situate within the district were to be taxed to pay the fee claimed by the plaintiffs for their services, as employees of the district, in settling differences between the trustee and the cestui que trust.

The trial court found that no fraud had been committed upon the intervener, and rested its decision upon the ultra vires character of the proceedings which we have outlined. It was also found by the court that a considerable period of time prior to the occurrences here narrated the district had sold \$200,000 worth of bonds of said district, but had expended the proceeds thereof in pursuance of the purposes for which the district was created; that these bonds were certified as provided by the Bond Certification Act (St. 1913, p. 778) as amended in 1921 (St. 1921, p. 1198). The court further found that no money had been provided by levy of assessment, or otherwise, as specified in section 59 of the California Irrigation District Act (St. 1897, p. 274, as amended by St. 1919, p. 668), except the sum of \$66,689.63, and that all of said money had been provided for by an annual assessment for purposes of the district other than for the payment of plaintiff's alleged compensation, and had been so expended by it prior to the institution of this action. The court further found that the memorandum of agreement executed by the defendant intervener procured by the plaintiffs was ultra vires, as claimed by the respondents, and constituted no basis upon which to predicate a valid claim against the district.

[1-3] In considering these questions, we think the following propositions are so firmly established that citation of authority is unnecessary, to wit: That irrigation districts are public corporations or agencies; that such agency has only such powers as are given to it by the act of the Legislature under and by virtue of which it exists, either as are expressly stated or such as are necessarily implied in order to carry out the purposes of the district; that, while the board of directors of the district, in the performance of their duties, have the power to construct, acquire, or purchase water rights, canals, ditches, dams, etc., the property so acquired is the property of the district, and that the board of directors of the district possess no power to dispose of any of the property of the district other than in the manner provided by law; that any one dealing with a public corporation, a state agency, or what has been sometimes called an "executive arm of the state," is chargeable with knowledge of all the powers that the officers of such corporation, or state agency, possess, or may legally exercise, and that all contracts or purported contracts, which may be entered into, which go beyond the scope of the power vested in the officer exercising the

functions of said agency are void; that knowledge must be taken, not only of the extent of the power, but also the mode in which such power may be exercised.

Controverting the contentions of the respondents, the plaintiffs insist that there is in the hands of the district \$27,500,000 in authorized but unissued bonds of the district; that the various sections of the Irrigation District Act do not prohibit the incurring of the expense referred to herein without having first made provision for its payment; that the memorandum of agreement between the district and the intervener is not ultra vires, but, if ultra vires, a settlement has been secured, and plaintiffs should recover upon a quantum meruit count in their complaint. Answering the argument of plaintiffs that the authorized or unissued bonds are available and were, at the time of the entering into of the contract of date of July 10, 1922, available for liquidating the demands of the plaintiffs, the respondents call attention to section 3b of the Bond Certification Act, as amended in 1921 (Stats. 1921, p. 1198), which section, after setting forth the manner in which irrigation district bonds may be certified, and limiting the manner in which the moneys so raised may be expended and the purpose to which such moneys may be applied, contains the following:

"Nor shall any expense of any kind be incurred in excess of money actually provided by levy of assessment or otherwise except as provided in section fifty-nine of the California Irrigation District Act."

It is conceded that the certification of the bonds as issued by the district contains no authorization to apply the proceeds thereof toward the payment of the plaintiff's claim. Basing their argument upon this condition, respondents insist that the district is inhibited by this section from entering into any contract incurring an obligation or liability unless an assessment has first been levied to liquidate the obligation about to be incurred. The appellant offers the interpretation that this clause means that no expenditure of money of any kind shall be made from bonds which have been certified, nor shall bonds of an irrigation district, if part or all of them have been certified, be used as collateral security for the performance of any unapproved act, or if the defendants' construction be correct, then and in that case, in so far as the quoted part of said section purports to modify or amend the California Irrigation District Act, it is unconstitutional and violative of the provisions of article 4, § 24, of the state Constitution. Conceding the wisdom of the limitation upon the acts of boards of directors of irrigation districts attempted to be fixed by the controverted clause contained in section 3b of the Bond Certification Act, we are not required to pass

upon its constitutionality for the reasons hereinafter stated.

Sections 30 and 30a of the Irrigation District Act, relating to the issuance of bonds, fix the purposes for which the money provided from the sale thereof may lawfully be used. Section 30 (as amended by St. 1919, p. 662) gives the power and defines the purposes; section 30a (as added by St. 1917, p. 762, and amended by St. 1919, p. 662) is procedural in its subdivisions, excepting as to the latter portion thereof. The authority and the use are found in the first sentence of section 30 of that act, to wit:

"For the purpose of constructing or purchasing necessary irrigation canals and works, and acquiring the necessary property and rights therefor, and for the purpose of acquiring waters, water rights, reservoirs, reservoir sites, and other property necessary for the purposes of said district, and otherwise carrying out the provisions of this act, or any other act under which said district is or may be authorized to acquire property or construct works, the board of directors of any such district must, as soon after such district has been organized as may be practicable, and also whenever thereafter the board of directors shall find that the construction fund raised by the last previous bond issue is insufficient, or that the construction fund has been exhausted by expenditures herein authorized therefrom and it is necessary to raise additional money for said purposes, estimate and determine the amount of money necessary to be raised."

[4, 5] There is nothing in this section which authorizes the expenditure of money raised from the sale of bonds toward the payment of claims such as we are considering in this case. We think that, in ascertaining the meaning of the words, "and otherwise carrying out the provisions of this act," contained in said section, these words should be read as though the following words, "or any other act," were not found in the section, and that these words mean that for the purposes of construction or purchasing necessary irrigation canals, etc., bonds may be issued for acquiring property necessary for the purposes of the district and otherwise carrying out the provisions of this act, under which said district may be authorized to acquire property or construct works, and also under the provisions of any other act covering the same power. In other words, the quoted language and "otherwise carrying out the purposes of this act," as found in said section, relate to cognate subjects and are not to be read as granting unlimited power in the expenditure of money derived from the sale of bonds, simply because of the punctuation or lack of punctuation found in said section. Properly construed, the words give the power of carrying out and expending all moneys derived from the sale of bonds in any construction work authorized by the act in which the words are found, or any

other act authorizing the district to acquire property, construct works, etc. It is thus apparent that when bonds are issued for construction purposes, the acquisition of water rights, the building of canals, dams, reservoirs, etc., that the money so raised must be devoted to such purposes, and cannot be diverted at either the pleasure or desire of any board of directors. It is thus apparent that, irrespective of whether the respondents' or the appellants' contention relative to the true interpretation and meaning of the controverted words found in section 3b of the Bond Certification Act is correct, the Madera irrigation district on the 10th day of July, 1922, had no bond money nor unissued bonds available for payment of the plaintiffs' demand. If the memorandum of agreement entered into between the district and Miller & Lux, Incorporated, can be construed as a purchase or acquisition of water or water rights, and therefore within the permissive portion of section 30 as to the purpose for which bond moneys may be expended, it nevertheless remains true that compensation of employees, agents, and officers is an entirely different subject, and must be provided for in accordance with the powers granted in other sections of the Irrigation Act, the only exception made in the expenditure of bond money other than for the construction of works, or the acquisition of property, is that for a limited period of time interest on bonds issued for such purposes may be paid out of the proceeds of bonds subsequently issued. Compensation of agents for the settlement of controversies, even though that settlement contemplates the acquisition of property, is not in any sense of the word "purchase money."

[6] These considerations bring us to the question, Was the board of directors of the Madera irrigation district on the 10th day of July, 1922, empowered to enter into the contract with the plaintiffs sued upon in this action? Appellants base their contention in this particular principally upon the provisions of section 15 of the Irrigation Act (as amended by St. 1919, p. 661), which section, with other grants of power, contains the following:

"Said board shall also have the right to acquire, by purchase, lease, contract, condemnation, or other legal means, all lands, and waters, and water rights, and other property necessary for the construction, use, supply, maintenance, repair and improvements of said canal, or canals," etc.

And, also:

"The board of directors shall have the power and it shall be their duty to manage and conduct the business and affairs of the district; make and execute all necessary contracts; employ and appoint such agents, officers, and employees as may be required, and prescribe their duties."

While the grant of powers contained in this section are general and comprehensive in terms, the grant is not absolute and independent of other sections of the same act. The grant of power is relative only, and must be exercised in accordance with the limitations and restrictions defining the mode of the exercise of the granted powers. The mode, the time, and the manner of executing the powers granted by section 15 are found in sections 30, 30a, 37, 39, 55, 59, and 61 of the Irrigation Act (St. 1897, p. 254, as amended [see Gen. Laws 1923, pt. 1, p. 1447, et seq.]). If the limitations contained in the various sections, to which we have just referred, are disregarded, then the exercise of the power granted in section 15 cannot be said to be in accordance with law. In section 61 we find:

"The board of directors or other officers of the district shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this act; and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void; except that for the purposes of organization, or for any of the purposes of this act, the board of directors may, before the levying of the first assessment, incur indebtedness in such sum or sums as shall amount to two thousand dollars, or, if the district shall contain more than four thousand acres, to one-half as many dollars as there are acres of land in the district, and may cause warrants of the district to be issued therefor. * * *

The different provisions of the act referred to by the language contained in section 61 fix the time and define the mode for levying and collecting the taxes to pay the expenses of maintaining the district, compensating its officers, agents, and employees, and in section 59 sets forth a proviso clause to cover unexpected emergencies arising from excessive flow of water or damage to the works of the district, and limits the incurring of a liability for such purposes in the sum of \$40,000. The different sections to which we have referred for the raising of money set forth specifically how the money shall be raised, either by the levying of an assessment by the board of directors, or the submitting of the question of raising money by a special assessment to the voters of the district.

It does not appear that the provisions of these various sections relative to the raising of money and limiting the liabilities which may be placed upon the district by the board of directors were complied with or in any manner attempted to be complied with, either prior or subsequent to the 10th day of July, 1922. As said by the learned trial judge:

"There is nothing in the contract of employment which brings it within the purview of the exception contained in section 61, which exception relates exclusively to the incurring of indebtedness before levying the first assessment."

Clearly the contract sued upon, as already shown, attempted to create a liability against the district far in excess of the provisions of the act, because nothing had been done as required by section 39 or section 59, or any other sections which apply to the raising of money for the purposes of the district other than by the sale of bonds, in the levying of assessment or otherwise or at all. In this particular the opinion of the Supreme Court in the case of *Hughson v. Crane*, 115 Cal. 413, 47 P. 120, quoted by the trial judge, is also applicable:

"The Irrigation Act is evidently framed upon the theory, and with the intention on the part of the Legislature, that the affairs of the district shall be conducted upon a ready money basis, and not upon credit, and, to enable the directors to carry out this purpose, provision is made for levying special assessments for the payments of salaries, wages, and expenses of management," etc.

In *Ser-Vis v. Victor Valley Irr. Dist.*, 190 Cal. 732, 214 P. 223, the sections of the Irrigation Act with which we are dealing were considered by the Supreme Court, and the ruling there announced is the same relative to the incurring of liabilities which we are following here, and which, we think, prohibits boards of directors from incurring liabilities such as are presented in this case, without having first made provision for the payment thereof in the manner prescribed in the Irrigation Act. In *Lincoln & Dawson County Irr. Dist. v. McNeal*, 60 Neb. 613, 83 N. W. 847, the Supreme Court of Nebraska, construing the various sections of the Irrigation Act of that state, which, in the particulars now being considered, is almost an exact copy of the California act, it was held that the incurring of liability without first making provision for its payment was inhibited, and collection could not be had. It was also held in that case, if the contract was one which the district was authorized to make at the time it was made, but that the manner of making the same was irregular and the district had received the benefit thereof, then and in that case recovery could be had. In other words, if at the time the power is exercised it may be lawfully exercised, and benefits have been received under the contract so entered into, the district will not be permitted to defend payment on that ground, but must pay on a quantum meruit count the value of the benefits received or services performed. In the case at bar, we have a lack of authority to exercise the power at the time it was attempted to be exercised, and not simply a defect in the mode of exercising that power. The authorities are practically uniform in support of the rule that, where the want of funds at the time of the execution of the proposed contract renders the same invalid, recovery cannot be had. If the contract is valid at the time of its execution, the want of funds to pay

the claim when presented is immaterial, unless some other statutory inhibition invalidates a judgment made and entered for the plaintiff on such a contract, even though funds are unavailable for present payment thereof. *City of Santa Cruz*, 202 F. 357, 120 C. C. A. 485; *Arthur v. Petaluma*, 175 Cal. 216, 165 P. 698; *Chester v. Carmichael*, 187 Cal. 287, 201 P. 925; *Higgins v. San Diego Water Co.*, 118 Cal. 527, 45 P. 824, 50 P. 670; *Buck v. City of Eureka*, 119 Cal. 44, 50 P. 1065; *Montague v. English*, 119 Cal. 226, 51 P. 327.

[7] Respondent further insists that the memorandum of agreement dated the 31st day of July, 1922, is ultra vires and void; that the making and entering of such an agreement is entirely outside of, and contrary to, the provisions of the Wright Irrigation Act. We think that a reading of the memorandum is all that is necessary to answer this contention in the affirmative. Clearly the board of directors of the Madera irrigation district are only empowered to execute the various provisions of the Irrigation Act for the preservation of the district, for the protection of its properties, and for the distribution of water to the irrigable lands within the boundaries of the district. There is nothing in the Irrigation Act which empowers a board of directors to contract to dispose of its properties, to provide for the dissolution of the district, and the conveyance of its rights and privileges to some other corporation. There is a section in the Irrigation Act empowering a board of directors under certain circumstances to sell property unnecessary for the uses and purposes of the district, but there is nothing in any of the sections which contemplates the entering into a contract for the dissolution and death of the district. Voluntary dissolution of a district can only be had in accordance with the provisions of the act of the Legislature as amended in 1915. Stats. 1915, p. 859. Involuntary dissolution must be had in accordance with the act approved May 19, 1919. Again, the memorandum calls for an illegal delegation of power to determine the boundaries of a proposed district, provides for the turning over of the property of the Madera irrigation district, provides for the management of the new district, contrary to the mode prescribed by statute, and in various ways constitutes a virtual surrender on the part of the board of directors of the Madera irrigation district of the powers and functions which by statute they are expressly authorized and required to perform in a definite and particularized mode.

[8] The wisdom of the agreement has nothing whatever to do with its ultra vires character. If the agreement procured is not one authorized by the Irrigation Act, it is illegal, even though there is no taint or color of moral wrong. It is not a question of right or wrong. It is simply a question of legality

or illegality. It may be that the differences between the district and Miller & Lux, Incorporated, which the record shows to be owners of several thousands of acres of land situate within the exterior boundaries of the district, can best be settled by the dissolution of the Madera irrigation district and the formation of a water storage irrigation district, but this does not alter the situation as to the ultra vires and unauthorized contract presented in this case. The rule is uniform that boards of directors of irrigation districts have only such powers as are expressly granted or necessarily included in the exercise of the powers granted. *Stimson v. Alessandro Irr. Dist.*, 135 Cal. 389, 67 P. 493, 1034; *Danley v. Merced Irrigation Dist.*, 226 P. 847-854; *Colburn v. Wilson*, 23 Idaho, 337, 130 P. 381. That boards of directors cannot in any such manner abdicate their powers and turn over the properties to other corporations is well established. *Colburn v. Wilson*, supra, where it is said:

"A contract by the board of directors of such a district, giving to others the management or control of any part of the system, and taking that management and control out of the hands of the district board, would be ultra vires and void."

See, also, *Chase v. Treasurer*, Los Angeles, etc., 122 Cal. 540, 55 P. 414; *Egan v. San Francisco*, 165 Cal. 576, 133 P. 294, Ann. Cas. 1915A, 754, and for a general discussion of the subject *Thompson on Corporations* (2d Ed.) vol. 3, § 2426 et seq.

[9] The trial court further found that the services to be performed by the plaintiffs under the contract were not fully performed; that the making of the agreement procured did not constitute a composition or settlement of the differences between Miller & Lux, Incorporated, on the one hand and Madera irrigation district on the other; that no suits were settled, no pending litigation was terminated. A reading of the instrument shows that at best it is only a proposed method by which a composition or settlement may be had, that, as said by counsel, it is only an armistice and not a treaty of peace, in that it points out a road by which a final settlement may be reached, but it is in no sense a settlement and is not binding upon anybody. For these reasons, among others, the trial court also found that plaintiffs were not entitled to recover on the quantum meruit count contained in their complaint.

[10] Appellants present the further point that the order allowing intervention on the part of Miller & Lux, Incorporated, is erroneous, but from the views here expressed it is clear that, if erroneous, the order of the court has not resulted in a miscarriage of justice, and would not constitute grounds for reversal, as it is covered by the provisions of section 4½ of article 6 of the state Constitution. It is further contended on the

part of the respondent intervener that, notwithstanding the finding of the court that no fraud as a fact was perpetrated upon the intervener in this case, that fraud as a matter of law exists, in that the board of directors occupying the position of a trustee toward the landowners were entering into an undisclosed agreement, which would, if consummated, fix a charge upon intervener's land as a cestui que trust without its knowledge or consent. The appeal is upon the judgment roll alone, and whether the contention of the respondent is or is not meritorious does not, from the views which we have heretofore expressed herein, affect the final determination of this case. For this reason we do not think it necessary to pass upon this contention made by the intervener.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

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BIURRUN v. ELIZALDE et al. (Civ. 2976.)

(District Court of Appeal, Third District, California. Nov. 3, 1925. Hearing Denied by Supreme Court Dec. 31, 1925.)

1. Trusts $\S$ 345—One receiving money to be paid to owner accountable therefor, though appropriated to payment of debts of trustor or otherwise diverted.

Where one receives money in trust to be paid to another who is owner thereof, owner may hold trustee accountable therefor, even though trustee appropriated money to payment of debts of trustor or otherwise diverted its use to a purpose other than that for which it was delivered to him.

2. Money received $\S$ 1—Owner may sue to recover money or property retained by another to which owner is entitled to possession.

Where one obtains possession of money or property of another and retains it, owner may proceed against him for its recovery, whenever owner is entitled in law to such possession.

3. Trial $\S$ 377(1)—Within discretion of trial court sitting as jury to accept or reject testimony of any of the witnesses.

It is duty of trial court sitting as jury to accept or reject testimony given before it by any of the witnesses, but such power may not be arbitrarily or capriciously exercised, but only in exercise of sound discretion.

4. Appeal and error $\S$ 926(5)—Presumed on appeal, in absence of contrary showing that there was no arbitrary rejection or acceptance of any testimony.

In absence of contrary showing, presumption is that there has been no arbitrary rejection or acceptance of testimony, but that the triers have, for sufficient legal reasons, accepted as true the testimony with which final result arrived at harmonizes, and rejected as of no

probative value testimony leading to an opposite conclusion.

5. Trial $\S$ 404(4)—Findings phrased in general language imply finding of every fact essential to support of judgment, and further finding that any fact not supporting judgment was not true.

Findings phrased in general language, or substantially in language of one of the pleadings whose averments, whether affirmative or negative, are not themselves specific, if otherwise sufficient, always imply findings of every fact vital and essential to support of judgment, and further finding that any fact not supporting judgment was not true.

6. Trial $\S$ 404(4)—General findings in favor of defendant imply findings of facts relied on as defense.

In action for money had and received, based on alleged payment to defendant of money received from sale of plaintiff's sheep, in which defense was that defendant was not instructed to pay money to plaintiff, and did not know it was proceeds of such sale, general findings for defendant imply findings of facts asserted in defense.

7. Judgment $\S$ 570(4)—Judgment of nonsuit, either of trial court or court of review, not res adjudicata on issues of fact.

A judgment of nonsuit, whether by trial court or a court of review, cannot operate as an estoppel upon the issues of fact or be pleaded as res adjudicata.

8. Trial $\S$ 384—"Motion for nonsuit" admits truth of facts proved, but denies that they operate as matter of law to sustain plaintiff's case.

A "motion for a nonsuit" is in effect a demurrer to the evidence, and, like a demurrer to a pleading, admits truth of facts proved, but denies that, as a matter of law, they operate to sustain plaintiff's case.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Motion for Nonsuit.]

9. Appeal and error $\S$ 1195(3)—Doctrine of law of case not applicable to judgment of nonsuit.

Holding, in reversing judgment of nonsuit, that plaintiff had made prima facie case, was not conclusive on trial on the merits that facts were as claimed by plaintiff, under doctrine of law of the case.

10. Trial $\S$ 395(3)—General findings sufficient, where they follow averments of pleading, and thus decide issues submitted by pleadings.

Though specific findings are preferred to general findings, latter are sufficient, where they follow averments or denials of complaint or answer, and thus decide issues submitted by the pleadings.

11. Trial $\S$ 395(5)—Findings of fact should be ultimate conclusions deduced from facts proved.

Findings must be of ultimate and not of probative facts; that is, findings of fact are or

should be ultimate conclusions educed from the facts proved.

12. Trial ⚡395(3)—General findings in negative language of answer held sufficient, without special findings on various probative facts.

In action for money had and received, wherein issue was merely whether defendant received and held in his possession money belonging to plaintiff, general findings in negative language of answer was sufficient, without specific findings on variety of probative facts.

13. Appeal and error ⚡1078(4)—Appellate court authorized to assume that point not referred or discussed in briefs abandoned or waived.

Where point that court erred in admitting evidence was included in specifications of errors, but no reference or discussion of point is made in briefs of counsel for appellant, appellate court is authorized to assume that point was abandoned or waived.

14. Witnesses ⚡392(1)—Signed written statement of party, contradictory to testimony on trial, held admissible for purposes of impeachment.

A signed written statement of a party, contradictory to his testimony on trial, was, under Code Civ. Proc. § 2052, admissible to impeach testimony of such party, and failure to lay foundation for its introduction as expressly prescribed by such section was immaterial, where such party stated he remembered having signed statement.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action for money had and received by Vicente Biurrun against Eulalio Elizalde and A. G. Ramirez. Judgment in favor of plaintiff against defendant Elizalde and in favor of defendant Ramirez, and action as to him dismissed. From a judgment in favor of defendant Ramirez, and from an order denying plaintiff a new trial as to said defendant, plaintiff appeals. Affirmed.

See, also, 61 Cal. App. 675, 215 P. 690.

W. E. Davies, of Marysville, and Russell W. Cantrell, of San Francisco, for appellant.
W. P. Rich, of Marysville, for respondent.

HART, J. The complaint alleges that defendants, within two years immediately preceding the commencement of this action, became indebted to plaintiff in the sum of \$6,300 for and on account of money "had and received by said defendants to the use of and benefit of plaintiff," etc.; that said sum "and the whole thereof is still due, owing, and unpaid."

The defendants Ramirez and Elizalde filed separate answers to the complaint. The former denied that he became indebted to plaintiff in the sum alleged in the complaint, or in any other sum, within "the two years last past immediately preceding the com-

mencement of this action, or at any time," and denied that there is due plaintiff from him said sum or "any sum or at all," etc.

Elizalde, by his answer, admitted that, within the time mentioned in the complaint, "defendants did become indebted to plaintiff in the sum of \$6,300, for and on account of 900 head of sheep sold defendants by plaintiff," but denied that "there is now due to plaintiff from defendant" (Elizalde) the sum named or any sum; that, "within the last two years past," he (Elizalde) paid to defendant Ramirez the sum of \$6,300, "as and for plaintiff herein"; that said Ramirez, as defendant "is informed and believes, * * * has appropriated said sum of \$6,300 to his own use." Said answer asked that judgment be awarded plaintiff as against said Ramirez and that he (Elizalde) "be dismissed with his costs."

The trial was before the court, sitting without a jury. The court found that Ramirez was not at any time indebted to plaintiff in the sum of \$6,300 or in any sum whatever, but that Elizalde was indebted to the plaintiff in the sum of \$5,600, for and on account of money had and received by the said defendant Elizalde, to the use and benefit of plaintiff, and that the whole of said sum "is now owing and unpaid," etc.

Judgment was, upon the findings, awarded and entered in favor of plaintiff against Elizalde for the sum of \$5,600 and costs, and in favor of Ramirez, and the action as to him dismissed. The plaintiff moved for a new trial as to Ramirez, and the motion was denied. The appeal is by the plaintiff from the judgment in favor of defendant Ramirez and from the order denying him a new trial as to said defendant.

This case in a different form was once before considered by this court; the appeal therein being from a judgment entered upon an order granting a nonsuit. *Biurrun v. Elizalde et al.*, 61 Cal. App. 675, 215 P. 690. Therein it was held that the plaintiff had introduced sufficient evidence to make out a prima facie case under the allegations of his complaint, and the judgment of nonsuit was accordingly reversed.

The points urged for a reversal are: That the findings are not supported by the evidence; and that what purport to be the findings are not findings of fact, but conclusions of law.

It appears that plaintiff was, in the latter part of the year 1919, the owner of a band of 728 head of sheep and that he was then without the necessary pasture for the proper feeding of the sheep. On the 26th day of December, 1919, the plaintiff, so he testified, met Elizalde, who is a cousin of plaintiff, and Ramirez, in front of the Western Hotel, in the city of Marysville, and on that occasion plaintiff proposed to Elizalde that if he

(Elizalde) would take possession of his 728 head of sheep, and feed and care for them, he (plaintiff) "would pay him \$2,176 as expenses for running them, and when he (Elizalde) sold the sheep he was to pay me \$8 per head and keep for himself all that he received over that sum. We then went to the First National Bank," plaintiff proceeded to testify,

"and I gave Mr. Elizalde a check for \$2,176. I had 728 head of sheep that I turned over to Mr. Elizalde. After we left the bank, we had a conversation outside, on the same day, and Mr. Ramirez suggested that we make a note, and Mr. Ramirez wrote a note for us for the sum of \$8,000. After I got the note, I took it up to Mr. Carlin's office, and Mr. Carlin said it was no good, and he drew another note, which note Mr. Elizalde signed."

This note, plaintiff testified, was given to him as security for the sheep or for the payment of any money received by Elizalde in the sale of the sheep. Plaintiff also stated that he did not sell the sheep to Elizalde, but merely turned them over to the latter on the conditions above explained. The plaintiff further testified that Elizalde sold 700 of the sheep to a Mr. Carey, receiving therefor the sum of \$9 per head. Having learned of this sale, plaintiff made a demand on Elizalde for the payment of the money received on said sale. This money, or the check therefor, as will presently be more fully explained, was by Elizalde turned over to Ramirez, with certain directions as to the disposition thereof.

Elizalde testified that he did not buy the plaintiff's sheep, but took possession of the flock to feed and care for under the terms and conditions of the agreement as shown by the testimony of plaintiff as above given; that the agreement was made in the presence of Ramirez. He stated that the latter suggested that plaintiff advance the sum of \$2,176 to witness for the "running expenses" incurred in feeding and taking care of the sheep and that witness then execute and deliver to plaintiff his note for \$8,000 "as security for the sheep"; that plaintiff, acting upon said suggestion, advanced the sum of \$2,176 to witness; and that the latter, likewise prompted, gave his note to plaintiff for the sum of \$8,000. Elizalde further testified that, after the delivery of plaintiff's sheep to him, and, on the 8th day of January, 1920, he sold 700 head thereof, together with 108 head of his own, to a Mr. Carey at the rate of \$9 per head; that he received from Carey for the sheep a check for the sum of \$7,272; that he later indorsed and delivered said check to Ramirez, with instructions to pay to plaintiff out of the money represented by said check the sum of \$5,600, said sum being the total amount for which he had sold plaintiff's 700 head of sheep at \$8 per head, and to "put the balance to my credit." At that time, Elizalde testified, he was indebted to Ramirez in the sum of \$16,000.

It appears that Ramirez did not appropriate the money to the purposes for which Elizalde (so the latter testified) intrusted it to him. The plaintiff testified that, having been informed of the delivery of the money to Ramirez, he made a demand on the latter for so much of the money as represented the amount received by Elizalde for his (plaintiff's) sheep, but Ramirez refused to comply with the demand for reasons explained by him in his testimony given when the case was called for the further trial thereof after it had been returned to the court below by this court upon reversing the judgment entered upon the order granting the nonsuit. This brings us to the testimony of Ramirez, which, in substance, is as follows:

"I know Vicente Biurrun, the plaintiff, and Eulalio Elizalde, the other defendant. I knew them both in the latter part of 1919 and the fore part of 1920. I did not meet Mr. Elizalde or Mr. Biurrun on or about the 26th day of December, 1919, or close to the 1st day of January, 1920, at the Western Hotel in Marysville. I met Mr. Elizalde. He came to my place of business at 224-C street in Marysville, and wanted me to make a note for Mr. Biurrun. I told him to bring Mr. Biurrun here, but he said, 'No; he is at the Western Hotel,' and I said, 'I have not got the time; but I will see if I have a blank,' and I took up a blank from the Rideout Bank and rushed over to the Western, filled it out, and gave it to Mr. Elizalde. I could not swear whether I saw Mr. Biurrun sign the note. I do not remember the amount of the note, and I do not know what the transaction was at all. I do not recall going to the First National Bank with these gentlemen on that day. I made the note out at the Western Hotel. Mr. Elizalde told me at that time that he wanted to give Mr. Biurrun a note, and I wrote it out as he dictated it to me, and I went right back to my place of business. Some time about January 1, 1920, I saw Mr. Elizalde and received some money from him; \$6,272 I believe it was. It was on a check, and, when I received it, I put it in the First National Bank of this city, the exact date I do not know, about January 13, 1920. At the time Elizalde gave me this check, he told me to pay \$3,000 to Feliciano Goni, and he said, 'I need the balance for feed. You deposit it for me and I will draw on you.' I know Feliciano Goni. Elizalde was in the sheep business at that time. Upon receipt of this money, I paid \$3,000 to Feliciano Goni, on the 23d day of January, 1920, by check upon the First National Bank. I have not got the check; I have lost it. The canceled check was returned to me. After paying the check of \$3,000, I still had some money in my hands belonging to Elizalde, and he was drawing on me, and I was advancing him money at that time. I did not keep one cent of the money for myself. At the time Mr. Elizalde gave me \$7,272, he did not mention Mr. Biurrun's name, nor did he tell me to pay it to Mr. Biurrun, the plaintiff in this action. There was not a word said about Biurrun at all. I was not interested financially in the transaction between Elizalde and Biurrun with reference to the sheep. I did not know anything about their business. Mr. Biurrun did not call at my place of business on the

1st day of April, 1920, and ask me for any money. He never at that time, or any other time, told me that Elizalde was willing to pay in sheep, and I did not tell him, 'I will not give you the sheep or any money.' My only reason in filling out the note was as an act of accommodation and friendship, and that ended my connection with the sheep transaction. After paying Goni, I paid out to Elizalde more than the balance that was left. I am not indebted to Biurrun on my own account. I never sold him any sheep, nor bought any sheep from him."

Ramirez, on cross-examination, stood by his direct examination, but added that, while it was true that Elizalde was indebted to him in a large sum, he did not ask him whether he (plaintiff) "could apply this check on that indebtedness," and that he did not so apply it. He further stated on cross-examination that "Elizalde simply gave me the check"; that "he did not tell me what the check was for"; that "he simply said 'pay Goni \$3,000, and keep the balance to my account.' There was not a word said about paying my bill." He stated that, when Elizalde handed him the check, he (Elizalde) did not tell him that he (Elizalde) sold 700 of Biurrun's sheep. Ramirez, further testifying on cross-examination, stated that, when he prepared the \$8,000 note in favor of Biurrun for Elizalde to sign, he had no conversation with Biurrun; that he merely exchanged greetings with him, and that he (Ramirez) did not "mention any sheep" to Biurrun, "nor did he to me"; that Biurrun "did not tell me why he wanted this note from Elizalde"; that "Biurrun never asked me for any money" (referring to the testimony of Biurrun that he demanded of Ramirez payment of any of the money delivered to the latter in the form of a check by Elizalde).

W. C. Owens, assistant cashier of the First National Bank of Marysville, testifying from "ledger sheet No. 1" of the account of defendant Ramirez, stated that, according to said account, Ramirez, on the 13th day of January, 1920, deposited the sum of \$6,272, and that it also showed that on the 28th day of January, 1920, a withdrawal of \$3,000 from said account was made, but that, as the check was returned to the maker on the 31st day of January, 1920, he had no way of ascertaining to whom the withdrawal was made.

A statement, reduced to writing, made by Elizalde in the office of an attorney on May 17, 1921 (at which time a suit by one Bastiqueta against Ramirez and Elizalde was pending), in which Elizalde declared that he gave the check mentioned to Ramirez, with directions to pay \$3,000 to F. Goni on a note held by the latter against Elizalde, and to retain the balance of the check for him (Elizalde), was introduced in evidence. W. P. Rich, the attorney in whose office said statement was made, testified that he heard Elizalde make the statement that he gave the check to Ramirez, with directions to pay

Goni \$3,000 of the check and to keep the balance thereof for him (Elizalde); that, in fact that statement by Elizalde was made in response to questions propounded to him by Rich; and that thereupon the latter caused the statement to be reduced to writing by his stenographer, and that Elizalde signed it after Ramirez had explained to the former the purport thereof. Elizalde, in rebuttal, stated that, while the signature to the written statement was his, he had no recollection of signing it; that Ramirez did not translate the writing to him. The above embodies a comprehensive statement in substance of the testimony presented by the parties to the action.

[1-6] The specific contention of the plaintiff, in support of his general contention that the decision below is afforded no support by the evidence, is that the sum of money to which he was entitled on account of the sale of his sheep having been delivered to Ramirez by Elizalde, with specific instructions by the latter that he (Ramirez) pay the same to plaintiff, Ramirez held said sum of money in trust for his (plaintiff's) use or benefit, and that, therefore, the plaintiff is authorized in law to proceed against Ramirez in an action for money had and received, irrespective of the disposition the latter might have made of it. Indeed, the plaintiff goes further and contends that, even if Ramirez received the sum of \$5,600 out of the check to which plaintiff was entitled without knowledge, either at the time he received it or at any subsequent time, that the plaintiff was the owner and entitled to receive said sum out of said check, Ramirez was, nevertheless, subject to an action by plaintiff for the recovery of said sum of money.

It is obviously true that where one receives money in trust to be paid to another who is the owner thereof, the latter may hold the trustee accountable for the money so received, even though the latter had appropriated it to the payment of the debts of the trustor, or otherwise diverted its use to a purpose other than that for which it was delivered to him. And undoubtedly, if one obtains possession of the money or other property of another and retains it in his possession, the owner of the money or other property may proceed against and maintain an action against the party having possession of the money or other property for the recovery of the same, whenever the owner is in law entitled to such possession. But, in urging the propositions above stated, the plaintiff necessarily proceeds upon the assumption that it is undisputed that Elizalde, on delivering the check to Ramirez, instructed the latter to pay to plaintiff, out of said check, \$5,600, and that Ramirez accepted the check upon the condition that such payment should be made; that Ramirez did not pay Goni \$3,000 out of the check and the balance to Elizalde; and that he (Ramirez)

still retains the money received by him on the check. The assumption is without foundation.

It was with the trial court, as the trier of the questions of fact, to accept as true or reject as untrue the testimony given before it by any of the witnesses. Of course, as often it has been said, the power thus vested in juries or trial courts may not be arbitrarily or capriciously exercised, but only in the exercise of a sound discretion upon a consideration of the testimony by the tests alone available to the triers of issues of fact at nisi prius. And, where, as here, there is no showing, or nothing on the face of the record to indicate, that the triers of the fact have arbitrarily or without just reason accepted or rejected particular testimony, the presumption must be indulged on appeal that there has been no arbitrary rejection or acceptance of any testimony, but that the triers have, for sufficient legal reasons, accepted as true the testimony with which the final result arrived at, or the judgment, harmonizes, and rejected as of no probative value testimony which tended to lead to an opposite conclusion. There is, as is to be observed, a positive conflict in the testimony, and the findings show that the trial court accepted the testimony of Ramirez and by reason thereof of necessity rejected that of Elizalde and Biurrun upon the points upon which the testimony of those parties disagree. It is true that the findings are not specific, but follow, substantially, the negative averments of the answer.

Findings phrased in general language or which are substantially in the language of one of the pleadings, whose averments, whether affirmative or negative, are not themselves specific, if otherwise sufficient, always imply the finding of every fact vital and essential to the support of the judgment and the finding that any fact which would not support the judgment, and to which some of the witnesses had testified in the trial, was not true. Hence the findings here imply the finding of every fact vital and essential to the support of the judgment, or, specifically speaking, the findings imply the finding of the following facts: That Ramirez knew nothing at any time, until perhaps this action was brought, about the agreement between plaintiff and Elizalde, whatever it may have been, whereby the latter was to feed and care for plaintiff's sheep, or that he (Elizalde) had authority to sell said sheep; that Ramirez did not know, when he received the check from Elizalde, that the latter had sold plaintiff's sheep, or that, if such was the fact, the bulk of the money represented by the check was received by Elizalde as in payment for plaintiff's sheep on the sale thereof by Elizalde; that Elizalde, on delivering the check to Ramirez, did not instruct the latter to pay any part thereof or any money to plaintiff, but specifically directed Ramirez to

pay Goni, to whom Elizalde was indebted in a large sum, out of said money, the sum of \$3,000, and to keep or deposit the balance for him (Elizalde) and for his use and benefit; that Ramirez, in accordance with the directions so given him by Elizalde, paid Goni \$3,000 within a few days after he received the check; that he deposited or kept for Elizalde the balance of the money represented by the check and from time to time, as Elizalde called for it, paid him said balance; that plaintiff, at no time prior to the bringing of this action, demanded from Ramirez payment of any money received by the latter on said check; that Ramirez, neither at the time this action was instituted nor for some time prior thereto, had in his possession any money belonging to plaintiff.

The findings thus interpreted render untenable the argument of plaintiff's counsel, as indicated above, and, consequently, render inapplicable the cases cited in plaintiff's brief as in support of said argument.

[7-9] The contention that upon the question whether plaintiff did or did not sell his sheep to Elizalde, instead of employing the latter to feed and care for them, the decision of this court on the appeal from the judgment of nonsuit is *res adjudicata*, for the reason that, after the case was returned by this court to the court below for a trial thereof upon the facts, no other testimony addressed to that question was received, is without merit. In the first place, it is to be remarked that the point thus made is of no legal consequence in the decision of this appeal. In the second place, it is to be observed that a judgment on nonsuit, whether by a trial court or a court of review, cannot operate as an estoppel upon the issues of fact. A motion for a nonsuit, as has often been declared in the cases, is in effect a demurrer to the evidence, and, like a demurrer to a pleading, admits the truth of the facts proved, but denies that they as a matter of law operate to sustain or support the plaintiff's case. It may happen, and no doubt it has happened, that, upon the very same evidence upon which a reversal of a judgment of nonsuit has been ordered the trial court may render an unimpeachable judgment upon the merits of the case in favor of defendant. The reason is that the trial court, when entertaining a motion for a nonsuit, is dealing entirely with a question of law, and must attach to the evidence, whether properly or improperly received, its full probative value, whereas, when deciding the case on its merits, so far as the facts are concerned, it is dealing with a question of fact, in the decision of which it is vested with the power of believing or disbelieving any testimony in the case and deciding accordingly. See *Merritt v. Campbell*, 47 Cal. 545; *City and County of San Francisco v. Brown*, 153 Cal. 644, 648, 96 P. 281; *Ramsey v. Powers et al.* (Cal. App.) 241 P. 567. Nor does the doctrine of

the "law of the case" apply here, if that is what plaintiff really means to claim in asserting that the judgment of this court on the nonsuit is res adjudicata. The cases of *McGraw v. Friend & Terry Lumber Co.*, 133 Cal. 589, 65 P. 1051, and *Neale v. Morrow*, 163 Cal. 445, 125 P. 1052, cited by counsel for plaintiff in support of their view of the effect of the judgment of this court in the respect mentioned, contain no pronouncements inconsistent with the views here expressed.

[10-12] The contention that the findings are insufficient because they constitute or involve conclusions of law rather than findings of fact cannot be upheld. Specific findings are always to be preferred to general findings, but findings in general terms have been held sufficient where, as here, they follow the averments or denials of the complaint or answer and so decide the issue or issues submitted by the pleadings. It is true that the findings here involve, in a measure, conclusions of law. This is more or less true of nearly every set of findings made by trial courts, and it is so because the rule is that findings, as is true in pleading the facts, must be of ultimate and not of probative facts; that is to say, the findings of fact are or should be ultimate conclusions deduced from the facts proved. Yet, as stated, we often find what strictly are conclusions of law properly serving the office of findings of fact. For illustration, on an issue of debt, where the court finds generally that the defendant was not, at the time mentioned in the complaint, nor at any other time, indebted to the plaintiff in the sum claimed, or any other sum, we have a good finding of fact, although, strictly speaking, whether one is or is not indebted to another is also a question of law to be determined from the probative facts. In the present case the plaintiff's action, as seen, is one for money had and received. No fraud or mistake or mala fides in the handling of trust funds is or are alleged. The defendant, therefore, was required merely to set up the general issue or a general denial. Therefore the issue tendered and to be tried was merely whether Ramirez received and held in his possession money belonging to plaintiff. Hence the findings in the negative language of the answer as clearly, squarely, and effectually decided the single issue made by the complaint and answer as the court could have done by specifically finding upon the variety of probative facts directed to the support or the demolition of the affirmative of that issue, and measures up to the rule that findings must

be sufficiently definite and clear as not to require an investigation on review to determine what issue has been decided. *Chatfield v. Continental Building, etc., Association*, 6 Cal. App. 665, 669, 92 P. 1040.

[13, 14] While the point that the court erred in admitting in evidence the written statement made and signed by Elizalde prior to the trial hereof to the effect that he directed Ramirez to pay out of the check the sum of \$3,000 to Goni is included in the specifications of "errors in law occurring at the trial," there is no reference to or discussion of said point in the briefs of counsel for plaintiff. We are therefore authorized to assume that the point is abandoned or waived. Still it may be well enough to explain why the point cannot be maintained. The only ground of objection to the admissibility of the statement was that—

"No foundation had been laid outside of the testimony of an interested party that he interpreted this instrument to Elizalde; that it had not been shown that Elizalde understood the contents because he cannot read or write the English language."

The statement was admissible as in impeachment of the testimony of Elizalde by virtue of the provisions of section 2052 of the Code of Civil Procedure. No objection was made that the foundation for the introduction of impeaching testimony as expressly prescribed by said section was not laid, but, if such objection had been made, it would have been without legal justification, inasmuch as Elizalde stated that he remembered the time and place at which he signed the statement and that the signature to the statement received in evidence was his, declaring, however, that he did not understand the purport thereof when he signed it. Ramirez testified that he explained to Elizalde in his own language (the Spanish) the real contents of the statement before the latter subscribed his name thereto. While Elizalde contradicted this testimony of Ramirez, it was for the court to decide whether Ramirez or Elizalde told the truth about the translation of the contents of the statement to the latter in his native language and to find, as presumptively it did find, that Elizalde thus learned and, at the time he signed the statement, well understood and knew the full import thereof.

There are no other points requiring attention herein.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

75 Cal. App. 152

(242 P.)

WALKER v. BOYLE, Auditor. (Civ. 5422.)

(District Court of Appeal, First District, Division 1, California. Nov. 9, 1925. Hearing Denied by Supreme Court Jan. 7, 1926.)

1. Witnesses ⇨29—Witness from another state, appearing in criminal case, but not in pursuance of undertaking or on subpoena, held not within statute allowing payment of reasonable expenses.

Where witness from another state attended criminal trial without being subpoenaed, and not pursuant to any undertaking or order requiring his attendance, as authorized by Pen. Code, § 1330, he was not entitled, under section 1329, to payment of expenses on the judge's certificate of approval, regardless of Pol. Code, § 4300g, relating to witness fees and mileage.

2. Witnesses ⇨29—In construction of statute relating to payment of expenses of witness from outside county, court should not disregard any part thereof.

On petition for mandamus to require warrant to be drawn for expenses of witness from outside state attending criminal trial, court may not disregard any portion of Pen. Code, § 1329, permitting payment of such witness' expenses only when he attends on subpoena or in pursuance of undertaking.

3. Witnesses ⇨29—Witness in criminal case from outside state held entitled to reasonable and necessary expenses, if method prescribed by law for payment of expenses is followed.

Under Pol. Code, § 4307, subd. 2, making expenses necessarily incurred by district attorney in detection of crime and prosecution of criminal cases county charges, witness from outside state attending criminal case at request of county attorney is entitled to reasonable and necessary expenses under Pen. Code, § 1329, if method prescribed by such statute for payment of such expenses is followed.

Original application by Harry Walker for writ of mandate to be directed to Thomas F. Boyle, as Auditor of the City and County of San Francisco, requiring him to draw a warrant for expenses incurred by petitioner as witness in a criminal case. Writ denied.

Louis Ferrari and J. J. Posner, both of San Francisco, for petitioner.

Edward F. Moran, of San Francisco, for respondent.

KNIGHT, J. This is a proceeding in mandamus to compel the respondent, Thomas F. Boyle, as auditor of the city and county of San Francisco, to draw his warrant upon the treasury of said city and county, pursuant to an order of court made for the payment of expenses necessarily and reasonably incurred by petitioner as a witness on behalf of the prosecution in a criminal action heard and determined in the superior court of said city and county.

It appears that the defendant in said crim-

inal action, while in the employ of a bank in San Francisco, embezzled certain American Express Company's travelers' checks, which later he converted into cash in New York City. The testimony of the petitioner herein, Harry Walker, who cashed said checks in the city of New York, became indispensable at the trial of said action in order that the defendant might be identified as being the person who presented said checks for payment. The importance of having said witness present to testify at the trial was brought to the attention of the court in which said action was pending by the assistant district attorney and the bank's attorney; the latter being associated with the district attorney in the prosecution of said action. In response, the judge of said court directed that said witness be produced at said trial. The attorney for the bank then communicated with Walker, requested him to proceed to San Francisco, and represented to him that his traveling and other necessary expenses as a witness would be paid in said action. Walker complied with said request, came to San Francisco, and after testifying in said action, presented a claim for expenses in the total sum of \$389.68. The court thereupon made and signed the following order:

"In this cause, it appearing to the court that Harry Walker has come into this city and county from New York, state of New York, by virtue of a subpoena duly and legally issued by said court, and duly and legally served upon him, in the above-entitled proceeding, and has attended before this court as a witness on behalf of the prosecution in the above-entitled proceeding, now agreeably to the provisions of section 1329 of the Penal Code of this state, it is ordered that Thomas F. Boyle, the auditor of the city and county of San Francisco, draw his warrant upon John McDougald, the treasurer of the city and county of San Francisco, in favor of said Harry Walker for the sum of \$389.68 necessary expenses incurred by him in attending as such witness."

It further appears that said bank advanced to petitioner the full amount of his expenses, and obtained an assignment of his claim therefor. Upon refusal of respondent to draw his warrant for the amount of such expenses, as directed in said court order, this proceeding was commenced.

It is admitted that no subpoena was ever issued or served upon petitioner, and also that no affidavit was made pursuant to the provisions of section 1330 of the Penal Code to require the attendance of said witness. Said section 1330 in this respect provides that—

"No person is obliged to attend as a witness before a court * * * out of the county where the witness resides * * * unless the judge of the court in which the offense is triable * * * or a judge of the superior court, upon affidavit of the district attorney or prosecutor,

* * * stating that he believes the evidence of the witness is material, and his attendance at the * * * trial necessary, shall indorse on the subpoena an order for the attendance of the witness."

The claim of petitioner for expenses is based primarily upon the following code section:

"When a person attends before a magistrate, grand jury, or court, as a witness in a criminal case, upon a subpoena or in pursuance of an undertaking, and it appears that he has come from a place outside of the county, or that he is poor and unable to pay the expenses of such attendance, the court, at its discretion, if the attendance of the witness be upon a trial, by an order upon its minutes, or, in any other case, the judge, at his discretion, by a written order, may direct the county auditor to draw his warrant upon the county treasurer in favor of witness for a reasonable sum, to be specified in the order, for the necessary expenses of the witness." Pen. Code, sec. 1329.

In connection with that section might be read a portion of section 4300g of the Political Code, although probably not material, because that section has not been cited by counsel on either side. It is as follows:

"Witness' fees, except as in this title otherwise provided: For each day's actual attendance, when legally required to attend upon the superior court, per day, two dollars in civil cases and one dollar and fifty cents in criminal cases. Mileage actually traveled, one way only, per mile, ten cents; provided, however, that in criminal cases such per diem and mileage shall only be allowed upon a showing to the court, by the witness, that the same are necessary for the expenses of the witness in attending, and the court shall determine the necessity for the same, and may disallow any fees to a witness unnecessarily subpoenaed. * * *

[1] Petitioner contends that, inasmuch as that portion of said section 1329 of the Penal Code declares that the court may allow the payment of the reasonable and necessary expenses of a witness, when "it appears that he has come from a place outside of the county," a witness who has come from any point "outside of the county," whether from another county in the state, or from another state, or another country, or from across the seas, is entitled to an allowance for expenses, at the discretion of the court in which the action is tried. It will be noted, however, that at the beginning of said section a qualifying clause is employed which apparently constitutes the foundation for the exercise of the court's power to allow witness' expenses in the cases therein provided. It reads:

"When a person attends before a magistrate, grand jury, or court, as a witness in a criminal case, upon a subpoena or in pursuance of an undertaking, and it appears that he has come from a place outside of the county, * * *

—the court, in its discretion, may make certain allowances for expenses. (Emphasis ours.)

[2] It will also be observed that said qualifying clause is used conjunctively, and it so connected with the remainder of said section that it necessarily limits the operation of said section to those persons who attend as witnesses "upon a subpoena or in pursuance of an undertaking." Applying said qualifying clause to the facts of the instant proceeding, petitioner is clearly not entitled to an allowance for expenses for the reason that, although he came from outside of the county, he did not attend before the court "upon a subpoena or in pursuance of an undertaking," having come voluntarily from the state of New York, wherein, it is conceded, the process of subpoena issued by a court in this state has no territorial force or effect. Therefore, unless the plain language of said qualifying clause is wholly ignored, and the remainder of said section be given universal application to all persons attending as witnesses, whether they attend in response to subpoenas or undertakings or otherwise, the contention of petitioner cannot be sustained. Of course, under well-settled rules of statutory construction, we may not disregard any part of the code section.

"A statute should always be so construed, if reasonably possible, as to give each part thereof the meaning and effect which, from the act as a whole appears to have been intended." In re Reineger, 184 Cal. 97, 193 P. 81; Barber v. Galloway (Cal. Sup.) 231 P. 34.

We conclude, therefore, that the provisions of said section 1329 by which the court is granted authority to make allowances for expenses of witnesses apply only to such witnesses as the court may legally require to attend, and that, since the case of petitioner does not fall within that class, the provisions of said section are unavailing to him.

[3] Petitioner makes the further contention that, inasmuch as a defendant in a criminal action is entitled to be confronted with the witnesses against him, it becomes a matter of public policy to encourage the attendance of the state's witnesses from foreign jurisdictions, when their testimony is essential to the enforcement of criminal laws; that, therefore, independent of statutory authority, and aside from the question of whether valid service of a subpoena may be made, if a person, in response to the request made by the court, voluntarily and in good faith, goes from a jurisdiction wherein the process of such court is ineffective to the place of trial to testify for the prosecution, he is entitled to be compensated for the reasonable expenses incurred by him in so doing. In support of such contention petitioner cites the cases of Climie v. Appanoose Co., 125 Iowa, 292, 101 N. W. 98; Westfall v. Madison Co., 62 Iowa, 427, 17 N. W. 614; Dutcher v. Justice, 38 Ga. 214; Albany v. Derby, 30 Vt. 718.

The wisdom of the policy declared in the authorities just cited cannot be denied, but the Legislature of this state has provided a law to meet just such emergencies by the enactment of subdivision 2 of section 4307 of the Political Code, which is as follows:

"County Charges. The following are county charges: 1. Charges incurred against the county by virtue of any of the provisions of this act. 2. The traveling and other personal expenses of the district attorney, incurred in criminal cases arising in the county, and in civil actions and proceeding in which the county is interested, *and all other expenses necessarily incurred by him in the detection of crime and prosecution of criminal cases,* and in civil actions and proceedings and all other matters in which the county is interested." (Emphasis ours.)

It would therefore seem clear that petitioner may not be denied reimbursement for the reasonable and necessary expenses incurred by him in attending as a witness in said criminal action, provided the method prescribed by law for the payment of those expenses be followed.

In view of the conclusion reached upon the main questions involved herein, it is not necessary to discuss or decide the other points urged by respondent in opposition to the granting of the petition herein. The alternative writ heretofore issued is discharged, and the peremptory writ prayed for is denied.

We concur: TYLER, P. J.; CASHIN, J.

75 Cal. App. 783

**ATWOOD v. SOUTHERN CALIFORNIA
ICE CO. (Civ. 5286.)**

(District Court of Appeal, First District, Division 2, California. Dec. 26, 1925.)

Appeal and error — 1011(1).

Appellate court may not disturb findings made on conflicting evidence.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warner, Judge.

Action by Leon A. Atwood against the Southern California Ice Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 218 P. 283, 63 Cal. App. 343.

Sidney J. Parsons, of Los Angeles, for appellant.

McNabb & Hodge, of San Bernardino, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover damages alleged to have been incurred while plaintiff's apples were in storage in the defendant's warehouse. The defendant answered, and a trial was had before the trial court sitting without a jury. Judgment went for the plaintiff, and the defendant has appealed.

In response to allegations contained in the pleadings the trial court found that the de-

fendant is a California corporation, having its principal place of business at San Bernardino, Cal.; that as a corporation the defendant is engaged in conducting a cold storage warehouse; that during the months of October and November, 1919, plaintiff delivered to defendant at its cold storage warehouse in the city of San Bernardino, Cal., 12,000 boxes of apples, a portion of which constituted the 120,000 pounds of apples described in plaintiff's amended complaint; that all of said apples so delivered to defendant by plaintiff were delivered for the purpose of having defendant keep said apples in cold storage until such time as the plaintiff sold the same; that at the time of the delivery of said apples by plaintiff to defendant all of said apples were in good condition; that the defendant accepted said apples and all of them a being in good condition and piled said boxes containing all of said apples in its said warehouse in the usual and customary manner for storage; that defendant, negligently and carelessly, and without exercising ordinary care in conducting and maintaining its said warehouse in which said apples were stored, permitted and allowed said warehouse to become infested with large numbers of rats, and during all the time said apples were stored in said warehouse defendant, negligently, and without exercising ordinary care, maintained said warehouse in said condition and allowed large numbers of rats to infest said warehouse, and to run upon, over, and across said apples, and to eat holes in large numbers of them, which caused the juice and pulp of the apples so eaten into by said rats to run down, over, and upon others of said apples belonging to plaintiff, etc.

The appellant makes three points. It claims (1) that it was not negligent; (2) that the apples were infested with mice when brought into the warehouse; and (3) that the defendant at all time exercised that degree of reasonable care that a warehouseman under the circumstances was in law bound to exercise. It does not claim that the respondent was guilty of any act which prevented the appellant from having a fair trial, and it does not claim that the trial court made any ruling at any time which prevented the appellant from producing its entire defense. Turning to the three points which the appellant makes, it is sufficient to state that there was much evidence introduced for and against each of the propositions stated by the appellant. The most that we can say in its behalf is that the evidence was conflicting, but in that regard we are not to be understood as intimating that the evidence did not preponderate in behalf of the respondent. Under well-established rules, in the face of such a record, an appellate court may not disturb the findings made by the trial court.

The appellant earnestly contends that under the law a warehouseman is not an insurer. Neither in the trial court nor in this court do we understand the respondent to make a contrary contention. We find nothing in the record indicating that the trial court so ruled.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

197 Cal. 716

(242 P.)

SHAMLIAN et al. v. WELLS et al.
(Sac. 3638.)

(Supreme Court of California. Dec. 30, 1925.)

1. Pleading ⚡129(2)—Special denial of unlawful retention of possession held an admission that possession was retained.

In action for use and occupancy of realty, a special denial by defendant that he unlawfully retained possession of land is an admission that he retained possession and appropriated rents, issues, and profits; the only issue being lawfulness of such appropriation and possession.

2. Judgment ⚡695—Principal held bound by judgment against agent where he had notice thereof.

Where an undisclosed principal was in possession of premises through his agent and received proceeds of sale of crops, the principal is bound by the judgment against agent for possession of land, though not a party thereto, since notice to agent of action is notice to principal.

3. Judgment ⚡695—Judgment against agent binding on principal when agent notified.

A judgment against an agent is binding on his principal when notice comes to agent while he is acting for his principal in the very transaction in controversy.

4. Principal and agent ⚡177(1)—Knowledge of agent held knowledge of principal.

Knowledge of agent in the course of his agency is knowledge of principal, and when knowledge of agent is ascertained the constructive notice to principal is conclusive.

5. Principal and agent ⚡145(1)—Undisclosed principal benefiting by agent's possession liable to owner.

An undisclosed principal reaping the benefits of acts of his agent in unlawful possession of premises cannot avoid responsibility to owner thereof.

6. Principal and agent ⚡145(1)—Undisclosed principal held liable for acts of agent within scope of authority.

In view of Civ. Code, §§ 2330, 2338, an undisclosed principal is liable for acts of his agent, performed or committed within scope of agent's authority.

7. Crops ⚡2—Party harvesting crops while owner is out of possession is entitled to crops.

Party entering on land and harvesting crops on his own account is entitled to such crops under rule that owner of land has no right to crops raised thereon by one not in privity with him and severed while he is out of possession.

8. Crops ⚡2—Party severing crops liable to owner for value of use and possession of land.

Party not in privity with owner, raising and harvesting crops while owner was out of possession, is liable to owner for damages, the measure of which is value of use and possession of land while in possession.

9. Principal and agent ⚡171(1)—Principal retaining profits under same liability as agent for latter's possession of land.

Where owner was entitled to value of use and possession of land while occupied by agent of another, the principal, under Civ. Code, § 2330, is liable to owner where he retains the fruits of his agent's acts.

10. Use and occupation ⚡6—Allegation of contract for premises held not to change cause of action for use and occupation.

In action for value of use and occupation of premises unlawfully possessed by defendants, allegation as to contract with one of defendants shown to have been terminated held not to change cause of action, but to be regarded as matter of inducement or evidence.

In Bank.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action for value of use and occupancy of certain real property by Arthur T. Shamlian and another against Charles Wells and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

N. Lindsay South, of Fresno, and Bradley & Bradley, of Visalia, for appellants.

E. A. Bagby, of Oakland, E. I. Feemster and Feemster & Cleary, all of Visalia, for respondents.

SHENK, J. At all times involved herein the plaintiffs were the owners of a 27-acre tract of producing vineyard land in the county of Tulare. On January 28, 1922, they brought this action against the defendants for the value of the use and possession of said land from February 10 to October 8, 1921. Judgment was rendered in their favor for the sum of \$1,800.50. Notice of appeal was served and filed on behalf of all of the defendants, but the appeal is not prosecuted by the defendants Charles Wells and Harry Faith. The appeal of the defendant C. L. Caine is therefore the only matter here for determination.

It is alleged in the complaint that prior to the 10th day of February, 1921, the plaintiffs entered into an agreement to sell the said land to Wells and that he took possession on August 21, 1920; that the defendant Wells and the defendants Faith and Caine, as assigns, continued in possession of the said premises by virtue of said agreement until the 10th day of February, 1921, upon which last-mentioned date the said agreement was terminated; that thereafter all the right, title, and interest of the defendants in and to said premises and to the possession thereof were terminated; that demand for possession was made but was refused; that the defendants remained in possession during the period of the controversy, harvested the crops, appropriated the same to their own use; and

that the value of the rents, issues, and profits for said period was the sum of \$3,000.

[1] The defendant Caine answered separately, denying generally the allegations of the complaint, but specially denying that he unlawfully retained possession of said land during the period in question and harvested the crops thereon. The denial last referred to must be taken as an admission that the defendant Caine had and retained such possession, harvested the crops and appropriated the proceeds from the sale thereof to his own use. The only issue raised by said denial was as to the lawfulness of such appropriation and possession.

The court found that the allegations of the complaint were true; that Caine claimed possession by virtue of a purchase from Faith, prior to February 10, 1921, of the crop for the year 1921, with the incidental right of possession and removal of the crop; and that whatever rights Caine or any of the defendants had in the premises had been terminated on the 10th day of February, 1921.

[2] As proof of the allegation of the complaint that the alleged agreement had been terminated as to all of the defendants, the respondents offered in evidence a final judgment in an action in said court wherein Charles Wells and Steves Zahar were the defendants and wherein it was determined that the original contract with Wells was terminated on the 10th day of February, 1921; that on that day all of the right of the defendants in and to the said premises and the possession thereof had ceased; and that on that date the plaintiffs were entitled to the possession of said land. Caine objected to the introduction of said judgment in evidence on the ground that he was not a party to said action. The court overruled the objection. He now contends that the said ruling was error and that without said judgment there was no evidence before the court which would sustain a finding that the said contract had been terminated. It was in evidence, however, without conflict, that during the period in question, and for some time prior to the commencement of the action in which said judgment was entered, Caine, as an undisclosed principal, was in possession of said premises through his agent, the said Steves Zahar, one of the defendants in said action; that the said agent Zahar was in actual physical possession during said time, cared for the land, and harvested the crop; and that he (the appellant) received and appropriated to his own use the proceeds from the sale of said crop. The Wells contract contained a provision that no assignment thereof should be made unless the assignee should agree in writing to be bound by the terms of the agreement in the same manner as the original contracting party was bound. Neither Faith nor Caine complied with this provision of the contract, nor did they otherwise become bound to the plaintiffs in writing under said contract. It

appears that the respondents did not know at the time they commenced their action against Wells and Zahar that Caine was in possession through his agent and interested in the crop, consequently they did not make him a party. It also appears that Zahar was made a party defendant because he was actually in possession of the premises prior to and at the time of the commencement of said action. It is undisputed that he was so in possession and continued in such possession and harvested the crop solely as the agent of Caine. It would necessarily follow that Zahar had no right of possession apart from the right of possession of Caine, his undisclosed principal. It must be conceded that the said judgment was admissible in evidence as against Wells, for he was a party defendant in said action and was bound thereby. Zahar was a party defendant and was also bound. It is suggested by the plaintiffs that Caine, because of his relationship with Zahar, was likewise bound, on the theory that a judgment is binding between the parties and all persons who are represented by them and claim under them or who are in privity with them. See *Satterlee v. Bliss*, 36 Cal. 489; *Estate of Clark*, 190 Cal. 354, 360, 212 P. 622; 15 Cal. Jur. 97.

[3, 4] It has been held that under some circumstances a judgment against an agent is binding on his principal. *Bridges v. McAlister*, 106 Ky. 791, 51 S. W. 603, 45 L. R. A. 800, 90 Am. St. Rep. 267, and note; *Jacob v. Town of Oyster Bay*, 109 App. Div. 630, 96 N. Y. S. 626. The circumstances justifying such a holding would seem to be present when notice comes to the agent while he is acting for his principal in the very transaction in controversy. The general rule is well settled that the knowledge of the agent in the course of his agency is the knowledge of the principal. 1 Cal. Jur. 846, and cases cited. It rests on the assumption that the agent will communicate to his principal all information acquired in the course of his agency, and when the knowledge of the agent is ascertained the constructive notice to the principal is conclusive. 1 Cal. Jur. 853, and cases cited. In this case the knowledge of and notice to Zahar of his relationship with Caine and of the pendency of said action was established and may not be disputed. The rule would seem to be especially applicable when, as here, the principal is undisclosed. Caine was not a party of record to the contract of purchase, and when he was secretly in possession of the premises through his agent he should not, under the circumstances here shown, be heard to say that notice to his agent in said action was not notice to him.

[5-7] The appellant is then relegated to the position of an undisclosed principal who has reaped the benefit of the acts of his agent unlawfully in possession and is seeking to avoid responsibility to the owner. It is a familiar rule that an undisclosed principal is liable

for the acts of his agent performed or committed within the scope of the agent's authority. Civ. Code, § 2338; 1 Cal. Jur. 838, 839, and cases cited. Section 2330 of the Civil Code provides:

"An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal."

[8, 9] If Zahar had entered upon said land and harvested the crop on his own account, he would have been entitled to the harvested crop, for it is well settled that the owner of land has no right or title to crops raised on the land by one not in privity with him and severed while he is out of possession. *Rector v. Lewis*, 46 Cal. App. 168, 188 P. 1018; *Betha v. Jeffres*, 126 Ark. 194, 189 S. W. 666, L. R. A. 1918A, 549, 552, and note; 8 R. C. L. 366; 8 Cal. Jur. 688. But coincident with his right to retain the severed crops is his liability to the owner for damages, the measure of which is the value of the use and possession of the land while he was in possession. *Page v. Fowler*, 39 Cal. 412, citing *Page v. Fowler*, 37 Cal. 100; *Groome v. Almstead*, 101 Cal. 425, 35 P. 1021; *Johnston v. Fish*, 105 Cal. 420, 38 P. 979, 45 Am. St. Rep. 53; *Rector v. Lewis*, supra, 168; 8 Cal. Jur. 689. Since this liability would have been imposed upon Zahar if he had been acting in his own behalf, the same liability accrued to Caine, his principal, pursuant to said section 2330 of the Civil Code, and having retained the fruits of his agent's acts he will not now be heard to say that liability on account of such acts has not accrued to him. The judgment of the trial court was therefore correct in assessing the damages against the appellant at the value of the use and possession of the premises during the period in question.

[10] The appellant contends that the cause of action set out in the complaint is predicated upon the rights of the parties under the original contract with Wells; that the proof was offered on that theory, and that the findings and judgment of the court are based upon another theory, to wit, a recovery by way of damages for the value of the use and possession of said land; wherefore, it is urged, the findings and conclusions and judgment are outside of the issues raised by the pleadings and not supported by the evidence. The form of the pleadings lends some support to the contention, but they are also susceptible to the construction contended for by the plaintiffs. It is true that the complaint alleges the execution of the original contract with Wells, but it does not proceed on the theory that the plaintiffs are foreclosing the interests of said defendants in and to the said property and contract. On the contrary, the complaint alleges that the contract had been terminated prior to the period in question and

that the defendants unlawfully retained possession, harvested the crop and appropriated the same to their own use. The allegations concerning the execution of the contract may properly be considered as matters of inducement or evidentiary. They do not affect the theory of the plaintiffs' cause of action, viz., that the plaintiffs were the owners and entitled to possession; that the defendants were unlawfully in possession; that they harvested the crop and appropriated the same to their own use and became liable to the plaintiffs for mesne profits. An inspection of the record discloses that the evidence was abundantly sufficient to support the findings and judgment on that theory.

The appellant makes the further contention that there was no proof of a demand made on him for possession at any time during the period in question. He does not support his contention that demand was necessary with any citation of authority, but assuming that demand was necessary under the circumstances here shown there was ample proof that the plaintiffs sought in many ways and at different times during said period to obtain possession, even going to the extent of endeavoring forcibly to take possession, but that their efforts were resisted with force in the interest of and on behalf of the appellant.

The judgment is affirmed.

We concur: MYERS, C. J.; RICHARDS, J.; SEAWELL, J.; WASTE, J.; LENNON, J.; LAWLOR, J.

197 Cal. 801

Hagop DANIELIAN, Plaintiff and Respondent, v. Charles WELLS, Harry Faith, and C. L. Caine, Defendants and Appellants. (Sac. 3639.)

(Supreme Court of California. Dec. 30, 1925.)

In Bank.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

N. Lindsay South, of Fresno, and Bradley & Bradley, of Visalia, for appellants.

E. A. Bagby, of Oakland, and E. I. Feemster, of Visalia, for respondent.

SHENK, J. The plaintiff brought this action to recover from the defendants the value of the use and possession of a 27-acre tract of producing vineyard land located in the county of Tulare. Judgment went for the plaintiff against the defendants in the sum of \$2,262. Notice of appeal was filed on behalf of all of the defendants, but said appeal as to Charles Wells and Harry Faith has been abandoned. The appeal of C. L. Caine is the only one presented for determination. The plaintiff's land adjoins the 27-acre tract of land owned and described by the plaintiffs in the case of *Shamlian v. Wells* (Sac. No. 3638) 242 P. 483, this day decided. On this appeal it is stipulated that the facts in this case are distinguishable from the facts in that case only as to the amount of the judg-

ment, and no point is made that the amount of the judgment was not properly ascertained. On the authority of that case the judgment is affirmed.

We concur: MYERS, C. J.; RICHARDS, J.; SEAWELL, J.; WASTE, J.; LENNON, J.; LAWLOR, J.

197 Cal. 627

HOLMES et al. v. RAILROAD COMMISSION OF CALIFORNIA et al. (S. F. 11467.)

(Supreme Court of California. Dec. 23, 1925.)

1. Automobiles ⚡63—Statute extends jurisdiction of Railroad Commission to private carrier operating as transportation company as defined by it.

Amendment of Auto Stage and Truck Transportation Act, § 1(c), by St. 1919, p. 458, § 2, defining Transportation Company, held intended to extend jurisdiction of Railroad Commission to private carriers when engaged in the business of a transportation company as there defined, and to subject such private carriers to the burdens, obligations, and limitations imposed by the act.

2. Automobiles ⚡59—State may withhold use of highway from private carrier.

The power and right of the state to withhold, in its discretion, use of its public highways by a common carrier, which is a privilege and not a right, rests not on the fact that it is a common carrier, which subjects it only to regulation, and not to prohibition, but on the fact that it is making a private use of the highways, making them its place of business, and so applies as well to private carriers.

3. Constitutional law ⚡241—Classification of private carriers, as distinguished from those carrying their own goods, as transportation companies, held to have natural or inherent basis, and so not lacking in uniformity.

Classification by Auto Stage and Truck Act, § 1(c), as amended by St. 1919, p. 458, § 2, of private carriers, as distinguished from those carrying their own goods, as transportation companies, subject to jurisdiction of Railroad Commission, has a natural or inherent basis, so that statute is not lacking in uniformity.

4. Automobiles ⚡73—Constitutional law ⚡62—Arbitrary discretion not given Railroad Commission by Auto Stage and Truck Transportation Act.

Auto Stage and Truck Transportation Act, § 1(c), as amended by St. 1919, p. 458, § 2, is not unconstitutional as vesting arbitrary discretion in the Railroad Commission; its discretion being controlled and guided by the relation of the facts found by it to the public convenience and necessity.

5. Automobiles ⚡84—Railroad Commission's finding as to operation by carrier between fixed termini, or over regular route, reviewable.

Railroad Commission's finding that carrier is operating between fixed termini, or over reg-

ular route, is subject to review, though Auto Stage and Truck Transportation Act, § 1(c), as amended by St. 1919, p. 458, § 2, provides that it shall be final, the fact being necessary to its jurisdiction; but it is enough that there is some substantial evidence to support it.

6. Automobiles ⚡83—Commission's finding that private carrier was operating between fixed termini and over regular route held supported by evidence.

Railroad Commission's finding that private carrier was operating over highways between fixed termini, or over regular route, necessary to constitute it a transportation company, subject to commission's jurisdiction, held supported by evidence; it being immaterial, under the statute, that there were departures from the termini and route, whether periodic or irregular.

Shenk, J., dissenting.

In Bank.

Application by Henry E. Holmes and others for certiorari to review a decision and order of the Railroad Commission of California. Decision and order affirmed, and writ discharged.

Thelen & Marrin, of San Francisco, for petitioners.

Gwyn H. Baker, of San Francisco, for respondent Highway Transit Co.

Walter H. Robinson, of San Francisco, for respondent S. B. McLenegan & Son.

Carl I. Wheat and W. M. Taylor, both of San Francisco, for other respondents.

MYERS, C. J. Review to annul a decision and order of the respondent Railroad Commission. The decision sought to be reviewed was the outcome of a proceeding before the commission wherein the respondents Highway Transport Company and S. B. McLenegan & Son, both "certified" common carriers of freight by motor truck between San Francisco and San Jose and intermediate points, filed complaint alleging that the petitioners herein were operating motor trucks without having obtained a certificate of public convenience and necessity to do so for the transportation of freight for hire over the public highways between San Francisco and San Jose and intermediate points along and over the same routes and roads over which the complainants were operating; that such operations were in violation of law, were in direct competition with the complainants, and resulted in injury and damage to them. The defendants therein, petitioners here, filed an answer denying the allegations of the complaint, and setting up as a separate defense that defendants were the owners of certain automobile trucks which they leased to a number of "selected" shippers of freight for use by said shippers in the distribution of merchandise between San Francisco and such points in San Mateo and Santa Clara coun-

ties as from time to time served the convenience and necessity of said shippers.

The answer further denied that the defendants were common carriers; that they operated between fixed termini, or over a regular route; that they were operating in violation of law; and that they were subject to the jurisdiction of the Railroad Commission. Upon the issues thus joined the Railroad Commission, after due notice, and after a full and extended hearing, rendered its decision and order now before this court for review, wherein it was found that the defendants, petitioners herein, were operating as a transportation company as that term is defined in section 1 (c) of chapter 213, Statutes of 1917 (St. 1917, p. 330), as amended (St. 1919, p. 458, § 2), and that they were engaged in the operation of motor trucks over the public highways for compensation, over a regular route and between fixed termini, namely, "San Francisco to San Jose and intermediate points." The commission thereupon made its order directing the defendants to cease and thereafter to desist from any and all such transportation unless and until they should secure a certificate of public convenience and necessity therefor. The defendants, after the denial of their petition for a rehearing of said order and decision, instituted the present proceedings in this court for a writ of review to annul the same.

[1, 2] Petitioners were engaged in operating 3 motor trucks in the transportation of merchandise consisting principally of drugs, drug sundries, and groceries from wholesale houses in San Francisco to retail dealers in San Jose and at other points in Santa Clara and San Mateo counties, which points, for the most part, are intermediate points between San Francisco and San Jose. Petitioners operated under separate contracts with the several shippers, 23 in number; each contract being entered into severally by petitioners as one party and by one of the shippers as the other party thereto. These contracts were substantially alike in their terms (except as to minor variations not deemed pertinent to the present inquiry). By each of these contracts the petitioners purported to lease their trucks to the shipper for use by the latter in transporting its merchandise from San Francisco to points in Santa Clara and San Mateo counties at an agreed rental of \$19.50 per truck per day.

It is further provided that, if on any day only a portion of the capacity of any truck is used for such transportation, the rental shall be such proportion of said rental of \$19.50 as is represented by the ratio which the capacity of the truck actually utilized in the transportation of the lessee's merchandise bears to the total agreed capacity of the truck, and, further, that the minimum rental in connection with any transportation shall be based on one-thirtieth of the capacity of the truck. It is apparent from the other pro-

visions of these "leases," and from the manner in which they were performed by the parties, that they are nothing more than contracts for the transportation of merchandise for compensation at the rate of 32½ cents per 100 pounds, subject to a minimum charge of 65 cents per shipment. The commission so found and its finding is abundantly supported, if not compelled, by the evidence. The commission did not expressly find upon the issue as to whether or not the petitioners were operating as common carriers, which was alleged in the complaint and denied in the answer. The finding is:

That the petitioners "are operating a transportation company as that term is defined in section 1(c) of chapter 213 of the Statutes of 1917 and amendments thereto; that they are engaged in the operation of auto trucks over the public highways for compensation, over a regular route and between fixed termini, namely, San Francisco to San Jose and intermediate points. * * *

Petitioners contend that this finding must be taken by us as a negative finding upon the allegation that they were operating as common carriers, and we are inclined to agree with this contention. The carrier respondents strongly insist that under the rule which requires the construction of findings so as to support the judgment we should construe this as a finding that petitioners were in fact operating as common carriers and that such finding is amply supported by the evidence herein. It may be that the evidence herein would sustain such a finding if it had been made by the commission. As to that we express no opinion. We are of the opinion that the present is not a proper case for the application of the rule invoked by the carrier respondents. A careful reading of the entire decision of the commission, of which the quoted finding forms but a part, makes it clear that the commission did not intend to find as a fact that petitioners were operating as common carriers. On the contrary, the commission took the view that petitioners were subject to its jurisdiction under the other facts and circumstances found herein, regardless of the question whether they were operating as common carriers or as private carriers, and in accordance with that view it deliberately and intentionally omitted to find upon this question. If, therefore, we should conclude that the operation of petitioners as common carriers is a fact essential to the jurisdiction of the commission over them, it would be our duty to annul this decision and order.

This precise question was involved in the recent case of *Frost v. Railroad Commission* (Cal. Sup.) 240 P. 26, which was decided by us adversely to petitioners' contentions herein. That case must be regarded as controlling with respect to this phase of the present inquiry, and the respective counsel for the petitioners and for the Railroad Commission

so concede. Counsel for petitioners argue most earnestly that our decision in the Frost Case is erroneous, and should be promptly overruled. We have given careful consideration to these arguments, and are not disposed to depart from our views as expressed in that case. The gist of our conclusion in that case may be briefly stated as follows: The Legislature by the 1919 amendment to the Auto Stage and Truck Transportation Act plainly intended and attempted to extend the jurisdiction of the Railroad Commission to private carriers when engaged in the business of transportation companies as there defined and to subject such private carriers to the burdens, obligations, and limitations imposed by that act. The question, then, is whether the state has the power to impose such burdens and limitations upon private carriers when using the public highways for the transaction of their business, or whether its power in this behalf is limited in its application to public carriers. It is now universally recognized that the state does possess such power with respect to common carriers using the public highways for the transaction of their business in the transportation of persons or property for hire. That rule is stated as follows by the Supreme Court of the United States:

"A citizen may have, under the Fourteenth Amendment, the right to travel and transport his property upon them [the public highways] by auto vehicle, but he has no right to make the highways his place of business by using them *as a common carrier for hire*. Such use is a privilege which may be granted or withheld by the state in its discretion, without violating either the due process clause or the equal protection clause." Buck v. Kykendall, 267 U. S. 307, 45 S. Ct. 324, 69 L. Ed. 623, 38 A. L. R. 286. (Italics added.)

Petitioners emphasize the words which we have italicized and insist that this rule is limited in its application to common carriers. We think it is equally applicable to all persons who seek to make a special and private use of the public highways by transacting their private business thereon and that it applies with equal force to private carriers who engage in the business of transportation for hire upon the public highways. The reason for the rule which authorizes the state to prohibit the private use of the highways by such carriers is not that they are common carriers; it is that they are making a private use of the public highways, which are owned and paid for by the public, and which are open alike to all persons.

It is true that common carriers are subject to regulation by the state because the fact that they are engaged in public service causes their business to be affected with public interests, and thus justifies the regulation thereof by public authority. But this is not, as it seems to us, the reason for the existence of the rule above quoted. The circumstance

that they are public carriers would subject them to *regulation*, but it would not subject their business to *complete prohibition*, it being a business which is not inherently unlawful or wrongful; but it is universally conceded that the state does have the power and the right to completely prohibit the use of its public highways by a common carrier. This must rest not upon the fact that he is a common carrier, but upon the fact he is making a private use of the public highways. This conclusion is not based, as petitioners assert, upon the power of the state to *regulate the use* of its highways. It is based upon the power of the state to *prohibit the private use* of its highways or in its discretion to grant the privilege of such private use upon such conditions as it may see fit to impose. By the statute here in question the state says in effect to the citizen:

"I will grant you the special privilege of using my highways for your private business upon condition that you in turn submit yourself and your property to such regulations as I impose. I will not compel you to submit to these regulations, but, if you are not willing to do so, I shall not grant you this special privilege."

A conclusion somewhat analogous to this is presented in the case of Producers' Transportation Co. v. Railroad Commission, 176 Cal. 499, 169 P. 59, relied upon by petitioners herein. It was there held that a state has no power by mere legislative fiat, nor even by such fiat embodied in its Constitution, to transmute a private carrier into a common carrier. With that conclusion we are in entire accord; but it was also there held that, if a private carrier exercises the right of eminent domain in aid of his transportation business, he will be deemed thereby to have dedicated his transportation system to a public use and to have thereby become a public carrier.

The circumstance that the right of eminent domain is a right of sovereignty which is inherent in the state does not seem to us of particular importance. The important fact, as it seems to us, is that the right of eminent domain is not possessed by individuals as a matter of right. When the state offers to grant this right to an individual, it is as to him a special privilege. If the state offers this privilege to him upon expressed conditions, he will be deemed, if he exercises the right, to have accepted the offer and to have agreed to the conditions. He is under no compulsion to submit to the conditions. If he does not submit to the conditions, he cannot exercise the privilege. If he does exercise the privilege, he will be deemed to have voluntarily agreed to the conditions. Herein lies the distinction between the present case and the case of Michigan Public Utilities Comm. v. Duke, 266 U. S. 570, 45 S. Ct. 191, 69 L. Ed. 445, 36 A. L. R. 1105. Counsel for petitioners direct our attention to the fact that the reasoning adopted by us in the Frost Case and

adhered to herein was urged upon the Supreme Court of the United States in the Duke Case and was by that court rejected. We agree that it was properly rejected in that case because it was not tenable under the facts of that case. It could not be said that, by continuing in the transportation of property for hire after the enactment of the Michigan Public Utilities Act (Pub. Acts 1923, No. 209), Duke had voluntarily elected to dedicate his property to a public use, because Duke had no opportunity for an election. He had no choice but to continue in the transportation of property after the enactment of the statute. He was under compulsion so to do because of his contracts which were in existence and subsisting at the time of its enactment. Therefore, to hold the statute applicable to him would be to say in effect that the state had the power to transmute him from a private carrier into a public carrier *nolens volens*, and this we agree it could not do. This is what we had in mind when we said in this connection in the Frost Case, "To give it effect in its application to his situation would have been to impair the obligation of those contracts." We intended thereby to point out that the only liberty of choice offered by the Michigan statute in its application to Duke was a Hobson's choice between dedicating his property to the public on the one hand and breaching his contracts on the other. We did not intend thereby to intimate that the decision of the United States Supreme Court in the Duke Case was rested in part upon the impairment of the contracts provision of the federal Constitution. It clearly was not.

In the present case the petitioners did not enter into the transportation business until long after the enactment of the statute here in question. We find here no such obstacle as there was in the Duke Case in the way of the conclusion that by so doing petitioners must be deemed to have voluntarily elected to submit themselves to the conditions imposed by the statute. We do not agree with petitioners that the Washington decisions cited by us in the Frost Case have all been overruled by the later decisions of that court in *Davis v. Metcalf*, 131 Wash. 141, 229 P. 2. They were not expressly overruled therein. On the contrary, they are cited with apparent approval. It must be conceded, however, that the implications of some of the language used in the opinion in that case appear to be in conflict with our conclusions in the Frost Case and herein. That case, however, did not involve the question of the power of the Railroad Commission to make an order in respect of a private carrier such as is here under review. That case arose as a suit in equity by a certified carrier to procure an injunction restraining an uncertified carrier from transporting goods for compensation over a regular route in competition with the plaintiff. The trial court denied the injunction

and the Supreme Court affirmed the judgment. It does not necessarily follow from anything said or decided in that case that if the Railroad Commission of that state had, after a hearing, made an order requiring the defendant to desist from further transportation over the highways until he obtained a certificate of public convenience and necessity, such order would have been annulled by the court. That question has not yet been litigated in the state of Washington so far as we are advised. The recent Utah case of *State v. Nelson*, 238 P. 237, is, we think, distinguished from the present case by the differences in the Utah Statute. The grant of jurisdiction to the commission in that statute is:

"To supervise and regulate every public utility in this state as defined in this title. * * *"

The term "public utility" is defined to include:

"Every * * * automobile corporation * * * where the service is performed for or the commodity delivered to the public or any portion thereof."

The term "common carrier" is defined to include:

"Every * * * automobile corporation * * * operating for *public service* within this state; and every person or corporation * * * engaged in the transportation of persons or property for *public service* over regular routes between points within this state." (Italics added.)

The section of the Utah statute providing for the issuance of certificates of public convenience and necessity, while it does not expressly so provide, nevertheless indicates by clear implication the legislative intent that it shall be applicable only to public utilities as above defined. The Utah court held correctly, as we think, that the intent of the Utah statute was to limit the regulatory powers of the Railroad Commission to common carriers and other public utilities. Having reached this conclusion, the language in its opinion which is relied upon by petitioners herein must, as it seems to us, be regarded as obiter. We agree with petitioners that the case of *Hissem v. Guran* (Ohio) 146 N. E. 808, is in conflict with our conclusion in the Frost Case herein. It may be noted, however, that the reasoning which has impelled us to our conclusion does not appear to have been suggested to or at all considered by that court. We are disposed to adhere to that conclusion, notwithstanding the absence of any direct authority to support it.

[3] If the foregoing conclusion is sound, it is, as it seems to us, a sufficient answer to all of petitioners' contentions based upon the guaranties of the federal Constitution, with the possible exception of the contention that the Auto Stage and Truck Transportation Act as amended and as construed by us denies

to petitioners the equal protection of the law. Petitioners' first point under this contention is disposed of by our decision in the case of *Franchise Motor Freight Ass'n v. Seavey*, (Cal. Sup.) 235 P. 1000. Petitioners seemingly take the position that there is no legitimate basis for a classification and distinction between private carriers engaged in the business of transporting freight over the public highways on the one hand and private individuals engaged in other lines of business transporting their own freight over the public highways as an incident to such business on the other hand. Petitioners propound the following question:

"What reasonable ground of distinction is there between a *private* carrier engaged in the business of transporting his own freight over the public highway between two points and another *private* carrier who is engaged in the transportation of the same class of freight between the same points at the same time over the same highway; the only distinction being that the freight transported by the latter belongs to his neighbor or some other third party instead of to himself?"

The facts assumed in this question are self-contradictory. One who transports merely his own freight over the highway is not a carrier, private or otherwise. He may be a farmer or a manufacturer or a merchant or what not, but the business in which he is engaged is not the business of transportation. He is not a carrier unless he engages in the business of transportation of the persons or property of others for compensation. One, who transports merely his own goods, is of necessity engaged in some business other than transportation, and the transportation of such goods is no more than an incident to such business. So, also, one, who transports the goods of another as a servant or agent of such other, is not engaged in the business of transportation, but in so doing is engaged in the business of his master or principal, whatever that business may be. But one, who engages as an independent calling in the transportation of goods for another or for others under contract and for compensation, is engaged in the business of transportation and is a carrier. The true question in this behalf is, therefore, Is there a natural or inherent basis for a classification and distinction between those who engage in the business of transportation of the property of others for compensation over the public highways, thus making a private use of those highways, and those on the other hand who are engaged in other lines of business and who use the highways in the transportation of their goods merely as an incident to such business, for which purpose the highways are open alike to all? This question seems to us to answer itself. It is too well settled to require citation of authority that a statute is not lacking in uniformity if it operates alike upon all those comprised within a class

defined therein which is based upon some natural, inherent, or constitutional ground of classification.

[4] We find no merit in the suggestion that the act is unconstitutional in that it vests an arbitrary discretion in the Railroad Commission. The discretion of the commission is not arbitrary, but is controlled and guided by the relation of the facts found by it to the public convenience and necessity. *Tarpey v. McClure*, 190 Cal. 593, 600, 213 P. 983, and cases cited.

[5, 6] The final contention necessary to be considered herein is that the finding of the commission to the effect that petitioners were operating between fixed termini and over a regular route is unsustained by the evidence. The statute defines the words "between fixed termini or over a regular route" to mean:

"The termini or route between or over which any corporation or person * * * usually or ordinarily operate any automobile, jitney, bus, auto truck, stage or auto stage, even though there may be departures from said termini or route, whether such departures be periodic or irregular."

It also provides that this shall be a question of fact and that the finding of the commission thereon shall be final and shall not be subject to review. We agree with petitioners that the finding is, however, subject to review, notwithstanding the last-mentioned provision of the statute, for the reason that the fact in question is one which is essential to the jurisdiction of the commission. Such review, however, cannot extend beyond the inquiry as to whether or not there is some substantial evidence to support the finding. If there is, the finding must be sustained, no matter how much evidence there may be in conflict therewith. In this connection it is to be noted, however, that it is not necessary that the evidence shall sustain both of the findings of the commission; namely, that petitioners were operating between fixed termini and that they were operating over a regular route. The statute is in the disjunctive and it is sufficient in this connection to sustain the jurisdiction of the commission if there was substantial evidence to support either of these findings. The decision of the commission contains a fair résumé of the evidence upon this question, and we quote therefrom as follows:

"Defendants contend that they are not operating between fixed termini nor over any regular route, because they have had no depot at any point in San Mateo or Santa Clara counties, nor have they a telephone at such points; that deliveries are made either to store or sidewalk; that there is no point in any city or town in San Mateo or Santa Clara counties which constitutes a terminus, since the destination of trucks is determined entirely by the load which the 'lessees' of the particular truck happen to offer for transportation on that particular trip; and that there are no cities or

towns in San Mateo or Santa Clara counties to which any trucks regularly go on all trips.

"It is true that each and every truck operated down the Peninsula by defendants does not stop for pick-up or delivery of merchandise at each and every point along the highway, San Francisco to San Jose, inclusive, and that on occasions the trucks have gone off the highway for several miles to make deliveries to points such as the County Poor Farm back of Belmont, camp No. 4 on the Skyline boulevard, Chadwick and Sykes' camp 3 miles east of Redwood City, etc. The evidence, however, does show that there is only one main highway known as the Peninsula highway over which the trucks of the defendants usually or ordinarily operate; that defendants' drivers are instructed during fair weather to use what is known as the Bay Shore highway out of San Francisco to its connection with the main Peninsula highway at San Bruno and in rainy weather to use the Mission road through Colma to San Bruno. From San Bruno there is but a single route through Burlingame, San Mateo, Belmont, Redwood City, Menlo Park, Palo Alto, and other intermediate points, to San Jose. This main state highway is usually and ordinarily used with the exception of the infrequent occasions upon which, as mentioned above, a truck carries merchandise destined to points somewhat off the highway.

"In connection with Defendants' Exhibit No. 12, entitled 'Some routes used by H. E. and P. W. Holmes,' P. W. Holmes testified that no two of such routes were alike. Route No. 3 names Redwood City only; No. 5, Burlingame-Redwood City; No. 12, Redwood City-Burlingame. These three routes, however, when taken in connection with San Francisco as a northern terminus, are identical in every respect. Transposing the names of communities does not differentiate as to route over which the trucks travel, but merely shows a difference in the routing of particular deliveries. In fact, this entire exhibit in the main substantiates the contention of complainants that defendants' trucks do usually and ordinarily operate over a regular route or between fixed termini as represented by manifests therein named.

"Defendants further contend that they have no fixed termini, due to the fact that the manifests submitted in the evidence covering the month of January, 1924, show a different southerly terminus on different trips. Analysis of this evidence shows that, during the 30-day period above mentioned, San Jose or a point immediately adjacent to the city limits of San Jose, such as Alum Rock, Meridian road, etc., appears as the most southerly terminus upon 20 occasions; the most southerly destination on other occasions being some point along what is known as the main Peninsula highway, San Francisco, to San Jose, such as Redwood City, which appears some 7 times, or Palo Alto, which appears some 5 times.

"Certainly if a truck carries no merchandise for delivery upon a specified trip which would necessitate it going the entire length of its route, and has no call for a pick-up on the north-bound trip, it would in any case turn back after making its most southerly delivery, and if this commission should hold that the law contemplated this class of operation as not being over a regular route no truck operator in the state could be held to fall within the pro-

visions of the state regulation, due to the fact that one or more of his trucks on infrequent occasions might not cover the entire route usually or ordinarily served by him."

In addition to the foregoing, it may be noted that at the hearing before the commission petitioners introduced an exhibit consisting of a schedule showing the points of all deliveries made by them during the second week of each of the months of December, 1923, and January, February, and March, 1924, in connection with which they produced testimony that the deliveries during those weeks were fairly typical of all of their operations. The schedule shows all of the deliveries made by petitioners on 23 working days comprising those weeks and it appears therefrom that upon every one of those days petitioners made deliveries from San Francisco to San Jose and to intermediate points. Under the statute it is immaterial that there were departures from the termini and from the route, "whether such departures be periodic or irregular." We are satisfied that the finding of the commission is sustained by the evidence, and, if it were conceded that the evidence would equally sustain a contrary finding, that circumstance would be immaterial.

The decision and order of the commission are affirmed, and the writ discharged.

We concur: LAWLOR, J.; RICHARDS, J.; WASTE, J.; SEAWELL, J.; LENNON, J.

SHENK, J. I dissent. I cannot agree with the reasoning and conclusion of the prevailing opinion. It appears that the petitioners had applied to the commission for a certificate of public convenience and necessity. By that application they impliedly consented to subject themselves to the jurisdiction of the commission and to comply with the conditions which the law and the commission might impose. Included in those conditions under section 4 of the Auto Stage and Truck Transportation Act would be that the commission should have the power to fix their rates, regulate their service, and in general provide that the applicant operate as a common carrier in the event that the certificate be issued. The application, however, was denied. Such action was within the power of the commission under section 6 of the act, which provides that the commission may grant or deny such a certificate "with or without * * * hearing."

The petitioners established themselves as a private carrier. The respondent certificated carriers filed a complaint against them before the commission, alleging that the petitioners were a transportation company as defined by the Auto Stage and Truck Transportation Act, and as such were operating in direct competition with the complainants and were injuring and damaging their business. The petitioners were summoned before the com-

mission and in an answer filed by them they denied that they were a transportation company as defined by the act. After notice and an extended hearing, the commission found that the petitioners were a transportation company operating as a private carrier and issued an injunction directing them "to cease and hereafter to desist from any and all such transportation unless and until they have secured from this commission a certificate declaring that public convenience and necessity require the resumption or continuance thereof." The effect of the decision and order of the commission is to put the petitioners out of business, for it enjoins them from operating "unless and until" they obtain a certificate and on application the commission denies the certificate.

Under sections 22 and 23 of article 12 of the Constitution and the decisions of this court, the commission has jurisdiction only of the regulation and control of public utilities and matters which are germane to such regulation and control. This is conceded in the prevailing opinion, but it is held, following the Frost Case, that the regulation of such a private carrier is so germane because forsooth the private carrier is in competition with the public carrier. This conclusion in my opinion is not supported either by reason or authority. If that conclusion be sound, the result would be that the commission may now require a truck owner, engaged exclusively in the business of operating his truck for transportation of freight on the public highways under contract with the sole owner of a chain of stores, to apply for a certificate of public convenience and necessity or go out of business and by denying his application put him out of business.

To pursue the subject still further, it would logically follow that the commission could be endowed by the Legislature under the present constitutional grant with the power to say that no one may use the public highways for the transportation of his own goods because by so doing he would take from the certificated operator a revenue which the latter might otherwise receive. By the same reasoning the Legislature could vest the commission with power to prohibit the use of private passenger automobiles operating on the public highway because such use would be in competition with regulated common carriers of passengers with possible destruction of the business of the latter. Such a result may not be contemplated as within the power of the state, and more particularly within the constitutional powers of the Railroad Commission as defined and limited by this court.

Nor is the action of the commission authorized by the Public Utilities Act (St. 1915, p. 115) or the Auto Stage and Truck Transportation Act. The power of the commission to entertain complaints under the Public Utilities Act, under sections 60 and 61a, is with

reference to "any act or thing done or omitted to be done by any public utility." Section 7 of the Auto Stage and Truck Transportation Act provides that in all respects in which the Railroad Commission "has power and authority under the Constitution of this state or this act" complaints *may* be filed with the commission and disposed of "in the manner, under the conditions and subject to the limitations and with the effect specified in the Public Utilities Act." In *Motor Transit Co. v. Railroad Commission*, 189 Cal. 573, at page 578, 209 P. 586, 588, this court said:

"By specific reference to the Public Utilities Act the commission is given power to hear and determine complaints against transportation companies in exactly the same manner and to the same extent as it has of complaints against other public utilities. This power is conferred by section 7 of the 'Auto Stage and Truck Transportation Act.' * * * It obviously follows that sections 60 and 61 (a) of the Public Utilities Act, as originally enacted and still in force, which prescribe the power of the commission to hear and determine complaints against public utilities, make [mark] and measure the power of the commission to proceed in the instant case."

Said section is not merely procedural. It vests power in the commission to entertain complaints and to take action thereon. The restrictions and limitations specified in the section are that, for the purpose of procedure, the terms of the Public Utilities Act shall apply.

If the Auto Stage and Truck Transportation Act purports to vest in the commission jurisdiction over private carriers, in my opinion it is to that extent contrary to the Constitution. Such a conclusion would not deprive the commission of the power to entertain complaints against transportation companies which are common carriers in fact, but are seeking to avoid the requirements of the act by masquerading as private carriers. If the petitioners had been found to be a common carrier in fact, the commission would have had jurisdiction over them and could have properly exercised its authority in prohibiting their operations. But when the commission found the petitioners to be a private carrier, and it did so find, the jurisdiction of the commission over them was at an end. It seems to me that the prevailing opinion has misconceived the real purpose and object of the Auto Stage and Truck Transportation Act. The opinion fails to distinguish between regulation looking to safety and the conservation of the highways and the regulation of persons by whom the highways may be used. As to regulations concerning safety and the conservation of the highways, they must be uniform and apply equally as between those similarly situated and may comprehend all uses both public and private.

The Motor Vehicle Act (St. 1913, p. 639) is a familiar example of such regulation.

But such an act necessarily prescribed a uniform course of conduct to which all must conform and when its requirements are met must be available to all. Use of the highways under such an act may be regulated, but not prohibited, with certain exceptions not material here. Concerning the regulation of the persons who may use the public highways, it is unquestionably true that the state may not only regulate but may prohibit the use thereof by persons, firms, or corporations engaged in the business of a common carrier. It may grant the privilege to one carrier and deny it to another. It may regulate the charges and service of a common carrier and it may prevent other common carriers from competing with a privileged carrier. Such is the purpose of the Auto Stage and Truck Transportation Act. In other words, the purpose of the regulatory provision here in question is to prevent, in the public interest, ruinous competition as between concerns engaged in a like public business. With reference to a similar act in the state of Washington the Supreme Court of the United States in *Buck v. Kuykendall*, 267 U. S. 307, 45 S. Ct. 324, 69 L. Ed. 623, 38 A. L. R. 286, said:

"Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines, not the manner of use, but the persons by whom the highways may be used."

In determining the persons by whom the highways may be used, the state has no power, in my judgment, under the guise of prohibiting competition, to deny to its citizens the right to use the public highways for their own private purposes, whether for business or for pleasure. But assuming that it has that right, and particularly the right to prohibit a private business use of the highways, as announced by the opinion, it would necessarily be true that such regulatory prohibitions must be uniform and apply to all similarly situated and be enforced through the medium of a state agency duly constituted for that purpose. But in this case a state agency, whose judicial powers extend only to the regulation and control of public utilities and matters properly germane thereto, proceeds to hale before it a concern using the highways for its own private purposes, its private rights are adjudicated, it is found to be engaged in a private business, and it is put out of business because, forsooth, its private business diminishes the revenues of a certified common carrier. That the commission acted judicially in determining, after notice and hearing and on evidence, the status of the defendants before it, and in issuing the injunction, cannot be denied. That the commission may act judicially when legally authorized so to do is likewise beyond question. Its authority to act in that capacity, however, cannot be determined alone from a

consideration of the amendment to the statute in 1919. Such a grant of power must come from the Constitution or from some act of the Legislature which is constitutionally authorized.

It is not contended, as indeed it may not be, that the commission has direct grant from the Constitution to regulate private business. True, this court compelled the commission to assume jurisdiction of transportation companies prior to any legislative enactment on the subject (*Western Association, etc., R. R. v. Railroad Comm.*, 173 Cal. 802, 162 P. 391, 1 A. L. R. 1455), but the transportation companies before the commission in the proceeding involved in that case, and over which the commission was required to take jurisdiction, were admittedly common carriers, and, as such, public utilities within the definition of section 23, article 12, of the Constitution. The whole purpose of that section and of the preceding section 22 in re-establishing the Railroad Commission and endowing it with extensive powers was to regulate and control public utilities privately owned (*City of Pasadena v. Railroad Comm.*, 183 Cal. 526, 534, 192 P. 25, 10 A. L. R. 1425), and it is settled by the decisions of this court beyond question that such additional powers as the Legislature may confer upon the commission must be "germane to the subject of regulation and control of public utilities." *Pacific T. & T. Co. v. Eshleman*, 166 Cal. 640, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822; *City of Pasadena v. Railroad Comm.*, supra; *Motor Transit Co. v. Railroad Comm.* 189 Cal. 573, 209 P. 586. The commission recognizes that such is the rule, but contends:

"That the regulation of the type of carriage here in question is, because of its power to destroy regulated carriage, most cognate and germane to the subject of the regulation and control of public utilities [carriers]."

I deny that the commission has power to suppress and destroy a private business because such private business may be in competition with the business of the common carrier. This is, indeed, a curious, but nevertheless, an effective, method of taking private property for public use without compensation. Furthermore, if the question of competition be the test and the elimination of competition be germane to the subject of regulation and control of the public utility, it is difficult to conceive why it is necessary to consider the use of the public highways in connection with such competition, for, if the power to suppress competition be possessed by the commission, it may be exercised against the outlawed competitor, whether he operate on the public highways or elsewhere. If the suppression of competition alone does not make such regulation germane to the subject of regulation and control of public utilities, then it cannot be made so germane under the guise of regulat-

ing the use of the public highways. We are here dealing with public and private concerns which use the public highways in their business, but the fact that they are so using them, in so far as competition is concerned, is a mere circumstance.

The prevailing opinion concedes that the conclusions reached are without direct precedent. By reference to the laws and decisions of other states, it is found that Michigan, Ohio, Utah, and Washington have statutes similar to our Auto Stage and Truck Transportation Act. The courts of last resort of those states, in construing their statutory provisions, have uniformly reached a conclusion opposed to the prevailing opinion. *Hissem v. Guran et al.* (Ohio) 146 N. E. 808; *Davis & Banker v. Metcalf*, 131 Wash. 141, 229 P. 2; *State v. Nelson* (Utah) 238 P. 237. The declaration of the Supreme Court of the United States in *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570, 45 S. Ct. 191, 69 L. Ed. 445, 36 A. L. R. 1105, is directly in point. In that case Duke had employed 75 men and 47 motor trucks as a private carrier under three private contracts for the transportation of automobile bodies from Detroit to Toledo. Under the Public Utilities Act of Michigan, which concededly is essentially similar to our own Auto Stage and Truck Transportation Act, it was sought to subject Duke to regulation as a common carrier. The court said:

"Moreover, it is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment. *Producers' Transportation Co. v. Railroad Comm.*, 251 U. S. 228, 230 [40 S. Ct. 131, 64 L. Ed. 239]; *Wolff Co. v. Industrial Court*, 262 U. S. 522, 535 [43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280]. On the facts above referred to, it is clear that, if enforced against him, the act would deprive plaintiff of his property in violation of that clause of the Constitution."

The prevailing opinion attempts to distinguish that case from the one at bar on the ground that Duke's contracts were outstanding at the time the Michigan statute took effect and for that reason the statute was not applicable to him. The Supreme Court of the United States did not base its decision on the impairment of contract clause, but on the Fourteenth Amendment. Such, in my opinion, should be the conclusion reached in this case; that is to say, it should be decided that the petitioners, by reason of the act of the commission, have been deprived of their property without due process of law, have been denied the equal protection of the law, and their private property has been tak-

en for public use without just or any compensation. The order of the Railroad Commission should be annulled.

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GLENN-COLUSA IRR. DIST. v. PAULSON.
and two companion cases. (Civ. 2979.)

(District Court of Appeal, Third District, California. Nov. 3, 1925. Hearing Denied by Supreme Court Dec. 31, 1925.)

1. Waters and water courses ⚡254—Rights accruing to service of water furnished by public utility held subject to state regulation.

Any rights accruing to service of water after adoption of Constitution, if water is furnished by public utility, is controlled by Const. art. 14, § 1, declaring distribution of water by public utility subject to state regulation, regardless of Civ. Code, § 552, as to perpetual easement of one furnished water.

2. Waters and water courses ⚡254—Water right of consumer served by public utility merely right of service subject to regulation.

The right of a water consumer is simply a right of service so long as public utility controls instrumentality rendering service, and the exercise of such right does not create an ownership or easement in the water such as is contemplated by Civ. Code, § 552, but is a service subject to regulation and control of state.

3. Waters and water courses ⚡254—Railroad Commission held authorized to discontinue insolvent public utility distributing water and permit transfer of property to irrigation district.

Where public utility distributing water for irrigation purposes was hopelessly insolvent, held, that, in view of Public Utilities Act, Railroad Commission had authority to discontinue functions of public utility and permit transfer of its property to an irrigation district.

4. Waters and water courses ⚡254—Landowners interested in application before Railroad Commission to transfer property of public utility distributing water held entitled to petition for rehearing and modification, and on denial thereof to apply to Supreme Court for writ of review.

Where landowners sufficiently showed themselves to be parties in interest in application to Railroad Commission by public utility distributing water to discontinue its functions and transfer its properties to irrigation district, such landowners had right to petition for rehearing before Railroad Commission or for modification, and on denial of such petition for rehearing to apply to Supreme Court for writ of review.

5. Public service commissions ⚡27—Superior court without power to alter or modify determination of Railroad Commission.

The superior court possesses no power to alter or modify a determination of the Railroad Commission, since, under Public Utilities Act, § 67, such power rests in Supreme Court alone.

6. Waters and water courses ⇨254—Order of commission, though erroneous, cannot be annulled by superior court.

Even though order by Railroad Commission discontinuing functions of public utility distributing water for irrigation purposes and permitting transfer of its properties to an irrigation district is erroneous, under Public Utilities Act, § 67, superior court could not annul or set aside such order, as Supreme Court only has power to make such correction.

7. Waters and water courses ⇨254—Railroad Commission held authorized to permit transfer of property of public utility distributing water to irrigation district and to regulate use of water.

Under Const. art. 14, § 1, the Railroad Commission, in discontinuing functions of public utility distributing water and permitting transfer of its properties to an irrigation district, was authorized to determine how the services of water should be controlled or supplied and to direct users of water to place themselves in position where use and control of water would be under jurisdiction of some district, and also to provide that those who theretofore had benefit of service of public utility should be received within territorial limits of irrigation district as tracts of land, on equal footing with land already included in district.

Appeal from Superior Court, Glenn County; C. J. Luttrell, Judge.

Action by the Glenn-Colusa Irrigation District against John Paulson to enjoin interference with the Irrigation District, consolidated for trial with action by said Irrigation District against B. G. Kline and another, and that of Edna L. Knight against said Irrigation District. Judgment for plaintiff, and defendant appeals. Affirmed.

R. M. Rankin, of Willows, for appellant.

Hankins & Hankins, of San Francisco, for respondent.

PLUMMER, J. In this proceeding three cases are involved, to wit, one bearing the above title, one Glenn-Colusa Irrigation District v. B. G. Kline and Minnie E. Kline, superior court action, No. 3300, and Edna L. Knight v. Glenn-Colusa Irrigation District, superior court action, No. 3435. It is stipulated that all three cases should be tried as one in the superior court upon the testimony introduced in the case of Glenn-Colusa Irrigation District v. John Paulson, that separate judgments should be entered in each action, that the appeals herein should be combined, one transcript being used for the three appeals; and that, when judgment is entered in the case of District v. Paulson, a like judgment should follow in the other cases. This action was begun by the respondent irrigation district to enjoin the appellant Paulson from interfering with the ditches owned by the respondent district; also to restrain him from

diverting water therefrom. The plaintiff had judgment, and the defendant appeals.

The transcript shows that the appellant owns land situate within the flow of that certain canal known as and called the Central Canal, which canal was used for a considerable period of time in conveying water to a certain area of land known as and called the Central irrigation district. The appellant purchased his land prior to the 1st day of October, 1913, and from that date, up to and including the season of 1921, received water for irrigation purposes from the Central Canal, and used the same in the irrigation of the lands owned by him. At the trial it was stipulated that the recital of facts set forth in the opinion of the Supreme Court in the case of Byington v. Sac., etc., Co., 170 Cal. 124, 148 P. 791, should be admitted as testimony to be considered in the case as competent evidence of the facts therein set forth. The same stipulation was entered into concerning the recital of facts in the case of Rogers v. Sac., etc., Co., decision No. 2483, case No. 597, and Sac. Realty Company v. Sac. Valley West Side Canal Company, No. 673, both reported in volume 7, pages 133 and 153, Opinions and Orders of the Railroad Commission. The statement of facts set forth in the Byington Case, supra, is very lengthy, and therefore we epitomize the same as follows: The Central irrigation district was organized in November, 1887, and contained about 156,000 acres of land situate in the counties of Glenn and Colusa. This district did some construction work, but made no appropriation of water, and never conducted any water through any of its canals or ditch system. In 1897, in an action begun by the district, it was held that the Central irrigation district was not legally formed. 117 Cal. 382, 49 P. 354. Thereafter one Byron Beckwith, Sr., in connection with two men, one named Sheldon and one named Schuyler, on or about January, 1903, obtained a lease for a period of 50 years from the Central irrigation district to Sheldon of all the Central Canal's properties and rights connected therewith. This lease did not convey any water rights, as the Central irrigation district does not appear to have possessed any at that date. Litigation ensued among these three persons, but not relevant to anything we are considering in this action. In February, 1903, Sheldon, Schuyler, and others incorporated the Central Canal & Irrigation Company, and posted notices of appropriation of water in practically the same places that Beckwith, Sr., hereinbefore named, had previously posted notices. In 1904 Sheldon assigned the lease held by him to the Central Canal & Irrigation Company. This company, it appears, did considerable work upon the canals involved in this action, and extended the same to the Sacramento river. In 1906 the Central Canal & Irrigation Company ob-

tained from Congress the right to divert and appropriate 900 second feet of water from the Sacramento river, and in 1907 diverted some water so appropriated. In 1909 J. S. and W. S. Kuhn acquired the outstanding bonds of the Central irrigation district, and also the capital stock of the Central Canal & Irrigation Company, and proceeded to organize the Sacramento Valley Irrigation Company, and also organized another company known as the Sacramento Valley West Side Canal Company. The first named company was to handle the sale of land, and the latter company was to handle the distribution of water. The lease hereinbefore referred to was in 1909 transferred to the Sacramento Valley West Side Canal Company. This company, the transcript shows, went into the hands of a receiver in 1915, and thereafter the property herein named went into decay, distribution of water was unsatisfactory, and, in order to conserve the properties, and maintain an irrigation system whereby the waters flowing through the Central Canal might be utilized, the Glenn-Colusa irrigation district was organized under the provisions of the Wright-Bridgeford Irrigation Act of the state of California (St. 1897, p. 254). This district, prior to the institution of the actions now pending, had become the owner of all the irrigation properties herein referred to and of the water, water rights, and privileges connected therewith. Prior to, and coincident with, the acquisition of said properties by the Glenn-Colusa irrigation district, application was made by the Sacramento Valley West Side Canal & Irrigation Company and the receiver thereof to the Railroad Commission of the state of California for permission to transfer all of the properties herein referred to to the Glenn-Colusa irrigation district, and to be thereupon and thereafter relieved from all its obligations as a public utility. At the hearing before the Railroad Commission on the application of the West Side Canal & Irrigation Company for the transfer of its properties to the district and to be relieved of all public utility obligations, the appellant in this case and the appellants in the two companion cases appeared and protested against the granting of such permission. The application of the Sacramento Valley West Side Irrigation Company was granted, and on or about the 30th day of June, 1921, the Railroad Commission in said matter made and entered the following order:

"Application having been filed herein for the approval by this commission of the proposed transfer by the Sacramento Valley West Side Canal Company, a corporation, and Alger Fast, the receiver thereof, and other parties in interest, of certain properties comprising the public utility irrigation system described in said application, to the Glenn-Colusa irrigation district and others, free and clear of public utility obligations, protests thereto having been filed by certain users under said system, a pub-

lic hearing having been held, testimony taken and other evidence received and the matter submitted, it is hereby ordered:

"(1) Authorization is hereby granted for the sales and transfers by the Sacramento Valley West Side Canal Company, a corporation, and Alger Fast, receiver thereof, and other persons beneficially interested, to the Glenn-Colusa irrigation district and other transferees, of the respective properties to be transferred as set forth and described in said application, and the forms of conveyances attached to said application are hereby approved.

"(2) Approval and authorization of this commission is hereby granted for the discontinuance and termination of service as a public utility by the Sacramento Valley West Side Canal Company, a corporation, and Alger Fast, receiver thereof, in the sale and distribution of water for compensation to the public by means of the properties, or any portion thereof, the sales and transfers of which are hereby authorized, upon the filing with this commission by said Sacramento Valley West Side Canal Company and Alger Fast, receiver thereof, of a certified statement showing that said sales and transfers authorized herein have been consummated.

"(3) Approval and authorization by this commission is hereby granted for the withdrawal from public service by the Glenn-Colusa irrigation district as to all properties herein authorized to be transferred to said district, and as to all territory heretofore served by means thereof, subject, however, to the following conditions:

"(a) Any landowner, user, or consumer heretofore supplied by means of such properties, or any portion thereof, shall be entitled to receive water therefrom at the same rates and upon the same terms of service as heretofore until January 1, 1922.

"(b) If at any time prior to January 1, 1922, any landowner, user, or consumer formerly supplied by that portion of the public utility system herein authorized to be transferred to the Glenn-Colusa irrigation district shall have made application to said Glenn-Colusa irrigation district to have his land included therein, and such application is denied, this order, in so far as it authorizes the withdrawal from public service by said district of said property herein authorized to be transferred to the Glenn-Colusa irrigation district, shall be null and void.

"(4) Approval and authorization is hereby granted by this commission for the withdrawal from public service by Jacinto irrigation district, the directors of Jacinto irrigation district, the directors of Glenn-Colusa irrigation district, and Merle B. Moon, as to all property herein authorized to be transferred to said Jacinto irrigation district, the directors of Jacinto irrigation district, the directors of Glenn-Colusa irrigation district, and Merle B. Moon, and as to all territory heretofore served by said properties.

"The effective date of this order, as to authorization of the proposed transfer of properties, is hereby fixed as of June 30, 1921. As to the authorization herein granted for the discontinuance of service as a public utility, or withdrawal from public service, as to any part of the territory herein referred to, the effective date is hereby designated as July 15, 1921.

"The foregoing opinion and order are hereby

approved and ordered filed as the opinion and order of the Railroad Commission of the state of California.

"Dated at San Francisco, Cal., this 30th day of June, 1921."

The following facts also appear to be practically admitted: That the Sacramento Valley West Side Canal Company was at the time of the transfer of its properties and prior thereto a public utility, subject to the control of the Railroad Commission; that the lands of the appellant had been served with water by such public utility until the time of the order of the Railroad Commission ending the public service obligations of the said canal company; that the lands of the appellant are situated within the flow of waters carried to the Central Canal owned by the respondent district; that the lands of the appellant are not within the confines of the irrigation district, but that the lands of the several appellants are either surrounded by or adjacent to the lands comprising the district, and may properly be included therein; that the appellants have not availed themselves of the opportunity to petition for or have their lands included within the confines of the plaintiff irrigation district; that the appellants have demanded service of water as theretofore rendered them by the Sacramento West Side Canal & Irrigation Company, and tendered payment therefor to the district in sums corresponding with the rates charged for such services by the West Side Canal Company; that, after the expiration of the time mentioned in the order of the Railroad Commission for the inclusion of the lands of the appellants within the district, the district refused, and still refuses to deliver water for irrigation purposes to the appellants upon any lands owned by them situated outside of the area comprising the irrigation district. This refusal is based upon the order of the Railroad Commission, and also upon the action of *Jenison v. Redfield*, 149 Cal. 500, 87 P. 62, wherein the Supreme Court considers the purposes for which an irrigation district is formed, and holds, in substance, that the purpose for which the district is formed is to furnish water for irrigation only to the lands comprising the district, and that the authority of such a district to furnish water outside of its territorial limits does not exist. The appellant, relying upon section 552, Civil Code, and the *Byington* Case, *supra*, insists that the order of the Railroad Commission, in so far as it directs the lands of the appellants in the three actions referred to herein be included within the irrigation district, is void, and that the transfer of the properties belonging to the Sacramento Valley West Side Canal Company to the Glenn-Colusa irrigation district could only be made subject to the perpetual right or easement of the appellants to have their lands served with water for irrigation purposes in the same manner and in the same

way that said lands had been served prior to the discontinuance of the canal company. The *Byington* Case, however, while saying, among other things, that the lands lying within the Central irrigation district constituted the primary territory for the irrigation of which the waters of the respective streams mentioned in the opinion had been appropriated, does not decide the questions presented in this case. In the *Byington* Case the court was called upon to decide whether water could be taken away from lands lying within the primary territory referred to as the territory for the irrigation of which the waters had been appropriated and conveyed to other parcels of land and those parcels of land given a preferential right, and answered this question in the following language:

"The fundamental and all-important proposition, then, is this, that a public service water company which is appropriating water under the Constitution of 1879, for purposes of rental, distribution and sale, cannot confer upon a consumer any preferential right to the use of any part of its water."

[1] The court was of the opinion that the plaintiff in that case had the right to prevent the defendants from subverting water intended for public use to private and extra-territorial purposes. No question of the termination of the public utility functions of the canal company were involved, and no transfer of its properties, but simply a subversion or misuse of waters controlled by the defendant was settled by the judgment of the court. Section 552, Civil Code, which reads as follows:

"Whenever any corporation, organized under the laws of this state, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, at such rates and terms as may be established by said corporation in pursuance of law. And whenever any person who is cultivating land on the line and within the flow of any ditch owned by such corporation, has been furnished water by it with which to irrigate his land, such person shall be entitled to the continued use of said water, upon the same terms as those who have purchased their land of the corporation,"

—we think must be read as applying to situations and conditions not affected by section 1 of article 14 of the state Constitution, which specifies that the use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner prescribed by law, etc. The section of the Civil Code was adopted in 1872; the section of the Constitution referred to is a part of the state Constitution of 1879.

Any rights accruing to the service of water after the adoption of the Constitution, if the water is furnished by a public utility,

is therefore controlled by section 1 of article 14 of the Constitution, irrespective of the provisions of section 552, Civil Code. In the case of *Turner v. East Side Canal, etc., Co.*, 168 Cal. 103, 142 P. 69, the court held:

"Under section 552 of the Civil Code, the owner of land lying on the line and within the flow of the canal of a company furnishing water for irrigation, who has been furnished water from such canal for the irrigation of his land, is entitled to have the supply of water continued upon the established rates and terms."

The *Turner Case*, although decided in 1914, did not involve any questions calling for the application of the statutory provisions reserving to the state regulation and control of such waters. Again, in the case of *Butte County W. U. Assn. v. Railroad Com.*, 185 Cal. 218, 196 P. 265, the concurring opinion of Justice Shaw, relied upon by the appellant, must be read in the light of the facts there presented for consideration. The language called to our attention is:

"I think it is clear, both from the Civil Code (section 552), from our decisions on the subject, and from considerations of sound public policy and justice, that such consumers [customers within the district for the service of whom waters have been appropriated] would have a right to insist on the continuance of the supply to their lands, that such right would be paramount to that of consumers in any newly formed district." etc.

—and further:

"I am of the opinion that if the company had thus disposed of this entire supply, it would have amounted to a dedication of that quantity of water to public use for irrigation exclusively upon the lands described in the several contracts, and that neither the company nor the Railroad Commission could enlarge the dedication or expand the territory entitled thereto, so as to give to other lands an equal right to receive water out of that one thousand second-feet in common with the lands described in such contracts. The land so described would be entitled to preference in such use and other lands could rightfully receive water only from the surplus remaining after the rightful users had taken the quantity they had respectively contracted for so far as it was required for beneficial uses on their lands"—citing a number of cases.

The right of the Railroad Commission to permit the discontinuance of service by a public utility was not involved in the *Butte County Case*. It was simply a question of whether the supply of water owned and furnished was adequate to permit of an additional area of arid lands being brought within the territory to be served by the water company. Under such circumstances, there would be no conflict between the provisions of section 552, Civil Code, and section 1 of article 14 of the Constitution, and the requirement of section 552, Civil Code, read with the interpretation that, so long as the

company continued to furnish water, landowners coming within the terms of that section were entitled to have their service continued and remain unimpaired by any attempt of the company to spread its waters over a territory larger than its supply would warrant. In the case of *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 93 P. 858, 15 L. R. A. (N. S.) 359, the distinction which we are making was partly drawn. It is there said, quoting from the syllabus:

"If the water right of the water company making the contract was in private ownership and use when the Constitution of 1879 was adopted, it could not have the effect to dedicate its property to public use without the consent, express or implied, of its owners. But, if it were otherwise, the constitutional provision as to the public use of water supplied for irrigation is not intended to prevent a landowner from acquiring and attaching to his land a right to the permanent use of water for its irrigation, subject only to the condition that the state may regulate and control the use."

This latter statement, in and of itself, furnishes some ground for the contention of the appellant. The first clause of the syllabus, however, as we have said, draws the distinction which, we think, must be made. In *Leavitt v. Lassen Irrigation Co.*, 157 Cal. 82, 106 P. 404, 29 L. R. A. (N. S.) 213, the court limits the language used in the *Bachman Case*, *supra*, and holds that—

It "must be construed in the light of the facts there presented. The court was there considering the claim of a water company to the right to collect rates in excess of those fixed by a contract made with its predecessor, its claim being in part founded on the theory that by a foreclosure sale it had acquired the water and distributing system free from that contract. The opinion, in the main, goes upon the theory that the water in control of the company was not subject to a public use, and upon that theory it was held that the contract to furnish water to *Bachman's* land attached the water right to it as an appurtenance, with the right to receive water from the previous owner of the system and its successors at the contract rates."

The opinion in the *Leavitt Case* was concurred in by Justice Shaw, who wrote the opinion of the court in the *Bachman Case*. In the case of *Danley v. Merced Irrigation Dist.*, 66 Cal. App. 97, 226 P. 847, 854, this court referred to sections 552 and 662, Civil Code, in relation to the acquiring of the right to the continued use of water, but in that case no questions arising under the Constitution were involved. The only question involved was the power of the irrigation district to enter into an agreement with the holders of contracts for the payment to them of a certain sum annually, and not whether the waters and water rights there being dealt with were or were not subject to the control and regulation of the state, by and through the agency of the Railroad Commission, and the rights mentioned in these sec-

tions of the Civil Code were referred to as rights or interests which the contracts did not purport to convey. The cases dealing with the subject directly make a distinction between water rights when acquired from a private concern possessed by a landowner and when the water is obtained from a public utility. In the latter case, the rule followed is clearly stated in the case of *Asher v. Hutchinson Water, Light & Power Co.*, 66 Kan. 496, 71 P. 813, 61 L. R. A. 52, where the Supreme Court of Kansas says:

"An individual can acquire no vested right as against the public in the continued service of a public utility. Such a doctrine, once admitted, would destroy the convenience as a public utility. It would then become hampered, and subject to the control of the individual, and made to subserve such interests, to the detriment of the public welfare."

[2] That case had to do with the removal of water mains belonging to a public utility, which had been ordered removed by a municipality having the authority so to do. A private individual, whose service would be cut off by such removal, sought an injunction to restrain such removal. The injunction was denied. In *Day v. Tacoma Ry. & Power Co.*, 80 Wash. 161, 141 P. 347, L. R. A. 1915B, 547, the Supreme Court of Washington quotes with approval the language of the Supreme Court of Kansas, and cites in addition a large number of cases wherein it is held that a public utility may be regulated or permitted to change its service, as in that case the change of the location of a line of railway, even though it left the property of some individuals, who had located along the line of the abandoned right of way practically worthless. In the case of *Phelps v. Logan Natural Gas & Fuel Co.*, 101 Ohio St. 144, 128 N. E. 58, the rule announced by the Supreme Court of Kansas is followed by the Supreme Court of Ohio. In *Bryan v. Louisville & N. R. Co.*, 244 F. 650, 157 C. C. A. 98, the Circuit Court of Appeals of the United States for the Eighth Circuit reviews a large number of cases, and follows the rule before stated. The Bryan Case involved the permission granted to a railroad to abandon its line for some 20 odd miles and to establish a new line. The Supreme Court of this state, in *Leavitt v. Lassen Irrigation Co.*, 157 Cal. 82, 106 P. 404, 29 L. R. A. (N. S.) 213, heretofore referred to, holds, in substance, that no private estate can be created in property devoted to a public use, and a consumer of water cannot have a water right in the sense of a private freehold interest in the real estate of the distributing company; that his right is simply a right of service. This, of course, carries with it the right to that service so long as the public utility controls the instrumentality rendering the service. The exercise and enjoyment of such right of service does not create an easement such as is contemplated by section 552, Civil Code,

but is a service rendered by a public utility subject to the regulation and control of the state in such manner as may be prescribed by law.

We are thus brought to the question as to the extent of regulation and control that may be exercised by the state through the agency of the Railroad Commission. If the cases which we have cited announce the correct doctrine that one served by a public utility only possesses a right of service in common with the class or status of those who are served by such public agency, we have no rights of property being dealt with taken away, limited, suspended, or destroyed. It is simply a question of the method of procedure through which that service may be continued, if continued, or, if abandoned, under what conditions it may be abandoned. The Public Utilities Act (St. 1911 [Ex. Sess.] p. 18), explicitly gives the Railroad Commission authority to determine whether the public utility may or may not discontinue its service. In the case of *Limoneira Co. v. Railroad Commission*, 174 Cal. 232, 162 P. 1033, the Supreme Court, in deciding a question relative to water rates, for water furnished by a public utility, held that the Railroad Commission had power to modify and practically annul the contract rates which had theretofore been agreed upon between the company and the consumer, and also that upon the sale of the water system to a public utility, which was devoted wholly to a public use, there could be no reservation of a private right of ownership as to a part of the property so devoted to public use. It is also held that the power to change the rates did not conflict with the federal Constitution in so far as it prohibits the impairment of contracts. This case takes up and considers at length the powers of the Railroad Commission in controlling public utilities engaged in the distribution of water, and concludes with the statement that—

"In view of the provisions of our Constitution and the Public Utilities Act, and our decisions thereunder, we do not see how it can be doubted that the Railroad Commission had the power to determine for the purposes of the exercise of its jurisdiction to regulate a public utility by the fixing of rates, subject to such power of review as is possessed by this court, all questions of fact essential to the proper exercise of that jurisdiction."

While not expressly involved in this case, and not directly deciding that question, we think it authority in support of the doctrine that the only right which a customer has, under such circumstances, is the right of service, and not any ownership or easement in the water furnished by the public utility, because, if there were an ownership in the water itself, it would amount to the taking of property without compensation, and so be an unconstitutional exercise of power.

[3] The record in this case is sufficient to

show that the Sacramento Valley West Side Canal & Irrigation Company was hopelessly insolvent, and that it was a case of either abandonment of the enterprise or a transfer of its properties to some irrigation system or company possessing the power to continue operations and distribution of water. The West Side Company was losing money, and was in a position to take advantage of the doctrine laid down in the case of *Lyon & Hoag v. Railroad Commission*, 183 Cal. 145, 190 P. 795, 11 A. L. R. 249, where it is said that the Railroad Commission has no power to compel the continued operation of a public utility at a loss. To the same effect is the case of *Brooks-Scanlon Co. v. R. R. Comm.*, 251 U. S. 396, 40 S. Ct. 183, 64 L. Ed. 323.

In making its decision relative to the discontinuance of its public utility functions by the West Side Canal Company and the permitting of a transfer of its properties to the Glenn-Colusa irrigation district, the Railroad Commission was confronted with the fact that the irrigation district was not a public utility subject to the regulations and control of the Railroad Commission (see *City of Pasadena v. Railroad Commission*, 183 Cal. 526, 192 P. 25, 10 A. L. R. 1425), and therefore was under the necessity of making its orders conditional, as in that way only could the use of the water for irrigation purposes, as formerly furnished by the Sacramento Valley West Side Canal Company, be insured.

We think, from what has already been said, that the authority of the Railroad Commission to regulate and control the distribution of properties of the public utility known as the Sacramento Valley West Side Canal Company, as well as the uses and conditions to be attached to the use of the water furnished by that public utility, has been satisfactorily shown, and therefore there remains but one further question to be considered.

[4-7] The appellant in this case, and the appellants in the two companion cases, voluntarily became parties before the Railroad Commission in its hearing upon the application of the canal company to discontinue its public utility functions and transfer its properties to the Glenn-Colusa irrigation district, and, while their appearance at that hearing was not accompanied with all the formalities which sometimes characterize such appearances, they sufficiently showed themselves to be parties in interest, and therefore had a right to petition for a rehearing before the Railroad Commission, or for a modification, and also of petitioning for a modification of that order, so far as it affects the conditions under which water services should be continued, and upon the denial of such petition for rehearing, to apply to the Supreme Court for a writ of review. Under section 67 of the Public Utilities Act, no court of this state, except the Supreme

Court, possesses any jurisdiction to review, reverse, correct, or annul any order or decision of the commission, and, under the section of the Constitution relating to the powers of the Railroad Commission, it expressly provides that no other limitations or provisions can affect the powers given to the Railroad Commission. The superior court, therefore, possesses no power to alter or modify the determination of the Railroad Commission. *Marin Municipal W. Dist. v. North Coast*, 178 Cal. 324, 173 P. 473; *Pac. T. & T. Co. v. Eshleman*, 166 Cal. 640, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822. In *People v. Hadley*, 66 Cal. App. 370, 226 P. 836, the District Court of Appeal for the Second District of this state had occasion to examine this question, and in the opinion in that case the authorities are fully cited to the point that the Supreme Court only possesses power to review the decisions of the Railroad Commission. We quote therefrom the following, which we think applicable to this case:

"It must therefore be accepted as the settled law of this state that no court other than the Supreme Court has jurisdiction to review, reverse, correct, or annul any decision or order of the Railroad Commission. Even though the order by the Railroad Commission be palpably erroneous in point of law, until some order by the Supreme Court may be issued to the contrary, the original order of the Commission must stand as a proper and legal order in the premises."

Consequently, in this case, even though it may appear that the order of the Railroad Commission were erroneous, it would not authorize the annulment or setting aside of such order; the Supreme Court only having power to make such corrections. We think, however, that section 1 of article 14 of the Constitution fully covers this case, wherein the public use is reserved to the regulation and control of the state in the manner prescribed by law. These words, we think, fully authorized the Railroad Commission to determine how the water, or the service thereof involved, should be controlled or supplied, and to direct that the user of the water should place himself in a position where the control and use of the water would be under the jurisdiction of some district or agency authorized to fix rates and collect such reasonable compensation for the service as would defray the expenses thereof, properly chargeable to the lands owned by the appellants, and that it is also within the jurisdiction of the Railroad Commission, in permitting the purchase of the properties of the public utility about to go out of existence, to provide that those who had therefore had the benefit of the service of that public utility should be received within the territorial limits of the irrigation district as tracts of land, so far as the lands were concerned, and the owners thereof, upon an

equal footing with the lands already included in the district and the rights and privileges possessed by the owners thereof.

The judgments of the trial court are affirmed.

We concur: FINCH, P. J.; HART, J.

75 Cal. App. 199

EDDIE v. NEW YORK LIFE INS. CO.
(Civ. 5268.)

(District Court of Appeal, First District, Division 2, California. Nov. 14, 1925. Hearing Denied by Supreme Court Jan. 11, 1926.)

1. Insurance — 367(1)—Unpaid premium note held not to extend time for commencement of automatic extended insurance.

Where premium note provided that, if note was not paid on or before time it became due, all rights of insured should then be same as if no part of premium had been paid, *held* that, on failure to pay note, it did not work an extension of time when extended insurance would automatically start after lapse.

2. Insurance — 367(1)—Provisions of premium note held not in violation of statute.

Premium note, providing that, if note was not so paid, all rights of insured should then be same as if no part of premium had been paid, construed as not extending time for commencement of automatic extended insurance, *held* not in violation of Civ. Code, § 450.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Edward C. Eddie against the New York Life Insurance Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Charles J. Kelly, of Los Angeles, for appellant.

Meserve & Meserve, of Los Angeles, for respondent.

NOURSE, J. This action was tried on a stipulation of facts to recover on a policy of life insurance issued by the defendant company to Charlotte F. Eddie, deceased. Judgment went for the defendant, and the plaintiff appeals on the judgment roll and a bill of exceptions.

By the terms of the policy the defendant promised to pay the plaintiff, who was the beneficiary therein, the sum of \$5,000 upon proof of the death of the insured. The policy called for the payment of annual premiums of \$159.55 each on the 23d day of February of each year in advance. The policy contained the usual nonforfeiture clause providing that, in case of default of any premium payment, the cash surrender value of the policy, including dividends accrued,

if any, should be applied as a premium upon paid-up nonparticipating insurance in accordance with the schedule fixed in the policy, and also provided that within three months after default the insured might at her option receive either the cash surrender value or paid-up insurance. Annual premiums on the policy were paid for the first two years in cash. The premium due February 3, 1916, was not paid, but in lieu thereof a lien note for the full amount was executed by the insured and delivered to the defendant. On February 23, 1917, another annual premium became due, as well as interest on this lien note of February 23, 1916. At the same time there became due the insured by way of dividends on the policy the sum of \$26.95. The insured was unable to pay the premium for the fourth year, and an agreement was thereupon executed between the insurer and the insured which is commonly referred to as the "blue note." This note was for the sum of \$111, and was made payable on August 23, 1917. The note recited that it was accepted by the insurer at the request of the maker, together with \$48.55 in cash paid by the insured, and that this was all done on the express agreement between the parties; that, although no part of the premium due on February 23, 1917, had been paid, the insurance under the policy shall be continued in force until midnight of August 23, 1917; that, if this note is paid on or before the time it becomes due, such payment, together with the cash mentioned, will be accepted as payment of the premium due February 23, 1917, but that, if the note is not so paid, it shall thereupon automatically cease to be a claim against the maker, the insurer shall retain the cash as part compensation for the rights and privileges granted by the extension of the policy, and all rights of the insured shall then be the same as if no part of said premium had been paid, except only that the time within which the insured may make a choice of benefits after the lapse is extended for three months after the due date of the note, but no longer. The insured failed to pay the note, or any part of it, and failed to pay any of the premiums due upon the policy covered by the note, and neither the insured nor any one in her behalf within three months after August 23, 1917, or in fact at any time, made any choice of benefits after the lapse of the policy as provided therein. The insured died on the 5th day of November, 1917, and immediately thereafter demand was made upon the defendant by the beneficiary for full payment of the policy.

The complaint alleged the facts concerning the issue of the policy, the payment of the annual premiums thereon, and the execution of the two notes hereinbefore referred to. It was also alleged on information and belief that on the 23d day of February, 1917, the cash surrender value of the policy, less the

indebtedness due the insurer, and including the dividend due the insured, was sufficient to purchase extended insurance for the period of 434 days from February 23, 1917; that is, to and including May 1, 1918. This allegation of the complaint was denied, and the court found that it was not true that the cash surrender value of the policy on February 23, 1917, was sufficient to purchase extended insurance for any period of time, and it was found that it was not true that by the use of any dividend due the insured, or by any other means extended insurance was purchased, or that the insured was entitled to extend her insurance after February 23, 1917, for any period or in any amount whatsoever.

The case depends upon this finding: If it were true, as alleged in the complaint, that the policy had on February 23, 1917, a cash surrender value sufficient to call for paid-up insurance for a period beyond the date of the death of the insured, there would be some reason in the argument of appellant that the parties were not competent to enter into the contract of February 23, 1917, whereby this right on the part of the insured was abrogated in consideration of the acceptance by the insurer of the so-called blue note. This would be so because of the provisions of section 450 of the Civil Code, which section, after providing for the inclusion of automatic nonforfeiture clauses in policies of insurance, provides that no agreement between the insurer and the insured shall be sufficient to waive any of those provisions. But the difficulty with appellant's case is that, although he alleged facts which would seem to bring him within the purview of the section of the Civil Code, he failed to prove the allegations of his complaint, and the trial court held that those allegations were not true. On this appeal our attention has not been directed to any evidence in support of the allegations of the complaint or contrary to the finding made by the trial court. Such being the case, we are, of course, bound by that finding. In argument the appellant insists that on February 23, 1917, after deducting all indebtedness due the company, the policy had a net cash surrender value of \$30.45, and that in accordance with the stipulation of the parties the net single premium for the purchase of nonparticipating extended insurance was at the rate of \$4 per month. The appellant then contends that the insured was therefore entitled to paid-up nonparticipating insurance for the period of 231 days. To support this contention appellant argues that the period of default should be fixed at August 23, 1917, rather than February 23d of the same year, and on that basis argues that the extended insurance covered a period beyond the death of the deceased. There are two errors in the argument of appellant which are apparent: First, it is wholly out of accord with the allegations of the com-

plaint and the findings of the trial court; and, second, the date of default or lapse of the policy was on February 23d rather than August 23d.

The legal effect of a note such as that executed on February 23, 1917, has frequently been before the courts of this country, and it has uniformly been held that such notes do not work an extension of the time when the extended insurance would automatically start after a lapse, but that such notes are merely accommodations to the insured, to be construed in accordance with their terms that, if the insured fails to pay within the time designated in the note, the policy shall be deemed to have lapsed at the time of the forfeiture. *Underwood v. Jefferson Standard Life Ins. Co.*, 177 N. C. 327, 98 S. E. 832, 835; *White v. New York Life Ins. Co.*, 200 Mass. 510, 513, 86 N. E. 928, 929; *Robnett v. Cotton States Life Ins. Co.*, 148 Ark. 199, 230 S. W. 257, 259, 260; *Bogue v. New York Life Ins. Co.*, 103 Neb. 568, 173 N. W. 591, 592. In *White v. New York Life Ins. Co.*, supra, a blue note similar to the one here under consideration was executed on August 19, 1906, the date when the annual premium was due. It recited the payment of part of the premium in cash, and provided for an extension of the insurance providing that the note was paid prior to February 19, 1907, and also provided that, if not so paid, it should not be a charge against the maker, and that all rights under the policy should automatically cease. The note was not paid on its due date, and some time thereafter the insured died. The Supreme Court of Massachusetts, in holding that the parties were bound by the terms of the blue note, said that the cash payment was to be treated as a consideration for the privilege which the insured enjoyed, and that "the rights of both parties in reference to the policy were precisely the same as if this note had never been given, and the payment in cash had never been made."

[1, 2] The only answer which the appellant makes to the authorities cited is that they are not in harmony with the provisions of section 450, Civil Code. But in this respect we are not able to agree with the appellant. The section provides that every policy of life insurance upon the life of a resident of this state and delivered within the state shall make certain provisions for automatic nonforfeiture, and declares that any agreement tending to waive such provisions shall be invalid. The blue note in question is not such an agreement. The policy contained all the requirements covered by the Code section. The rights of the insured thereunder were not affected by the execution of the blue note. If this note had not been executed, the policy would have terminated on February 23, 1917, and any surrender value which it might have would then accrue to the insured. By the execution of the blue note the insured was merely given

an extension of time within which she might have paid the premiums to continue the policy in force. She was wholly competent, however, to contract with the company that, if she would not perform her part of the contract, the note would not be an enforceable obligation against her, and that in that event the rights of both parties under the insurance policy should be the same as if the note had not been executed. Manifestly these rights, so far as the insured was concerned, were to exercise the option to make a choice of the benefits covered by the policy in the event of a lapse. Not only by the terms of the policy itself but by the agreement of the parties expressed in the blue note the lapse of the policy was fixed as of February 23, 1917. Underwood v. Jefferson Standard Life Ins. Co., supra, and White v. New Lork Life Ins. Co., supra. If, as appellant contends, the policy had a surrender value of \$30.45, which would have entitled the insured to 231 days of paid-up insurance, that period, reckoned from February 23, 1917, expired before the death of the insured. The blue note did not, therefore, curtail any of the rights or guaranties given the insured by the statute.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

75 Cal. App. 181

PEOPLE v. MECHLER. (Cr. 1272.)

(District Court of Appeal, First District, Division 2, California. Nov. 13, 1925.)

1. Bribery ☞6(4)—Indictment for bribery held not defective.

Indictment, under Pen. Code, § 68, on charge of asking and receiving bribes to forego arrests for violation of Motor Vehicle Act and St. 1921, p. 79, held not defective for failure to allege that violations of Motor Vehicle Act had been committed, or what they were or manner in which they were committed.

2. Criminal law ☞1170(4)—Exclusion of answer to particular questions held cured.

Error, if any, in excluding answer to particular questions held cured by admission of answer to question of similar import.

3. Criminal law ☞407(1)—Evidence of reading statement of coindictee in defendant's presence and his response thereto, together with prior written statement of defendant, held properly admitted in evidence.

In prosecution, under Pen. Code, § 68, for asking and receiving bribe, written statement made by defendant to chief of police, and evidence as to reading to him of coindictee's statement, and his response thereto, held properly admitted as against objection that it was incompetent, irrelevant, and immaterial, and

without proper foundation, in view of Code Civ. Proc. § 1870, subd. 3.

4. Criminal law ☞814(14)—Instruction as to liability of coconspirators for acts and declarations of each other held not inapplicable to case.

In prosecution, under Pen. Code, § 68, for asking and receiving bribes, where prosecution introduced evidence of conspiracy between defendants, instruction as to liability of each defendant for acts and declarations of the other held not erroneous as inapplicable to case and calculated to mislead jury.

5. Criminal law ☞719(1)—Improper argument in prosecution for receiving bribes held not established.

In prosecution for receiving bribes, improper argument of prosecuting attorney of matters not in evidence, necessitating admonition of court, held not established.

6. Criminal law ☞1178—Assignments of error deemed abandoned.

Assignments of error in brief, not argued or supported by citations of authority or excerpts from transcript, will be deemed abandoned.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Louis W. Mechler was convicted of bribery, and he appeals. Affirmed.

Frank M. Carr, of Oakland, for appellant.
U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

STURTEVANT, J. The defendant and one Villa were indicted on the charge of "asking and receiving bribes." Pen. Code, § 68. The defendant, Mechler, was tried, and the jury brought in a verdict of guilty "of felony, to wit, a violation of section 68 of the Penal Code of the State of California, as charged in the indictment." The defendant moved for a new trial, but his motion was denied. Thereupon judgment was pronounced against him, and he has appealed from the order denying his motion for a new trial and from the judgment of conviction.

At the time of his arraignment the defendant demurred to the indictment; the demurrer was overruled; and at this time the defendant urges that ruling as error. The charging part of the indictment was as follows:

"That the said Henry S. Villa and Louis W. Mechler, on or about the 27th day of April, A. D. 1924, and prior to the time of filing this indictment, at the city of Oakland, county of Alameda, State of California, did unlawfully, willfully, feloniously, and corruptly ask, receive, and agree to receive from persons, to wit, George W. O'Connor and Charles F. Smith, a bribe, to wit, the sum of \$100 in lawful money of the United States of America, of the value of \$100 in gold coin of the United States of America, upon the agreement and understand-

ing between the said Henry S. Villa, Louis W. Mechler, George W. O'Connor, and Charles F. Smith that the said Henry S. Villa and Louis W. Mechler and each of them would not arrest nor cause the arrest of the said George W. O'Connor and Charles F. Smith, nor either of them, for violations of the California Motor Vehicle Act and an act of the Legislature of the State of California (Stats. 1921, c. 80) entitled, 'An act to enforce the provisions of article eighteen of the amendments to the Constitution of the United States; prohibiting all acts or omissions prohibited by the Volstead Act; imposing duties on courts, prosecuting attorneys, sheriffs and other officers, and extending their jurisdiction, and providing for the disposition of fines and forfeitures' which had been theretofore, on said 27th day of April, A. D. 1924, committed by said George W. O'Connor and Charles F. Smith in the city of Oakland, county of Alameda, state of California."

[1] The appellant contends that the demurrer should have been sustained because the indictment does not allege: (1) That George W. O'Connor and Charles F. Smith committed violations of the California Motor Vehicle Act (St. 1923, p. 517); nor (2) what those violations were; nor (3) the manner in which they committed violations of the California Motor Vehicle Act. The appellant further contends that the indictment was uncertain because it did not specify the foregoing matters. The appellant cites and relies on *People v. Ward*, 110 Cal. 369 (42 P. 894), and quotes the first syllabus. The citation is not in point. The third paragraph on page 373 (42 P. 895) is more nearly in point. An authority that rules the point directly against the appellant is *People v. Markham*, 64 Cal. 157, 30 P. 620, 49 Am. Rep. 700. In that case the court upheld an indictment as being sufficient which charged the asking of a bribe "upon an understanding and agreement that he [the defendant] would not arrest persons engaged in violating section 330 of the Penal Code of the state of California, nor would he arrest persons engaged in violating the gaming ordinance of the said city of San Jose, contrary to the form of the statute," etc., The reason for the rule is stated by the court at page 161 (30 P. 622) in the following language:

"The matter, cause, or proceeding must be one which may come before him, that is, comes within his jurisdiction, or which may be brought before the officer, or which may be pending at the time of the corrupt promise. The Legislature, I think, did not intend that the prosecution should depend upon the fact whether the officer actually had it in his power to carry out the corrupt agreement before the indictment was exhibited. It is sufficient, I think, that the subject-matter upon which the bribe was to operate existed, and could legally be brought before the officer in his official capacity. The offense consists, in contemplation of the statute, in poisoning and corrupting the fountain of justice, and although the particular deleterious consequence designed to be effected by the parties has not ensued, the state, neverthe-

less, has an officer corrupted, and society has lost all protection for its rights, so far as the administration of the law by him is concerned."

See, also, *People v. Lips*, 59 Cal. App. 381, 390, 211 P. 22; 9 C. J. p. 409, § 10.

We think that the indictment was not vulnerable to any of the attacks made thereon.

[2] In his brief the appellant cites numerous rulings on the admission or exclusion of evidence as being errors. We have examined each one, and find no merit in any of the assignments except as we have noted below. When Mr. Smith, the prosecuting witness, was on the stand as a part of the cross-examination, the attorney for the appellant propounded to him a question, and the following proceedings were had:

"Mr. Carr: Isn't it a fact that in the first trial of this case held in this court in July, 1924, you were a witness and testified, and that you testified that at the time you arrived at your brother-in-law's home at 10 a. m. on Excelsior avenue and never left there until 2:30 in the afternoon?"

"Mr. Snook: Objected to as incompetent, irrelevant, and immaterial, and tends to impeach the witness on collateral and irrelevant matter."

"The Court: Objection sustained."

"Mr. Carr: You did testify in the first trial of this case on the 8th of July, 1924, that you remained at your brother-in-law's house from 10 a. m. until 2 or 2:30 in the p. m. without leaving?"

"Mr. Snook: The same objection."

"The Court: The same ruling."

"Mr. Carr: Did you leave your brother-in-law's house after you arrived there at 10:30 a. m. until 2 or 2:30 in the afternoon?"

"Mr. Snook: Objected to as asked and answered."

"The Court: He may answer. A. Yes."

[3] Any error in sustaining the objection to the first question and second question was cured by the ruling made on the objection to the third question. In another place the appellant contends that it was error on the part of the trial court to admit in evidence the alleged statement of Mechler, because no proper foundation had been laid for its admission, and on the further ground that at that time the corpus delicti had not been established. The statement referred to was a written statement of questions propounded by the chief of police and answers made by the defendant. The secretary of the chief of police was sworn as a witness, and testified that he was present at the interview and took down the questions and answers in shorthand. Before the secretary started to read the appellant made an objection that the statement "is incompetent, irrelevant, and immaterial, and no proper foundation laid." The appellant did not call to the attention of the trial court, and has not called to the attention of this court, any particulars wherein the foundation had not been laid. Before these proceedings were had the witness Smith and the witness O'Connor and other witness-

es had delineated in detail the occurrences on the 27th day of April, 1924. Mechler's statement to the chief of police was made on April 30th. In the same manner that Mechler's statement was taken a statement was also taken from Villa. After the chief of police had taken down each statement, he read Mechler's statement to Villa and Villa's statement to Mechler. At the time of the trial, having laid the foregoing foundation, the statement made by Villa which had been read to the appellant was offered in evidence. The whole statement was not read, as the prosecution conceded a part was immaterial. The part claimed to be material being offered, the appellant objected to it as incompetent, irrelevant, and immaterial. The objection was overruled. After the statement had been read to Mechler, the witness was asked what Mechler said, if anything. The trial court did not err in its rulings. *Codé Civ. Proc.* § 1870, subd. 3. The appellant cites and relies on *People v. Oldham*, 111 Cal. 648, 653, 44 P. 312. The facts before the court in the *Oldham* Case are readily distinguishable from the facts in this case.

[4] In presenting its case to the jury the prosecution had introduced evidence to the effect that Mechler and Villa had formed a conspiracy and were acting as conspirators in committing the offenses alleged in the indictment. Among other instructions, the trial court instructed the jury as follows:

"If a conspiracy has been shown to exist, every act and declaration of each member of the conspiracy in pursuance of the original concerted plan and with reference to the common object is in contemplation of the law the act and declaration of them all and each of them, and it makes no difference at what time one comes into a conspiracy, for everyone who does enter into such a common purpose and design is deemed in law a party to every act which may afterward be done by any of the others in furtherance of such common design."

At this time the appellant contends that the foregoing instruction was erroneous; that it was not applicable to the case on trial; and was calculated to confuse and mislead the jury. The appellant does not specify wherein the instruction was vulnerable to any one of those attacks. We think the point is without merit.

[5] The appellant contends that the district attorney was guilty of improper conduct in arguing the case to the jury. That point involved a consideration of the following facts: Mr. Smith had testified that between 3 and 4 p. m. on April 27, 1924, that he, Mr. O'Connor and two women were stopped while driving an automobile along Park boulevard. The defendant, Mechler, stopped them. An-

other officer, Villa, was near by. Mechler motioned the party over to the curb. They approached the curb, and stopped. Thereupon a conversation was held between the men and the officers, between the men and the women passengers, and between the officers and the women passengers. All were apparently assembled about the car at least part of the time. As to what each one saw and as to what each one heard at that particular time it may be conceded was not expressly developed in the testimony. While arguing, the deputy district attorney, referring in part to the words expressly used by the witnesses and in part to the inferences and presumptions that could be drawn therefrom, stated:

"Mr. Crosby: In the meantime Officer Villa (and I think his acts were just as contemptible as this other man's), Officer Villa saw the suit case in the back of the car, and asked what was in it, and O'Connor said there were some of his things in it, and Villa had heard of the previous conversation between the ladies and Mechler—

"Mr. Carr: I assign that as a misstatement, because there is nothing in the record that Villa heard any part of the conversation that occurred between Mechler and the women. I assign it as a misstatement of the evidence.

"The Court: Proceed."

Appellant now complains because the trial court did not admonish the district attorney. It was no proper time to admonish him. The interruption by the appellant was not justified by the record. Two other interruptions immediately following stand on the same basis. In another place the district attorney had stated that Mechler made out an arrest tag. The attorney for the appellant challenged the statement as not being supported by the record. The trial court stated to the jury that the statement had not been testified to. The deputy district attorney acknowledged his mistake, and proceeded. Certainly there was no occasion for admonishing the district attorney under such circumstances.

[6] In his brief the appellant made assignments of error, but did not print excerpts from the transcript showing the facts; nor did he stop to argue the point and to cite any authority supporting the contention. Such matters have not been specifically treated by us and we will assume, under such circumstances, that the contention has been abandoned. *Estate of Randall*, 194 Cal. 725, 230 P. 445; *People v. Singh*, 182 Cal. 457, 480, 188 P. 987. We find no error in the record. The judgment and order are affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

75 Cal. App. 222

PEOPLE v. RIVERA et al. (Cr. 1223.)

(District Court of Appeal, Second District, Division 1, California. Nov. 18, 1925. Hearing Denied by Supreme Court Jan. 14, 1926.)

1. Criminal law ☞553—Jury, in criminal case, may either believe or disbelieve whole or any part of testimony for defendants.

Jury, in criminal case, may either believe or disbelieve whole or any part of testimony given in behalf of defendants.

2. Criminal law ☞553—Verdict cannot be effectively challenged for insufficiency of evidence, where facts, if true, would support verdict.

Verdict of guilty, in criminal case, cannot be effectively challenged for insufficiency of evidence, where a state of facts shown by testimony, if true, would support verdict.

3. Criminal law ☞1172(6)—Judgment not reversed because instructions embraced matters not pertinent, unless prejudicial.

Judgment will not be reversed because of instructions, which, though correct, embraced matters not pertinent to issues, unless instructions were prejudicial to substantial rights of defendants.

4. Homicide ☞340(2)—Instructions held harmless, though no sufficient evidence existed on which to predicate them.

In prosecution for manslaughter, instructions that plea of self-defense was not available to one, who deliberately picked quarrel with another for purpose of causing him to do something which, under ordinary circumstances, might furnish a legal excuse for killing him, held harmless, though no sufficient evidence existed upon which to predicate such instructions.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Joseph Rivera and Adolph Rivera were convicted of manslaughter, and they appeal. Affirmed.

Chauncey Gardner, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

HOUSER, J. Defendants were convicted of the crime of manslaughter, and they appeal from the judgment, as well as from the order denying their motion for a new trial.

The usual conflicts appeared in the evidence; but, relying upon the right of the jury to justly discriminate as to the testimony given by the several witnesses in the case, the jury was warranted in basing its verdict upon the following facts:

Ralph Carnevale and his brother, Carlo Carnevale, were the owners of a certain restaurant. The defendants, one of whom being a police officer, and the other a deputy sheriff, in company with two other men, one of whom also being a police officer, at about

the hour of 12 o'clock at night, went to the restaurant belonging to the Carnevale brothers for the purpose of obtaining some refreshments. Neither of the defendants, nor either of their companions, was in uniform. On arriving at the restaurant it was found to be closed to the public for further business on that night, although some of the patrons thereof were still being served. After some delay the party was admitted into the restaurant, whereupon, according to the testimony of some of the witnesses, two of the members of the party proceeded to look into each of the several booths located in the rear of the restaurant, and to smile at some of the ladies who were seated therein. One of the members of the party demanded that he be served with a "trago," which is interpreted to mean a drink of intoxicating liquor, and, on being told that nothing of that sort was dispensed in the restaurant, remarked that he wanted it by "force." No violence nor threat of any sort, however, other than the implied threat contained in the statement made by one of the defendants that if necessary he would use violence to obtain that which he sought, was offered by any member of the party toward either of the proprietors of the restaurant, or to any person therein. Cigarets were purchased by and a cup of coffee ordered for each member of the party, which was served to them by Ralph Carnevale, one of the proprietors of the restaurant. He, however, was apparently suspicious of the good intentions of the defendants and their party, and on three separate occasions directed one of his employees to telephone to the police station for the "flying squadron." The employee having failed to carry out such direction of his employer, Ralph Carnevale sprang over the counter which separated him from his unwelcome guests, and, flourishing a revolver, ordered them to throw up their hands and to vacate the premises. Defendant Adolph Rivera and his brother police officer did as they were thus ordered. The defendant Joseph Rivera, however, refused to comply with the order made upon him to throw up his hands or to leave the restaurant, although Ralph Carnevale was very close to him and toward the close of the incident had the muzzle of his pistol pressed against Joe Rivera's body. While the two men were thus engaged, Carlo Carnevale came forward in the restaurant and, seizing the defendant Joseph Rivera by the coat collar, shoved him out of the door of the restaurant onto the sidewalk and immediately closed the door. The two Carnevale brothers then faced about and started to walk toward the rear of the restaurant, whereupon the two defendants began shooting at the two Carnevale brothers, which fire was by them returned. The result of the episode was that Carlo Carnevale was killed.

[1, 2] Appellants contend that the evidence was insufficient to justify the verdict. Considering as true only the evidence favorable to the theory of self-defense which was advanced by the defendants, it is possible that appellants' contention might be sustained. But, as heretofore stated, there was much evidence contrary to such defense. Following the rules of law applicable to the credit to be attached to the testimony given by the several witnesses, the jury had the right either to believe or to disbelieve the whole or any part of the testimony given in behalf of the defendants. Judging from the verdict, it is apparent that the jury considered as proven beyond a reasonable doubt a state of facts in accordance with those heretofore set forth, in which event the verdict was supported by the law and the evidence. Defendants' contention as to the insufficiency of the evidence, therefore, cannot be sustained.

It is urged by the appellants that the trial court committed prejudicial error in giving to the jury each of two certain instructions as follows:

"Whenever an assault is brought upon a person by his own procurement, or under an appearance of hostility which he himself creates, with a view of having his adversary act upon it, and he so acts and is killed, the plea of self-defense under such circumstances is unavailing."

"The court instructs the jury that the acts which a defendant may do and justify under a plea of self-defense depend primarily upon his own conduct, and, secondarily, upon the conduct of the deceased. There is no fixed rule applicable to every case, though certain general principles, well established, stand forth as guides for the action of men and measures for the jury's determination of their deportment. You are instructed that self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue, and thus, through his fraud, contrivance, or fault, to create a real or apparent necessity for killing."

Appellants concede that each of such instructions states well-recognized principles of law; but it is contended that there was no evidence upon which either of said instructions could be based and as a consequence that the giving thereof could but have had the effect of confusing and misleading the jury to the great prejudice of the substantial rights of the defendants.

The only evidence to which attention has been directed which would indicate that the claimed assault made by the proprietors of the restaurant upon the defendants was brought about intentionally and through the procurement of the defendants is that two of the members of the defendants' party went through the restaurant, looked into each of the booths thereof, smiled at some of the lady patrons seated therein, and that upon being refused a drink of intoxicating liq-

uor one of the defendants stated that he wanted it by "force." Some other evidence was received regarding the boisterous conduct of the defendants and some of the members of their party. All those things, however, occurred before the members of the party had become seated in the front part of the restaurant and where they were apparently engaged in smoking cigarets and drinking coffee. Assuming, however, that no sufficient evidence existed upon which to predicate either of the criticized instructions and consequently that the giving of them was unnecessary and improper, the question of their harmful effect upon the rights of the defendants remains to be considered.

[3, 4] Many authorities are cited by appellants to the effect that the giving of instructions upon matters not pertinent to the issues constitutes error, even though such instructions contain correct statements of the law; but the point to be determined is whether such instructions were really prejudicial to the substantial rights of the defendants. If they were not, it naturally follows that a reversal of the judgment should not be had. The general effect of the two instructions of which complaint is made is that one may not assume any false position toward another or deliberately pick a quarrel with him for the purpose of causing him to do something which, under ordinary circumstances, might furnish a legal excuse for killing him, and by so doing, after killing the person thus incited, to have available the plea of self-defense.

The defendants were charged with the commission of the crime of murder. They admitted that the killing was done by them, or by one of them, but claimed that it was done in self-defense. No complaint is made that the defendants were not afforded a full and fair opportunity to make their defense, nor that, upon the defense as presented, the jury was not properly instructed on all phases of the law applicable thereto. In such circumstances, it was for the jury to determine under the law as given to it by the court whether, the facts considered, the defendants were justified in taking the life of the person who was killed. The defense did not at all depend upon whether the defendants had deliberately started the quarrel with the design of forcing a deadly issue. Practically the entire case of the defendants was based upon what physical position was occupied by the defendants, and especially by the one who was the last to be ejected from the restaurant, with relation to the situation of the two restaurant keepers at the time the shooting took place. Manifestly, if both the defendants were outside the building, the door of the restaurant being closed, and the two restaurant keepers were walking away from and with their backs toward the door of the restaurant, no legal excuse was presented for offering them violence of

any sort. On the other hand, if, at the time the shooting took place, one of the defendants was being menaced by a revolver in the hands of one of the restaurant keepers, while at the same time his brother was actually assaulting such defendant, it is possible that (additional circumstances being also present) the other defendant would have been justified in offering the resistance which the evidence shows was done.

The defense which was urged by the defendants depended for its success upon proof of such circumstances as would justify a reasonable man in the belief that his life was in danger or that great bodily injury would result from the encounter. No part of such defense, either in the facts upon which it rested or in the law applicable thereto, was in any wise invaded or infringed upon by either of the instructions which it may be assumed touched upon facts not shown by the evidence and the declared law based upon such assumption. While the literal effect of the two instructions under consideration is that if certain designated facts appear in the evidence, under such circumstances the plea of self-defense is unavailing, there is no intimation that such a plea is denied as to other situations shown by the evidence, or especially as to the facts claimed to exist by the defendants at the time the shooting occurred. To the contrary, the language of the two instructions, while not expressly so declaring, would certainly indicate that the limitation was intended to apply solely to a possible situation as therein suggested. In addition thereto, one of the general instructions given to the jury expressly announces that—

"If any instruction is applicable only if a particular situation or state of facts exists, and if you find that no such situation or state of facts exists, then you should not take such instructions into consideration in your deliberations."

Perhaps the facts, under the circumstances shown to exist immediately preceding the action on the part of Ralph Carnevale in ordering the defendants from his place of business, were not such as reasonably would have created the suspicion that the defendants were intent upon committing the crime of robbery; but, if robbery had been the motive of the defendants and their companions in entering the restaurant, it is clear that a plea of self-defense would not have been available to the defendants. Had the court seen fit to so instruct the jury, such an instruction would not have prejudiced the rights of the defendants as to the facts which in fact they attempted to prove in their defense, and which, had they been proven to the satisfaction of the jury, would have constituted a complete defense to the charge.

And so it is with reference to the assumed exigency attempted to be set forth in either of the two instructions under consideration. Admitted that no facts were before the court upon which either of them could rest, the effect of either or their combined effect was but to attract the attention of the jury to a condition which had no existence and to state an abstract principle of law as deducible therefrom. The criticized instructions are just so much surplusage in the case. They are of no more consequence than had they been directed to any defense other than that of self-defense, or if they were entirely irrelevant to any issue in the case. Their effect did not detract from the force of either the facts or the law relied upon by the defendants in presenting their defense. The case of *People v. Glover*, 141 Cal. 233, 74 P. 745, is illustrative of the point, and it is there ruled (syllabus) that—

"An instruction that the plea of self-defense is not available where a person seeks a quarrel with the design of creating a real or apparent necessity for killing, correctly states the law, and is not erroneous, whether it is applicable or inapplicable to the evidence."

No prejudicial error appearing, it is ordered that the judgment and the order denying the motion for new trial be and they are affirmed.

Wa concur: CONREY, P. J.; CURTIS, J.

75 Cal. App. 229

PEOPLE v. KNOWLES. (Cr. 1248.)

(District Court of Appeal, First District, Division 2, California. Nov. 18, 1925.)

1. Sodomy $\S$ 6—Evidence held sufficient to support conviction.

Evidence held to support conviction of sex perversion, in violation of Pen. Code, $\S$ 288a.

2. Sodomy $\S$ 6—Evidence of accomplice held corroborated.

Testimony, in prosecution for violation of Pen. Code, $\S$ 288a, corroborating testimony of accomplice in every detail, except as to actual commission of act, held sufficient under section 1111.

3. Criminal law $\S$ 365(1)—Indecent pictures shown complaining witness before offense was committed held part thereof.

In prosecution for violation of Pen. Code, $\S$ 288a, where accused showed pictures to complaining witness just preceding commission of crime, held such pictures were so closely associated with preparation for crime that they became part of offense and were admissible.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

P. V. Knowles was convicted of a violation of Pen. Code, § 288a, and he appeals. Affirmed.

Ashley H. Conrad and Louis Oneal, of San Jose, for appellant.

U. S. Webb, Atty. Gen., and L. B. Browne, of San Francisco, for the People.

NOURSE, J. The defendant was tried and convicted on an information, charging him with a violation of section 288a of the Penal Code, which defines the crime commonly known as sex perversion. From the judgment of conviction and the order denying his motion for a new trial, the defendant has appealed on a record prepared under section 953a, Code of Civil Procedure.

[1] The defendant was a teacher in the public schools of Alameda county. The complaining witness was a high school student of the age of 16 years. This boy, accompanied by a fellow student of the same age, went to the defendant's apartment some time in the month of August, 1924. They were there entertained by the defendant, who showed them indecent and suggestive pictures and instruments used to prevent conception. The defendant explained the use of these instruments, and then urged the two boys to commit the act defined in the Code section cited. One of the boys refused and went to another room, where he played a piano, while the defendant and the complaining witness undressed and remained together for a period of half an hour.

[2] The chief attack on the judgment is that the evidence is insufficient, because the testimony of the complaining witness, he being an accomplice, was not corroborated as required by section 1111 of the Penal Code. The testimony of the complaining witness, detailing the story of the crime, is complete, and leaves no room for uncertainty. It is corroborated in every detail except as to the actual commission of the act itself. This is all that is required under the Code section. *People v. Yeager*, 194 Cal. 452, 473, 229 P. 40.

[3] Appellant suggests that the trial court erred in admitting in evidence the pictures which were found in appellant's possession, and which he had displayed to the boys just preceding the commission of the crime. These pictures were so closely connected with the preparations for the commission of the crime that they became a part of the offense itself, and were properly received in evidence.

Though we have not recited the evidence at length, we have read the record with care, and are satisfied that the appellant was fairly tried and convicted. He did not take the witness stand in his own defense, but rested on the testimony of his associates as to his previous good reputation. On the

evidence, which was before it, the jury could not have justly returned a different verdict. Judgment and order affirmed.

We concur: **LANGDON, P. J.**; **STURTEVANT, J.**

75 Cal. App. 231

WANEE v. THOMAS et al. (Civ. 2842.)

(District Court of Appeal, Third District, California. Nov. 18, 1925.)

1. Taxation ☞79—Title did not pass at time of sale of rice, subject to test, so that seller should pay taxes thereon.

Where 6,000 sacks of rice were bought, subject to test, which resulted in 100 sacks being rejected, and buyer paid \$4,000 in part payment at time of sale, but insurance on rice was kept by seller till after final payment, *held*, title to rice that had not been tested was in seller, and he should pay taxes thereon; Civ. Code, § 1140, providing for transfer of title of personal property, not being applicable because buyer's rice was not identified until tested.

2. Sales ☞199—Intention governs time title passes.

In contract of sale, question of when title shall pass is one as to intention of parties to be gathered from language of parties considered in light of all circumstances of the case.

3. Sales ☞199—How intention as to time title passes is determined, in absence of statement by parties, stated.

Where nothing was said in contract of sale as to intention of parties concerning time at which title would pass, whether title passed in present is determined from all the circumstances, acts to be performed by respective parties, if any, and rules of law applicable thereto.

4. Sales ☞200(1)—Title remains in seller while goods sold are not identified.

Where goods sold are positively identified, title passes to buyer, although they are part of larger mass, or have to be weighed, but when it is necessary to weigh, measure, or test goods in order to determine whether they are the kind buyer is bound to accept, seller retains title till such determination is made.

Appeal from Superior Court, Tehama County; **John F. Ellison**, Judge.

Action by **W. E. Wane** against **C. F. Thomas** and others, doing business under the firm name of **Thomas, Stephens & Mattei**. From a judgment for plaintiff, defendants appeal. Reversed.

Armfield & Eddy, of Woodland, for appellants.

McCoy & Gans, of Red Bluff, for respondents.

PLUMMER, J. On or about the 15th day of February, 1922, plaintiff, being the owner of some 6,000 sacks of rice, agreed to sell

the same to the defendants for the sum of \$2.41 per 100 pounds, subject to grading, rice to be delivered f. o. b. cars at Proberta station, in the county of Tehama. The rice was all piled or stored in a barn belonging to the plaintiff situate in the county above mentioned about a mile and a half distant from Proberta station. At the time of the entering into the contract relative to the sale of the said rice, the sum of \$4,000 was paid on account thereof. During the course of delivery \$10,000 additional was paid, and on or about March 10th, upon final delivery of all of the rice, the balance of the purchase price, amounting to \$6,472.79, was paid. It also appears from the transcript that, at the time of the making of the agreement concerning the sale of the rice, the plaintiff also sold to the defendants certain barley stored in a warehouse for the sum of \$2,858.34, and received payment therefor immediately, and on said date turned over and delivered to the defendants a warehouse receipt for the portion so sold. After the transactions above referred to had been had, it appears that a portion of the rice had been graded and delivered f. o. b. on the cars at Proberta, assigned to the defendants, but at 12 o'clock noon on the first Monday in March there still remained in the plaintiff's barn 313 tons of rice, unpaid for, ungraded, and undelivered. Under these circumstances, the assessor of the county of Tehama assessed the said 313 tons to the plaintiff and collected from the plaintiff on account of such assessment the sum of \$303.61. This action was brought by the plaintiff to recover said amount from the defendants, basing his action on the claim that the title to the rice vested in the defendants immediately on the 15th day of February, 1922. The plaintiff obtained judgment, and from this judgment the defendants appeal.

It appears from the transcript that Mr. Erle Gans, president of the Bank of Tehama County, conducted all the negotiations on the part of the plaintiff and George B. Champlin on the part of the defendants. The Bank of Tehama County, of which Mr. Gans was president, was then holding a chattel mortgage on the crop of rice and barley grown and owned by the plaintiff. The rice in question was all raised by the plaintiff in the year 1921 and stored in a barn situate on the ranch where it was raised. Prior to the sale of the rice a sample thereof was furnished by the plaintiff to George B. Champlin, the agent of the defendants, who communicated with the defendants, and was authorized by them to purchase the rice at the price stated, subject to grading, delivered f. o. b. cars at Proberta. It is agreed by both parties that the sale was made as per the terms herein stated. Three hundred sacks of the rice in the barn were to be retained by the plaintiff for seeding purposes. The testimony of Mr. Gans, who conducted

the negotiations for the plaintiff, is as follows:

"We had a crop mortgage on that rice and desired to sell it. We had negotiated with Mr. Champlin, among different ones, for the sale of the rice. Mr. Champlin was acting for Thomas, Stephens & Mattei. After some dickering around, Mr. Champlin agreed on—Mr. Champlin and myself agreed on a price, and Mr. Champlin brought a draft for \$4,000 on account—drew a draft for that amount on account, and we considered the sale made. As near as my recollection serves me, it was 2.41 per 100 pounds. The quantity of rice was somewhere in the neighborhood of 6,000 bags, more or less. The payment of the \$4,000 was made February 15th. That is the date of the sale or contract. At the same time we sold some barley. I do not remember the number of sacks. The amount paid for the barley was \$2,858.34. It was paid in a separate draft from the \$4,000. The barley was completely paid for. I delivered the warehouse receipts to Mr. Champlin. On March 8th, \$10,000 more was paid on account of the rice. On March 10th, final payment was made. The rice was to be delivered as soon as could be, taking into consideration the condition of the weather.

"Q. Can you recall anything else that was said, either by you or by Mr. Waneer or Mr. Champlin, in the matter of those negotiations and in closing the deal? A. Well, there was very little said as to the matter, except in arriving at the price, and Mr. Waneer's statement that there might be a delay in getting the stuff to the railroad.

"Q. What was said at the time as to the payments on the price, if anything? A. I do not recall that there was anything said about it.

"Q. But the sum of \$4,000 was paid there at the time the transaction was had, on the sale and purchase price? A. Yes, sir.

"Q. I understood you to say that Mr. Waneer was to deliver this rice to Proberta. That was, I suppose, f. o. b., was it not—that he was to deliver it at his cost? A. Well, there was no particular discussion about that, as I recall.

"Q. Was he to deliver it, as I understand your testimony, to Proberta? A. Yes, sir.

"Q. Was anything said as to delivery to Proberta being at his own expense, or on account of someone else, or was that discussed at all? A. I don't recall that it was.

"Q. Was the rice to be graded? A. Yes, sir.

"Q. What does grading mean? A. All I can tell you about it is that a sampler stands there, takes some out, looks at it, and passes it, or he does not pass it.

"Q. If he does pass it, what does he do with it? A. Sets it aside.

"Q. Rejects it? A. Sometimes it is taken later at a different price.

"Q. Was anything said in the conversation when this sale and purchase was made about paying for this rice at a price other than 2.41? A. Not that I recall."

The testimony of George B. Champlin in relation to the purchase of the rice was substantially to the same effect. It is as follows:

"The deal was finally closed in my office. They were offering this rice for sale. They had been in to see me on one or two occasions, and

finally the price agreed on was 2.41 f. o. b. cars Proberta, subject to grade."

This witness also testified that "subject to grading" meant that the pile of rice was to be torn down and the different sacks sampled, the buyer to take the sacks containing rice equal in grade to the sample, with the privilege of rejecting sacks containing rice not equal to the sample. It further appears from the transcript that a grader by the name of McClure was employed, who graded the rice so piled in different piles, and rejected somewhere in the neighborhood of 100 sacks thereof. The witness McClure testified that, in practice, the rejected rice ran all the way from 1 to 60 per cent. of the quantity of rice graded, depending upon whether the rice had been damaged by rain prior to harvesting, and also whether it had been protected from damage by rains after being harvested and stored; that in the instant case only a small percentage of the sacks were damaged by moisture; also that, where the rejected rice was of merchantable quality, it was usually disposed of upon subsequent contracts of sale at a lower price, but, in the case at bar, none of the rejected rice was afterwards taken.

The testimony further shows that a \$15,000 policy of insurance was taken out by the bank in the name of the plaintiff upon the rice, made payable to the mortgagee bank, and that this policy was not assigned to the defendants, but retained by the bank until final delivery and payment of the rice had been made, when the policy was canceled. The transcript does not show any testimony that anything was said by any of the parties indicating an intent to immediately pass title to the property. All there is in the transcript is the statement of the witness Gans, expressed in these words: "And we considered the sale made."

On the part of the appellants it is contended that, until the rice had been graded and segregated or set aside, there was no identification of the property, and it could not be determined until after grading just what rice the buyer would take, and also, further, that title would not vest in the buyer until it was delivered f. o. b. cars at Proberta. On the part of the plaintiff and respondent, it is insisted that the transaction in question is governed by section 1140, Civil Code, which reads:

"The title to personal property, sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not."

The agreement between the parties was oral, and, as we have said, there is no testimony one way or the other that the parties agreed upon a "present transfer" of the title. The parties agreed upon a price, agreed upon what was to be done, and \$4,000

was paid on account. The complaint in the case, after setting forth certain formal matters, alleged:

The purchase of the rice for the agreed price of \$2.41 per 100 pounds; that at the time of the sale and purchase defendants paid to plaintiff on account of said sale the sum of \$4,000; "that said parties then and there agreed upon the present transfer of said rice from said plaintiff to said defendants and the said rice was then and there identified and the title to the said rice then and there passed from said plaintiff to said defendants; * * * that it was then and there agreed between said plaintiff and said defendants, through their said agent, George B. Champlin, that said plaintiff was to deliver the said rice to said defendants f. o. b. at the railroad and in the cars, at Proberta, in said county of Tehama, at such dates as the weather conditions would permit; that said plaintiff commenced to deliver said rice and proceeded in the delivery of said rice, all in accordance with said conditions of sale and purchase, and the said rice was accepted and received by said defendants and the full amount of said purchase price was paid therefor."

Then follow allegations as to the assessment of taxes, as heretofore stated, demand upon the defendants for reimbursement, and refusal on the part of the defendants to pay to plaintiff the amount of said taxes.

The court made the following findings:

"(1) That all of the allegations of the complaint are true; (2) that before, or at the time of, the said sale and purchase of said rice, said plaintiff furnished to said defendants, by and through their said agent, George B. Champlin, samples of said rice, and that said defendants had and reserved the right to sample any or all of said rice at the time of or before the delivery to and acceptance of the same by them, and that they had and reserved the right to reject any of said rice which did not come up to the samples furnished to them as aforesaid."

It is contended by the appellants that, under the negotiations hereinbefore set forth, all that the defendants agreed to buy was that portion of the rice in the pile belonging to the plaintiff, and then situated in his barn, equal to the sample presented; that, while it is true that the particular pile or piles from which the rice equal to the sample is to be taken is identified, the purchaser, buying subject to grading, does not buy unconditionally; that the very fact that the rice is all subject to grading shows that the sale was conditional or executory.

It is further argued that, until the rice is graded and segregated, it cannot be ascertained what rice, or how much rice, the purchaser may take, or will be required to take, under the terms of the contract; that the agreement is not to purchase all the rice, but simply all the rice in the pile that may be found equal to the sample, when the sacks of rice are torn down from the piles and sampled; that the purchaser, under such a contract, retains the title, and, as found by the court in this case, retained the right

to reject all rice in the various sacks not equal to the sample; that such a sale is entirely different from a case where a group of articles, a stack of hay, or other fixed commodity, is sold at fixed rates, the buyer agreeing to take the whole lot, or whole quantity, without any right of rejection, regardless of quality or quantity, and leaving nothing to be done but to list, weigh, or measure the articles for the purpose of arriving at the total price or amount of money to be paid; that, in the case at bar, the identification of the rice sold consists in the grading, i. e., in segregating the good rice from the inferior rice in order to determine the quantity to be taken and paid for by the defendants under the terms of their purchase.

[1, 2] The rule, as stated in *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 18 P. 248, 9 Am. St. Rep. 199—

"seems well settled that the question as to whether the title has passed is one as to the intention of the parties. And such intention is, as a matter of course, to be gathered from the language of the parties, considered in the light of all the circumstances of the case. But in the absence of anything showing a contrary intent, there are certain circumstances which have a controlling force."

In *Williston on Sales*, vol. 1, § 262 (2d Ed.), as to whether title has passed, the rule is stated:

"The question is essentially one of fact; and though if the whole contract of the parties is reduced to writing this question is determined by the court, as also if the facts are so clear as to justify but one conclusion, yet the inquiry is always one of fact, subject only to the rules of presumption for the ascertainment of intention given in the following section. In a doubtful case the question is appropriate for the jury; evidence being admitted which is calculated to show the intention of both parties as indicated to each other. Not too great stress must be laid upon the use of the words 'sell' or 'buy,' or 'sold' or 'bought,' by the parties. These words are constantly used as meaning or including contract to sell or contract to buy."

The same author in the same volume, § 269, says, further, on the subject of inspection:

"Where, however, inspection involves more than such examination as may be necessary to see if the goods are such as are described in the contract, for instance where the buyer may exercise choice or judgment in taking or rejecting part or the whole, it would seem as if there were quite as much reason for presuming the transfer of the property did not take place until after inspection as where weighing or measuring is necessary to fix the price"—citing *Gilman v. Hill*, 36 N. H. 311; *Outwater v. Dodge*, 7 Cow. (N. Y.) 85; *Pike v. Vaughn*, 39 Wis. 499.

In *Blackwood v. Cutting Packing Co.*, supra, the court in commenting upon section

1140, Civil Code, on the subject of identification, says:

"This section does not dispense with identification. On the contrary, it requires it. It only dispenses with segregation when the property is otherwise identified. Therefore, where the identification consists in the segregation, weighing, or measuring, they are still necessary."

That case involved the purchase of apricots to be grown for five succeeding seasons at so much a pound, the apricots to be delivered f. o. b. Haywards, quantity not less than 75 tons and not exceeding 200 tons per annum. It was there held that the title had not passed.

In the case of *Turner, Kuhn & Fraser, Inc., v. Jones*, 61 Cal. App. 732, 215 P. 1033, in considering the question as to whether the title had passed to a certain number of bales of cotton, this court, in the first district thereof, says:

"In discussing this subject Mr. Benjamin in his work on Sales in substance states that it not infrequently happens that parties fail to express their intentions as to when property, the subject of a sale, shall pass, or that they manifest them so imperfectly as to leave it doubtful what they really mean, if indeed they have any definite intentions, for the reason that the question was not brought up to them. In such cases courts have adopted the construction that when there has been no clear manifestation of intention the presumption of law is that the contract is an actual sale if the specific thing is agreed upon and is ready for immediate delivery, but that the contract is only executory when the goods have not been specified, or if, when specified, something remains to be done to put them in a deliverable shape, or to ascertain the price. In the former case there is no reason for imputing to the parties any intention to suspend the transfer of the property, inasmuch as the thing and the price have been mutually assented to and nothing remains to be done. In the latter case, when something is to be done to the goods, it is to be presumed that the parties intended to make the transfer of the property dependent upon the performance of the things yet to be done, as a condition precedent. Of course, these presumptions yield to proof of a contrary intent. Benjamin on Sales, §§ 308, 312."

[3] The intention of the parties is to be gathered from the language and the contract considered in the light of all the circumstances, but, if nothing is said in the contract, whether the contract be oral or written, expressing the intention of the parties, whether the title passed in *presenti* is to be determined "from all the circumstances," the acts to be performed by the respective parties, if any, and the rules of law applicable thereto.

[4] In *Mechem on Sales*, vol. 1, § 522, where goods are to be measured, weighed, or tested to ascertain the kind or quality of goods the buyer is to accept, the rule as to when title passes is thus stated:

"There are still other cases, not often clearly distinguished, in which the weighing, measuring, testing, and the like is to be done neither to ascertain the price nor the identity of the goods alone, but also to determine whether the particular goods in question, apparently of the kind agreed upon, are really of the kind and quality which the buyer is bound to accept. Thus, though the parties are contracting with reference to specific chattels, for example a number of bales of cotton, but, by the contract, the cotton is thereafter to be sampled by both parties to ascertain if it conforms to a sample which was the basis of the dealing, the title will not pass until that act is done; and the fact that the cotton is yet to be weighed in order to ascertain the price furnishes simply another reason leading to the same result."

If the goods had been identified, the mere fact that they are to be weighed in order to ascertain the price does not offer any reason for concluding that the title has not passed. The distinction is made when it is necessary to sample the goods to determine their quality and so ascertain and identify the goods as well as the quantity of the goods that the buyer is bound to accept under his contract, in which case it is here held that the title would not pass until the quality of the goods had been ascertained and segregation made thereof between the goods of the quality bargained for and those of an inferior grade. The same author, in section 520 of volume 1, expresses the rule as we have just stated. In the recent case of *Idaho Products Co. v. Bales*, 36 Idaho, 800, 214 P. 206, the Supreme Court of Idaho passed upon a contract for the sale of hay, the substantive portion of which is as follows:

"That the grower has this day sold to the buyer all of his strictly No. 1, merchantable alfalfa hay, consisting of approximately 200 tons, now in stack or growing on that certain premises described as Old Conner ranch and of which hay the grower has the sole ownership and control; it being expressly understood and agreed that the grower is to harvest and stack the said hay at the proper time and in the proper manner, and that the said hay is to be delivered to the buyer in stack on said premises, or to the baler on the said premises, as the buyer may direct."

The court, in construing the contract, and to ascertain whether the title had passed, quoted section 501 of *Mechem on Sales* as follows:

"Where, though the specific goods are in a deliverable condition, there still remains some act like measuring, weighing, or testing in order to determine the price, where the price is to depend upon the quantity or quality of the goods, the title usually will not pass in the absence of evidence of an intention to the contrary until this act is done."

It is added:

"It therefore remained within the power of the buyer to refuse to accept the hay as strictly

No. 1, merchantable alfalfa hay, in the event the same did not fall within that grade as established by the department of agriculture. By this contract the buyer contracted for no other grade of hay than was strictly No. 1, merchantable hay.

"If we are correct in the construction given to the terms of the contract, there was no acceptance by the buyer of the hay until it was graded. There being no acceptance of the hay unconditionally, the title to the same did not pass when the contract was signed, and the same was therefore an executory and not an executed contract for the sale of the hay. Not only is this true, but the hay was not delivered for the reason that the buyer did not direct that the hay should be delivered in the stack or to the baler, and it is clear to our minds that it was not within the intention of the parties that there should be a delivery."

It will be observed that in this case the hay was to be graded. In the instant case the rice was to be graded. It was held in the Idaho case that the title to the hay did not pass until it was graded. It would seem that the same rule would hold here that the title to the rice would not pass until it was graded. The quantity to be purchased in both cases depended upon the quality. In neither case was the purchase unconditional. In both cases there appears no acceptance until after grading and in both cases the right to reject all goods not of a specified quality appeared in the contract.

In *Cornell v. Clark*, 104 N. Y. 451, 10 N. E. 888, a case involving the purchase and sale of railroad ties, where the contract provided for the delivery of the ties monthly, "and the balance to be paid after inspection and classification of the ties, and 'when they were taken and used,'" it was held that the title to the ties did not pass by the delivery, but only after inspection and ascertainment of quality.

In *McFadden v. Henderson*, 128 Ala. 221, 29 So. 640, the Supreme Court of Alabama had before it a contract for the purchase of 1,500 bales of cotton at a price therein specified, to be all of a certain quality; the offer to purchase being in the following words: We "offer six seven-eighths f. o. b. round, nothing below middling, subject to reweights." The court, in ascertaining whether title had passed, held as follows:

"The general rule to determine whether a contract of sale is executed or executory is, 'If anything remains to be done by either party to the transaction before delivery, as, for example, to determine the price, quantity, or identity of the thing sold, the title does not vest in the purchaser, and the contract is merely executory. If the sale is complete, and the goods perish without the fault of the seller, the purchaser is bound to pay the agreed price.'

"In this case, the number of bales out of the lot of 1,500 that were sold was not determined, for the number that would class low middlings and under, and how many were unmerchantable as being 'sandy, seedy, or false packed,' was unascertained, and could not have been known

until the cotton was turned out and classed, which remained, under the terms of sale, to be done, and which was never done. The sale was, therefore, executory and not executed."

In the case of *Longsdorff v. Meyers*, 171 Mo. App. 255, 157 S. W. 85, in construing a contract of sale for apples that were to be graded in order to determine the quantity to be taken and the price to be paid, the court held as follows:

"It is the law, as shown by citations in plaintiff's brief, that, if a given quantity of personal property which constitutes a part of a larger mass of exactly the same kind and quality (as, for instance, wheat in an elevator) is sold, the title to the quantity sold will pass, though it has not been separated from the mass. *Brownfield v. Johnson*, 128 Pa. 254, 18 A. 543, 6 L. R. A. 48; *Nash v. Brewster*, 39 Minn. 530, 41 N. W. 105, 2 L. R. A. 409. And so replevin may be had for one's part of such property. *Kaufmann v. Schilling*, 58 Mo. 218. But it is said in the first of these cases that, if 'the property is sold as part of a mass made up of units of unequal quality or value, * * * selection is essential to an execution of the contract'; that is, the passing of title. The same, in effect, is said in the other case. If we apply these cases to the facts as stated by plaintiff himself, he fails in his case, for defendants were not to take a part of a larger mass of exactly like kind. They were to select a part of a larger mass of unequal quality, and, until selection, the title did not pass."

In the case at bar the defendants were not to select a part of a larger mass where the whole mass was of an equal quality, but they were to take that portion thereof which was of a particular quality and reject and set aside and refuse acceptance of all that portion of the mass which was not of a uniform quality, or of a quality below the sample fixing the standard by which the quality of rice was to be determined, and so fix the quantity which the purchaser was bound to accept and pay for.

In *Sempel v. Northern Hardwood Lumber Co.*, 142 Iowa, 586, 121 N. W. 23, the Supreme Court of Iowa, in considering a contract for the sale and purchase of certain logs of certain dimensions and quality, said:

"Broadly speaking, the question when the title to personal property sold is to pass depends upon the intention of the parties, and, when there is any dispute as to the terms and material circumstances of the agreement, it is a question for the jury; but, where there is no material conflict in the evidence or the terms of the agreement are admitted, the intent of the parties is ordinarily for the court."

And, further:

"In the absence of a proved intent otherwise, a sale is not complete and title does not pass so long as anything remains to be done between the parties. The article must be designated and its identity ascertained, and, if it be a part of a greater mass, it must be set apart, or, if sold by weight or measure, the quantity must be ascertained by the usual standards."

In this case, the quality of the logs was to be determined, their size, etc. The court held that the title had not passed until these acts had been performed, and the judgment of the lower court was therefore reversed. This case cites a number of other cases where the same conclusions are reached.

In the case of *Fiddymont v. Johnson*, 18 Cal. App. 339, 123 P. 342, the sale was of the baled hay in two barns belonging to the plaintiff at a fixed price per ton. There nothing was to be done, but to weigh the hay, as it was all baled and unconditionally sold. It was properly held that the title passed. In the case of *Gianelli v. Globe Grain & Milling Co.*, 48 Cal. App. 103, 191 P. 720, the hay was all baled, piled in one pile, identified, \$6,000 was paid on account, and the insurance on the hay was transferred from the seller to the buyer. The real controversy in that case was over the meaning of the words "f. o. b."; it being claimed by the appellant that the title did not pass until the hay had been delivered f. o. b., cars or at warehouse. This court held that as the property was fully identified the circumstances of the transaction and the agreement evidenced an intent to pass title presently, and that the meaning of the words "f. o. b.," in that case, simply meant that the seller was to deliver the hay at his costs.

In *Anderson v. Crisp*, 5 Wash. 178, 31 P. 638, 18 L. R. A. 419, the court had before it an agreement for the sale of bricks in a kiln. The rule is there stated as follows:

"Where a vendee had bargained and paid for a quantity of 'merchantable brick,' which brick were to be sorted from a kiln by the vendee, such a sale does not pass the title of the brick to the vendee; it being impossible to determine, before a segregation, not only what particular brick were sold, but what relative portions of the kiln were sold."

The court, in its opinion, makes a clear distinction between cases where a part of a mass of property is sold, which is all of one quality, and cases where the property sold and to be accepted depends upon the quality. In referring to the case of *Kimberly v. Patchin*, 19 N. Y. 330, 75 Am. Dec. 334, a case having to do with the sale of part of a mass of property of one quality, the Washington court says:

"There it was held, upon a sale of a specific quantity of grain, that its separation from a mass indistinguishable in quality or value, in which it is included, is not necessary to pass the title, when the intention to do so is otherwise clearly manifested. In that case it will be noticed that the goods were indistinguishable in quality or value, and it was upon that particular state of facts that the argument of the court was based. 'It is,' said the court, 'a rule asserted in many legal authorities, but which may be quite as fitly called a rule of reason and logic as of law, that in order to [be] an executed sale, so as to transfer a title from one party to the other, the thing sold must be as-

certained. This is a self-evident truth, when applied to those subjects of property which are distinguishable by their physical attributes from all other things, and therefore are capable of exact identification.' * * * But it must be admitted that if all the property in the mass is not of equal value something more does remain to be done. Thus, in the case at bar, another element is injected into the contract, and there is a question of relative values to be yet determined. The appellants did not buy a portion of an indistinguishable mass, where all the component parts were of equal value; but their contract called for 162,000 merchantable brick, and the evidence was that the brick that were deemed unmerchantable were thrown aside and not counted in when they came to haul them. So that it is impossible to determine, before the segregation of the brick, not only what particular brick were sold, but what relative portions of the kiln were sold."

The holding of the Washington court was that, until the brick had been segregated to determine their merchantable quality, title did not pass.

In the case of *McLaughlin v. Piatti*, 27 Cal. 451, the agreement of sale related to 500 head of cattle out of a herd containing many more, the court said:

"It is a fundamental principle pervading everywhere the doctrine of the sales of chattels that, if goods be sold (while mingled with others) by number, weight, or measure, the sale is incomplete, and the title continues with the seller until the bargained property is separated and identified. * * * In the case under consideration, it could not be said with certainty that any particular 500 head of cattle belonged to Baker, or the plaintiff as his assignee, until a severance of that number from the herd from which they were to be taken."

In the case of *Wong Foo v. Southern Pacific Co.*, 41 Cal. App. 42, 181 P. 823, the agreement read:

"Hop Sing hereby sells to Rourke Company * * * 810 fancy spuds at \$1.30 per sack, * * * being that certain lot in ground at Donlon Island, * * * to be delivered f. o. b. bank and shipped to Stockton on or before Monday, next week, 1915, unless otherwise directed by Rourke Company. Must be new sacks, full, open-mouthed, contents properly graded and sorted and * * * to average 116 lbs. to sack."

"In consideration I hereby acknowledge receipt of * * * \$1 in part payment of above sale; balance to be paid after receipt of goods in good merchantable condition as above mentioned. It is understood that arrival of goods at Stockton in good condition, as provided above, shall be considered as the time and place for the consummation of this sale."

It was there said:

"These provisions of the agreement were for the purpose of permitting the Rourke Company either to elect to purchase the potatoes if they came up to the required standards, or to reject the same if they failed to measure up thereto. The agreement, therefore, amounted to no more than an executory contract of sale; the title to the property remaining in the vendor."

The court in this case in its findings found that the allegations of the complaint were true, which included the allegation that the rice was identified and that title to said rice passed from the plaintiff to the defendants at the time of the negotiations, to wit, February 15, 1922; but the court also found that the defendants had the right to reject all the rice not equal to the sample, and that the rice was to be graded, which finding brings the case within the rule set forth in the authorities hereinbefore cited that, when it is necessary to grade the property in order to determine what portion thereof passed under the contract and must be accepted by the buyer, title thereto remains in the seller until the segregation and grading has taken place. As we have said, the testimony in this case is silent upon the question of when the title passed, and therefore that question must be determined in the light of the authorities setting forth the rule to be applied and followed in such cases. We do not think it necessary to a determination of this case to discuss that portion of the contract which provides that the rice was to be delivered f. o. b. cars at Proberta station. The fact that the rice to be taken was unsegregated and its quality had to be determined to fix the amount to which the price agreed to be paid should attach and the quantity to be accepted remained undetermined is decisive herein. The judgment of the trial court is reversed.

We concur: FINCH, P. J.; HART, J.

75 Cal. App. 171

YOUNG v. FLICKINGER. (Civ. 4099.)

(District Court of Appeal, Second District, Division 2, California. Nov. 10, 1925.)

Sales 91—Contract held to give purchaser right to reject any part of quantity ordered; "shipment;" "order."

Under contract for sale of two cars of coconut meal, providing that purchaser's rejection "of the whole or part of the shipment will cancel the contract, in proportion, without claim for loss or damage," the purchaser, after accepting and paying for first car, was entitled to cancel his order for the second without liability for breach of contract; the word "shipment" being used as equivalent of "order."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Shipment.]

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Action by R. Young against M. P. Flickinger. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Clafin & Lambert, of Bakersfield, and Fred L. Dreher, of San Francisco, for appellant.

FINLAYSON, P. J. This is an action to recover damages alleged to have been sustained by plaintiff's assignor by reason of defendant's refusal to accept and pay for a carload of coconut meal purchased by defendant. Plaintiff, who was nonsuited in the court below, appeals from the judgment of nonsuit. The appeal turns upon the construction of the written contract for the sale of the meal. The firm of Lewis-Simas-Jones Company, a copartnership, has its principal place of business at San Francisco. Defendant's place of business is in Bakersfield. On May 29, 1920, at Bakersfield, defendant and the copartnership executed a contract which reads:

"Bakersfield, Cal., May 29, 1920.

"Lewis-Simas-Jones Co., 429 Davis Street, San Francisco, confirms sale to M. P. Flickinger on the following terms and conditions:

"Commodity: Cocoanut, new sacks.

"Amount: 2 cars Net Wt.

"Price: \$47.00 per ton, f. o. b. San Francisco.

"Quantity:

"Shipment: Oct., 1920, and Dec., 1920.

"Subject to change 2 weeks' notice.

"Payment: 30 days' acceptance.

"Sellers are not responsible for delays or defaults for shipment of the whole or part thereof, arising from strikes, car shortage, wars, revolutions, loss or damage in transit, or any other contingencies beyond their control. Rejection on your part of the whole or part of the shipment will cancel the contract, in proportion, without claim for loss or damage. This contract is not assignable.

"Lewis-Simas-Jones Co.,

"By Fitch."

"Accepted: M. P. Flickinger."

On October 4, 1920, Lewis-Simas-Jones Company shipped the first of the two carloads to defendant, who accepted that carload and paid for it according to the terms of his contract. On November 24, 1920, defendant notified Lewis-Simas-Jones Company that he would not accept the remaining carload, which, under the terms of the contract, was to be shipped, i. e., delivered, to the railroad carrier f. o. b. at San Francisco, in the month of December following. Because of the receipt of this notice, Lewis-Simas-Jones Company made no attempt to ship or to deliver or to tender the second carload, but, claiming to have a cause of action against defendant for breach of the contract on his part, that firm assigned its claim for damages to plaintiff, who later brought this action. The trial court held that the notice given by defendant on November 24, 1920, that he would not accept the second carload was justified by that clause of the contract which reads: "Rejection on your [defendant's] part of the whole or part of the shipment will cancel the contract, in proportion, without claim for loss or damage." It is contended by appellant that by this clause respondent was given no greater right than that of rejecting the whole or a part of the shipment after it had actually been made, and that therefore respondent's notice amounted to an anticipatory breach of his contract.

It is evident that the right given to respondent to reject the shipment, or any part of it, was intended to be much more inclusive than a mere right to reject because of the unsoundness or unmerchantability of the meal. The commodity was inaccessible to an examination by respondent at the time when the contract was entered into. There was therefore an implied warranty on the part of appellant's assignor that the meal, when delivered, should be sound and merchantable. Civ. Code, § 1771. Respondent therefore, quite apart from any right expressly conferred upon him by the contract, would have had the right to reject the whole or any part of the shipment if, upon delivery, it proved to be unsound or unmerchantable. Obviously the contract must have been intended to clothe respondent with a more comprehensive right of rejection than that which the law would have recognized in him had the written instrument been silent upon the subject. It would seem, therefore, that it was the intention of the parties to confer upon respondent the right to reject the whole or any part of the shipment for any bona fide reason whatever. For example, respondent's inability to realize profits on resales, by reason of declining market prices, might constitute a valid ground for the rejection of the shipment. Not only was respondent's right of rejection thus comprehensive, but it also involved the right to "cancel" the contract to

the extent that it calls for the rejected shipment or the rejected portion thereof. That is to say, respondent had the right, not merely to reject the shipment or any part thereof, but to do away with the contract to the extent that it calls for the quantity of meal embraced within the rejected shipment or rejected portion thereof. This is precisely what the contract says. It declares that the rejection of the whole or any part of the shipment "will *cancel* the contract, in proportion." By the rejection of the shipment, or a portion thereof, the contract is canceled *pro tanto*—canceled in proportion to the amount of meal rejected. As to such rejected amount, the contract is as completely annulled as if it had never been. To "cancel" a contract means to abrogate so much of it as remains unperformed. It differs from "rescission," which means to restore the parties to their former position. The one refers to the state of things at the time of the cancellation; the other to the state of things existing when the contract was made. "The word 'cancel,'" says the court in *Winton v. Spring*, 18 Cal. 451, "applied to the agreement, under the circumstances, means no more than 'doing away with' an existing agreement upon the terms and with the consequences mentioned in the writing."

But, says appellant, even if the clause in question does recognize a right to reject the shipment for any cause whatever, thereby canceling the contract, or canceling it *pro tanto*, respondent must wait until the shipment has actually been made ere he can exercise his right to reject it or a part of it. Wherefore it is claimed that the notice that the second carload would not be accepted, given, as it was, before the arrival of the time for shipping that carload, was a breach of respondent's contract to purchase two carloads of meal. This argument is plausible, but by no means convincing. It is true that in its primary sense the verb "reject," as its derivation indicates (re, back or again, and jacere, to throw), means to cast from one; to throw away; to discard. See Webster's Dictionary. It also is true that, in conformity with this root meaning of the verb, the noun "rejection" has been defined as a failure to accept; the repudiation of an offer. 34 Cyc. 1036. This being the primary meaning, there doubtless would have been ground for holding that the word "rejection" meant the refusal to accept the shipment after it had been started on its journey, or after it had been tendered for acceptance, if that word had stood in isolation in the contract, or if it would have been proper to consider it apart from the situation and evident purpose of the parties. But here the word does not stand in isolation; and it is evident that the parties intended that the right to reject should include more than is ordinarily connoted by the word "rejection." The right which is given to respondent by this contract

is not merely a right to reject the shipment or any part thereof. It includes the further right to cancel the contract itself in so far as it calls for the quantity of meal which respondent elects to reject. Moreover, respondent, as we have shown, could exercise his right of rejection and his right to cancel the contract *pro tanto* for any and every valid reason. If, then, he was determined to exercise the right, and the circumstances warranted its exercise, what could it boot either party to wait until the shipment had been made, and the expense of delivering the meal to the carrier had been incurred, before respondent exercised his right to reject the shipment and to cancel the contract therefor? Surely it was not within the contemplation of the parties that so vain a thing should be done, if, when it had been done, it would have to be undone at the expense of the shipper; and undone it would have to be if respondent delayed exercising his undoubted right of rejection and cancellation until after the shipment had been made.

It is for these reasons that the writer of this opinion concludes that respondent was well within his right when he gave notice on November 24, 1920, that he would not accept the second carload of meal. It follows, therefore, that the motion for nonsuit was properly granted.

The judgment is affirmed.

WORKS, J. I concur in the judgment, but I think the conclusion should be reached upon reasoning different from that which appears in the opinion of the presiding justice. The crucial sentence of the contract, in the light of the question before us, reads: "Rejection on your part of the whole or part of the shipment will cancel the contract, in proportion, without claim for loss or damage." I think the parties intended the word "shipment" as the equivalent of the word "order," and that the sentence should be read accordingly. The word "shipment" has a well-understood ordinary meaning, there is no doubt, but I think it is sufficiently elastic to be employed as a synonym for the word "order." That the parties to the contract intended so to wrench the word they used from its usual significance is plain to me upon several considerations. Surely there was here but one order, split for convenience into two parts by the language: "Shipment: Oct. 1920, and Dec. 1920." There having been but one order the parties must have had that order—the entire order—in mind when they employed in the crucial sentence the expression "*the shipment*." If they had intended the word last mentioned in its ordinary sense, they would have written "a shipment," or "either shipment," or "any shipment."

Further, the contract throughout bears inherent evidence of having been formulated by the filling out of a stock form, but this fact particularly appears from the manner in

which, at the left margin of the instrument, the following words appear, each standing in column below its predecessor: "Commodity," "Amount," "Price," "Quantity," "Shipment," and "Payment." It will be observed that nothing was written after "Quantity," as that expression stands in the margin. This circumstance alone is sufficient to stamp the instrument as one made by filling out a stock form. Considering the paper as one so drawn, we inspect more narrowly the language: "Shipment: Oct. 1920, and Dec. 1920." Suppose respondent had purchased but one carload of coconut meal, or that the two carloads actually bought were intended to have been "shipped" at one and the same time. The form employed by the seller would then have been filled thus: "Shipment: Oct. 1920," if we may assume that to have been the time agreed upon. Under such circumstances there can be no doubt that the word "shipment," where it appears in the crucial sentence of the contract, would have been the equivalent of the word "order." I cannot perceive that it should have a different meaning, as the actual instrument stands, merely because two dates were inserted after the expression "Shipment" where it appears in column in the margin.

Finally, the contract is more logical if the crucial sentence be read: "Rejection on your part of the whole or part of the order will cancel the contract, in proportion, without claim for loss or damage." This argument interlocks with that above advanced concerning the use by the parties of the word "the" before the word "shipment." Not only, taking the entire phraseology of the contract, does the word "order" fit perfectly the word "the," but the agreement in its entirety seems more consonant with sense if the word "order" be read in the place of the word "shipment." As there was but one order, I can see no good reason for so reading the crucial sentence of the contract as if its terms were to be effective twice—first, to the first carload; second, to the second carload. Such a construction of the sentence is based upon a slavish submission to what, it must be confessed, is the usual and ordinary meaning of the word "shipment." The shackles of such a submission are broken if we attribute to the word the meaning above suggested. It cannot be said that it does not readily lend itself to that meaning. I am convinced that the parties so intended it.

If we so read the crucial sentence of the contract the sole point advanced by appellant at once falls to the ground. The point is stated thus in the opinion of the presiding justice: "It is contended by appellant that by this clause"—what I have termed the crucial sentence of the contract—"respondent was given no greater right than that of rejecting the whole or a part of the shipment after it had actually been made, and that

therefore respondent's notice amounted to an anticipatory breach of his contract." With the construction which I would place upon the crucial sentence, this contention is disposed of without the necessity of argument. With that contention respondent's rejection of the coconut meal came in the midst of the attempted delivery to him of the full quantity called for by the contract. The fact that it came before the making of the second shipment, taking that word now in its usual and ordinary sense, becomes an utterly immaterial circumstance.

I concur: CRAIG, J.

75 Cal. App. 212

CONELAND WATER CO. v. NICKALLS.
(Civ. 2974.)

(District Court of Appeal, Third District, California. Nov. 16, 1925. Hearing Denied by Supreme Court Jan. 11, 1926.)

1. Parties $\S$ 7(2)—Water company, agent and trustee for land company, is trustee of express trust, and may sue without joining land company.

If water company is agent and trustee of land company who owns all its capital stock, then water company is trustee of an express trust, and, under Code Civ. Proc. $\S$ 369, is authorized to sue without joining the beneficiary, for adjudication of rights and duties under contract to furnish water for irrigation.

2. Appeal and error $\S$ 1036(3)—Rights of defendant not prejudiced by denial of motion to make land company, owning all stock of water company, party to suit to establish rights under water contract.

In action by water company to establish rights and duties under contract to furnish water for irrigation, defendant was not prejudiced by denial of motion to make land company, who owned all capital stock of water corporation, party, since both companies are bound by acts of either.

3. Reformation of instruments $\S$ 36(2)—Party seeking reformation must allege intended meaning and intended legal consequences.

While under Civ. Code, $\S$ 3401, in reforming a written instrument, the court is not confined to inquiry as to what language was intended to be, as it is limited to inquiry as to intended meaning and intended legal consequences, they must be alleged.

4. Evidence $\S$ 441(1)—Written contract, certain in terms, cannot be modified by contemporaneous oral agreement in conflict therewith.

Under Code Civ. Proc. $\S$ 1856, Civ. Code, $\S$ 1625, a written contract which is certain in its terms cannot be modified by contemporaneous oral agreement in direct conflict therewith.

5. Contracts $\hookrightarrow$ 170(1)—Conduct will be looked to in aid of construction only in relation to contracts which are uncertain or of doubtful construction on face.

It is only in relation to contracts that are uncertain or of doubtful construction on their face that conduct is to be looked to in aid of construction, and, where terms are plain and certain, court will be guided by language used.

6. Vendor and purchaser $\hookrightarrow$ 37(1)—Purchaser not justified in relying on advertising booklet in conflict with terms of contract.

Purchaser of land was not justified in relying upon statement in advertising booklet that company guaranteed certain amount of water, where by simple arithmetical computation he could have determined discrepancy between such amount and amount called for in contract.

7. Evidence $\hookrightarrow$ 441(8)—Vendor not estopped from standing upon terms of written contract by oral promises and representations.

In absence of fraud or mistake, vendor was not estopped to stand upon terms of written instrument, describing amount of water purchaser was entitled to for irrigation purposes by oral promises and representations.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by the Coneland Water Company against Thomas R. Nickalls. From the judgment, defendant appeals. Affirmed.

Fred C. Pugh, of Red Bluff, for appellant.

Richard C. Harrison and Albert E. Chandler, both of San Francisco, and W. P. Johnson, of Red Bluff, for respondent.

FINCH, P. J. Plaintiff brought this action for an adjudication of its rights and duties under its contract with defendant to furnish him water for the irrigation of his land, consisting of 20 acres. The contract, executed September 29, 1908, is attached to the complaint and made a part thereof. It has been held that the plaintiff is not a public utility and is not subject to the rate-fixing jurisdiction of the Railroad Commission. *McCullagh v. Railroad Commission*, 190 Cal. 13, 210 P. 264. The parts of the contract material to the questions arising on this appeal are as follows:

"The party of the first part agrees to furnish to the party of the second part not exceeding at any time four inches of water during the irrigating season of the year. * * * An inch of water is understood to mean 14,000 gallons in 24 hours."

The complaint contains the usual averments in actions for declaratory relief. It is alleged therein that the defendant claims to be entitled to the use of a greater quantity of water than that specified in the contract, and that such claim is without right. The defendant filed an answer and a cross-complaint, the plaintiff's demurrers to which

were sustained by the court. The defendant thereafter filed an amended answer and cross-complaint, to which the plaintiff demurred, and the court sustained the demurrers without leave to amend. A trial was thereafter had, the defendant not appearing, and judgment was entered establishing the rights of the parties in accordance with the terms of the contract. This appeal is from the judgment so entered. The amended answer and cross-complaint cover 33 pages of the printed transcript, and are therefore too long to be set out at length. The issues raised by the answer and cross-complaint will be stated separately in connection with the discussion thereof.

[1, 2] The answer alleges that the Los Molinos Land Company at all times mentioned therein was and is now the owner of all the capital stock of the plaintiff corporation, and that plaintiff at all times has been and is now "the agent and trustee of Los Molinos Land Company, holding for it the naked legal title to said properties." The defendant moved the court for an order making the Los Molinos Land Company a party to the action. The motion was denied, and appellant assigns the ruling as error. If the allegations of the answer and cross-complaint are true, the plaintiff is a trustee of an express trust of which the Los Molinos Land Company is the beneficiary. In matters relating to the trust, the plaintiff was authorized to sue without joining with it the beneficiary. Code Civ. Proc. § 369. The defendant had the right to set up in his answer or cross-complaint any defense or cause of action relating to the trust property which he could have set up against the Los Molinos Land Company. *Kelley-Clarke Co. v. Leslie*, 61 Cal. App. 559, 215 P. 699. His rights, therefore, were not prejudiced by the denial of his motion to make that company a party. Since, if the allegations of the answer are true, both the Los Molinos Land Company and the plaintiff are bound by the acts of either, the word "plaintiff" will be used to designate both or either of them.

It appears from the answer that, at the time the defendant purchased the land in question from plaintiff, it was not under irrigation, but was "raw and semiarid" land, of "little value without irrigation"; that defendant agreed to purchase said land and pay \$100 an acre for the same with a water right; that J. D. Sherwood was fully authorized to represent plaintiff; that in September, 1908, the defendant tendered the full purchase price of the land to Sherwood; that Sherwood thereupon offered to deliver to defendant a deed to the land and the contract alleged in the complaint; that the defendant "had no knowledge of irrigation and no knowledge or experience as to the quantity of water necessary to properly irri-

gate lands in the Sacramento valley or elsewhere, and had no means of acquiring such knowledge, and so informed said Sherwood at the time, and further informed said Sherwood that defendant would not sign said water right agreement or purchase said lands unless the same conveyed an adequate water right"; that "thereupon it was represented to defendant by said Sherwood * * * that one-fifth of one miner's inch of water per acre per season was believed by said water company and said land company to be an adequate water right for said lands for the growing and maturing of any and all crops which said land was adapted to produce; that said companies were not as yet fully informed as (to) the quantity of water per acre which was actually necessary to irrigate the lands they were colonizing, including defendant's lands, but that, if said quantity of water would prove to be insufficient to properly irrigate said lands, as aforesaid, said companies would deliver to defendant and to all of their colonists such additional quantity of water, without additional charge or expense to defendant, as should be proved by demonstration and practice to be necessary to properly irrigate his said lands, and that it was the intention of said companies to convey to defendant and to all of their colonists an adequate and sufficient quantity of water to properly irrigate their lands; that, if defendant accepted said deed and executed and accepted said water right agreement, the quantity of water he would be entitled to receive, and would receive thereunder, would be the quantity of water actually required to benefit said tracts of land;" that defendant believed said representations to be true, "and believed that one-fifth of one miner's inch of water * * * was a sufficient quantity of water to beneficially irrigate his said lands, and, in reliance upon said representations, executed and accepted said water right agreement, and paid the full purchase price for said lands"; that "through the mutual mistake of the parties thereto, and said land company, said water right agreement does not truly express the intention of the parties in this, that plaintiff and defendant and said Los Molinos Land Company, at the time of the execution and delivery of the deed and water right agreement, * * * believed that 4 inches of water during the irrigating season of the year was an abundance of water to beneficially irrigate said 20 acres of land * * * and all crops which said land was adapted to grow, including crops of alfalfa, whereas said quantity of water is not sufficient" therefor; that "8 inches of water delivered during the irrigating season of the year is the smallest quantity of water which will properly or beneficially irrigate said 20 acres of land, and defendant alleges that 8 inches of water instead of 4 inches of water during the irrigating season of the year is the quantity of

water which plaintiff and said land company have annually delivered to defendant, and which defendant has annually used in irrigating said land prior to April 1, 1923, and said quantity of water has been demanded by and delivered to defendant as of right for the 14 years next preceding the year 1923, in accordance with the true intent and meaning of said water right agreement"; that "defendant did not discover said mistake until subsequent to April 1, 1923, and could not with reasonable diligence sooner have discovered the same"; that "said Los Molinos Land Company and Coneland Water Company have uniformly interpreted said water right agreement during the 14 years last past in accordance with the mutual understanding and agreement between defendant and said Los Molinos Land Company and Coneland Water Company at the time of the purchase of said land, as aforesaid"; that the land company and the water company "have uniformly and for more than 15 years last past placed a similar interpretation upon all the water right agreements issued by them to purchasers of lands from said land company, and have delivered the quantity of water required for the beneficial and proper irrigation of said lands to the owners thereof as a matter of right, * * * and have uniformly and generally represented to purchasers and prospective purchasers and to the general public by means of letters, advertisements in newspapers, and printed matter prepared by them, that a full and complete water right was conveyed with every parcel of land sold."

[3, 4] Appellant contends that the foregoing alleged facts show such a mutual mistake of the parties as to entitle him to a judgment reforming the contract by substituting 8 inches of water for the 4 inches specified therein. It is not alleged that anything was embodied in or omitted from the contract through mistake or that any term thereof was intended or understood to mean anything different from the plain meaning of the terms used. Appellant relies upon the case of *F. P. Cutting Co. v. Petersen*, 164 Cal. 44, 49, 127 P. 163, 165, wherein it is said:

"The fact that no word was inserted which the parties did not intend to insert and none omitted which they did intend to insert or supposed had been inserted, does not prevent the application of the rule, nor make it any the less a case of mistake."

The contract involved in that case contained the following provision:

"The above prices guaranteed against the California Fruit Canneries Association opening printed prices for the season of 1908."

Contrary to the expectation of the parties and its prior practice, the association did not print the opening prices which it thereafter established for the season of 1908. It clearly appeared at the trial that the provision quot-

ed was intended to refer to the general market prices to be fixed by the association, and that the word "printed" was used to exclude occasional or special prices as a standard. In that case it was alleged that such provision was inserted in the contract with the intention that the "guaranty should protect this defendant against any prices which might be made on said goods by said California Fruit Canneries Association for said season of 1908." The answer in this case contains no similar allegation. The parties had in mind that 4 inches of water might be insufficient to properly irrigate the land, because it was orally agreed that more water would be supplied if necessary.

"In revising a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be." Civ. Code, § 3401.

The last clause in the section was not intended to neutralize the other provisions thereof, but, while the court is not confined in such a case "to the inquiry, what the language of the instrument was intended to be," it is limited to the inquiry, "what the instrument was intended to mean, and what were intended to be its legal consequences," and a party seeking a reformation of the instrument must so allege. *National Bank v. Exchange Nat. Bank*, 186 Cal. 172, 181, 199 P. 1; *Harding v. Robinson*, 175 Cal. 534, 542, 166 P. 808; *Horton v. Winbiger*, 175 Cal. 149, 154, 165 P. 423; *Auerbach v. Healy*, 174 Cal. 60, 161 P. 1157. The foregoing allegations show no more than an oral agreement which was not embodied or intended to be inserted in the written contract executed by the parties. A written contract which is certain in its terms cannot be modified by a contemporaneous oral agreement in direct conflict therewith. Code Civ. Proc. § 1856; Civ. Code, § 1625; *Pacific States Securities Co. v. Steiner*, 192 Cal. 376, 220 P. 304.

[5] The answer alleges that for 14 years the plaintiff has supplied the defendant with "the quantity of water required for the beneficial and proper irrigation" of his land. Appellant says:

"There are many cases holding, in substance, that when the terms of a contract are in dispute the practical interpretation placed thereon by the parties before the controversy arose is controlling."

"It is only in relation to contracts that are uncertain, or of doubtful construction on their face, that conduct is to be looked to in aid of construction. Where the terms are plain and certain, the court will be guided by the language used and construe the intention of the parties to have been in accordance with their agreement." 6 Cal. Jur. 306; *Jameson v. Chanslor-Canfield M. Oil Co.*, 176 Cal. 1, 8, 167 P. 369.

In the second count of the answer and in the cross-complaint, the foregoing facts and

those to follow are pleaded as an estoppel. It is alleged therein that, at the time of the execution of the contract, the plaintiff "represented that said water right agreement was intended to convey to defendant the quantity of water required by his said lands for the beneficial irrigation thereof, and that the specifying of a definite quantity of water therein was really done to prevent colonists upon said company's lands from taking advantage of said land company and demanding and using more water than necessary, to the injury of other colonists on said lands"; that "plaintiff and said land company further represented that they had an abundance of water for all of their lands and a full and adequate water right was sold with every parcel of land sold by them, including the lands sold to defendant"; that "defendant would not have purchased said lands had he known he was not securing a water right sufficient to beneficially irrigate the same"; that "defendant prepared his said lands and planted the same to alfalfa at great expense upon the advice of Los Molinos Land Company"; that "defendant has made valuable and extensive improvements on said lands, in reliance upon the representations of plaintiff and Los Molinos Land Company that said water right agreement conveyed an adequate water right"; that "during the year 1912 defendant moved upon said lands and has made his home thereon ever since, and has made improvements thereon of the value of \$4,000, and has leveled and checked and sowed about 18 acres thereof to alfalfa, and has planted and grown valuable fruit trees and shade trees thereon"; that "a short time prior to the time defendant moved upon and personally began to farm said lands said Los Molinos Land Company represented to defendant, in a printed booklet issued by it and delivered to defendant, as follows:

"All the Water You Want.

"Is there plenty of water for irrigation? All you can use in the dryest season. We guarantee to cover every acre 38 inches deep during the year. In addition there is 25 inches of annual rainfall, making 63 inches of water available for the land altogether, or over 5 acre feet.

"Has the company enough water to supply 38 inches of water to each settler? We have almost exclusive water rights on the Los Molinos river and additional water rights on Antelope creek. Measurements taken by the government on these streams for several years during the lowest flowage show that we have a great abundance of water for all our land.

"Is the water measured out for the landowner and must he give notice when he desires to use it? The company reserves the right to measure the water so as to protect everybody. If one user took ten times his share, some one else might be short. Notice is also necessary, if the company requires it. In practice, everybody is using all the water he wants whenever he wants it."

It is further alleged that "38 inches of water per acre per year are equivalent to two-fifths of one miner's inch per acre, or 8 inches of water delivered during the irrigating season of the year"; and that "defendant did not discover until subsequent to April 1, 1923, that said pamphlet specified a greater quantity of water than that provided in said water right agreement."

[6] By a simple arithmetical computation, the defendant, who alleges that he "had followed contracting and building as a business," could have ascertained that a constant flow of 4 inches of water, or 56,000 gallons a day, for a year, would equal in quantity a depth of about 38 inches of water over all of his land, or half that quantity if the flow continued for but 6 months. The defendant, therefore, was not "permissibly" ignorant of the discrepancy between the booklet and the contract, if it may be said that there is a discrepancy. Having a convenient and ready means of ascertaining the truth, the defendant was not justified in relying upon the statement contained in the booklet. 10 Cal. Jur. 636; *Wood v. Blaney*, 107 Cal. 291, 295, 40 P. 428; *Champion v. Woods*, 79 Cal. 17, 20, 21 P. 534, 12 Am. St. Rep. 126; *Faulkner v. Bank of Italy* (Cal. App.) 231 P. 380, 383; *Robbins v. Law*, 48 Cal. App. 555, 562, 192 P. 118.

[7] In each alleged defense in the answer, and in each cause of action attempted to be stated in the cross-complaint, it is alleged that at the time the contract was executed the plaintiff stated, through its representative, that it did not know but believed that the quantity of water mentioned in the agreement was sufficient to properly irrigate defendant's land, but that, if it should prove insufficient, the plaintiff would furnish such quantity as might be necessary, and that plaintiff subsequently represented that it would furnish all the water that was required. Such promises and representations are in direct conflict with the written agreement to furnish "not exceeding at any time 4 inches of water." Since the defendant knew the terms of his contract, he was not justified in relying upon promises and representations in necessary conflict with the express provisions thereof. To hold that such promises and representations estop plaintiff from standing upon the certain terms of the written contract, in the absence of fraud or of mistake as to the meaning thereof, would be to vary the terms of the written agreement by parol evidence.

Without giving any consideration in the decision of this case to the facts stated in *McCullagh v. Railroad Commission*, *supra*, it is deemed proper to state, in justice to plaintiff, that such facts explain the reasons which actuated plaintiff in supplying defendant and others with more water than it had agreed to

furnish. It therein appears that from the time the Railroad Commission was established in 1911 to October, 1922, when the *McCullagh Case* was decided, the plaintiff acted upon the assumption that it was a public utility and subject to the regulation and control of the commission in the distribution of water and the rates it was entitled to collect therefor, and that the commission so held. In the *McCullagh Case* it was decided that the plaintiff is not a public utility, but is bound by its contracts with the users of water. The plaintiff thereafter appears to have proceeded upon the theory that, being itself so bound, the water users were likewise bound by the terms of their contracts with it.

The judgment is affirmed.

We concur: PLUMMER, J.; HART, J.

197 Cal. 687

**UNITED RAILROADS OF SAN FRANCISCO
v. SUPERIOR COURT IN AND FOR SAN
MATEO COUNTY et al. (S. F. 11774.)**

(Supreme Court of California. Dec. 28, 1925.)

**1. New trial ⇨163(1)—New trial may lawfully
be granted only by order of court.**

A new trial may lawfully be granted only by an order of court, as distinguished from an order of a judge.

**2. New trial ⇨163(1)—Elements essential to
lawful rendition of order of court for new
trial stated.**

To constitute lawful rendition of an order of court for a new trial, there must be an application therefor by a motion or otherwise, in a pending action or proceeding, addressed to a court having jurisdiction of parties and subject-matter thereof, on notice to adverse party, or equivalent thereof, unless notice is waived, and hearing thereon in open court, or an opportunity for such hearing, at which both parties are, or have been, afforded an opportunity to be present and heard.

**3. New trial ⇨163(1) — Order granting new
trial may be rendered in open court or by filing
of order with clerk, signed by judge.**

When all elements antecedent to an order granting a new trial have been duly performed, and issue after a hearing thereon duly had has been submitted to court for decision, court's order may be rendered, either by a pronouncement in open court, or by filing with clerk of a written order of court signed by judge.

**4. New trial ⇨163(1)—Filing with clerk con-
stitutes rendition of order granting new trial.**

Where order granting new trial is made by filing with clerk a written order of court, signed by judge, it is the filing which constitutes rendition thereof.

**5. Judgment ⇨218—May be rendered notwith-
standing act of signing was performed by
judge in another county than that in which
action was pending.**

Where an action has been duly tried and submitted to court for decision, its judgment therein may be rendered by filing in action of written findings of fact, conclusions of law, and judgment, authenticated by signature of trial judge, notwithstanding act of signing same was performed by judge in another county than that in which action was pending.

**6. New trial ⇨163(1) — Rendition of order
granting new trial by mail from judge presid-
ing in another county held lawful.**

Where all elements antecedent to an order for new trial had been duly performed, and issue after a hearing thereon had been submitted to court for its decision, rendition within statutory time for deciding motion by presiding

judge, who regularly presided in another county, while in such county, by mailing to clerk of superior court in which action was tried a written order granting motion, signed by himself as judge of such court, clerk, within time required by Code Civ. Proc. § 660, having filed such order and entered in minutes of court a notation that motion was granted, *held* lawful.

In Bank.

Application for a writ of prohibition by the United Railroads of San Francisco against the Superior Court of the State of California in and for the County of San Mateo and another. Writ denied.

Wm. M. Abbott and K. W. Cannon, both of San Francisco, and Ross & Ross, of Redwood City (Ivores R. Dains, of San Francisco, of counsel), for petitioner.

Hugo D. Newhouse and Russell P. Tyler, both of San Francisco, for respondents.

MYERS, C. J. This is an application for a writ of prohibition to restrain the respondents from proceeding with the trial of a civil action which purports to be pending before the respondent court. There is no dispute as to the facts. The sole controversy herein relates to the legal conclusions incident thereto. A trial was had in the respondent court of the action of G. L. Wilkinson, as adm., etc., plaintiff, v. United Railroads of San Francisco, a corporation, defendant, resulting in a verdict and judgment in favor of the defendant. Thereafter an order was made granting plaintiff's motion for a new trial, from which order the defendant prosecuted an appeal. After several hearings upon appeal both in the District Court of Appeal and in this court, a decision and judgment was finally rendered by this court affirming the order granting the new trial. *Wilkinson v. United Railroads*, 232 P. 131. Upon the going down of the remittitur the plaintiff in said action regularly moved the court to have the action again set for trial, which motion was opposed by the defendant therein, petitioner herein, upon the ground that the order which purported to grant the motion for a new trial was utterly void for the reason that it was not made in open court. After a hearing upon that motion and the objections thereto, the trial court announced that it would overrule the objections and would proceed to set the cause for retrial, and thereupon the defendant petitioned this court for a writ of prohibition to prohibit the trial court from taking any further proceedings in said action. The essential facts upon which this petition is predicated may be outlined as follows: The trial of the action in the superior court in and for the county of San Mateo was had before Hon. John L. Hudner, judge of the superior court in and for the county of San Benito, who presided therein upon the re-

quest of the resident judge of the superior court of San Mateo county. After the return of the verdict and rendition of judgment thereon in favor of the defendant, the plaintiff regularly and within due time moved for a new trial. This motion was argued and submitted in open court in San Mateo county before Judge Hudner, presiding as the judge of said court. The motion, having been fully argued in open court, was submitted for consideration and decision, and Judge Hudner thereupon returned to his home in San Benito county. Thereafter and within the statutory time for deciding the motion, Judge Hudner, while in San Benito county, mailed to the clerk of the superior court in and for the county of San Mateo a written order granting plaintiff's motion for a new trial, signed by himself as judge of said court, together with a letter requesting that the said order be filed. The clerk thereupon and within the statutory time for the decision of said motion filed said order, and entered in the minutes of the court a notation thereof as follows:

(Title of Court and Cause.) "May 4, 1922. Present: Hon. Jno. L. Hudner, Judge.

"The hearing on the motion for a new trial of the above-entitled cause having been heretofore submitted to the court for consideration and decision, and now the court, having considered the same and being fully advised, renders the following decision:

"Motion for new trial granted. Opinion filed. "Recorded May 9, 1922."

This is the order from which the appeal was prosecuted which resulted in the affirmance thereof as hereinbefore related.

[1, 2] It is the contention of the petitioner that an order granting a new trial is one which cannot be made by a judge at chambers, but can be made only by the court; that under the facts hereof the court failed to take any action upon the motion for new trial, and that the purported order granting the same, not having been made in open court, is utterly void and of no effect for any purpose, from which it follows that no validity could be imparted thereto by the decision of this court purporting to affirm the same. In support of this contention petitioner relies chiefly upon the cases of *Shepherd v. Superior Court*, 54 Cal. App. 673, 202 P. 466, and *Finkle v. Superior Court* (Cal. App.) 234 P. 432. We are of the opinion that each of those cases was correctly decided upon the facts involved therein, but, as to the points necessary to be decided and actually decided therein, neither is authority for petitioner's contention herein. In the *Shepherd Case* the power of the court to grant the motion under the limitations of section 660, Code of Civil Procedure, expired at noon on Saturday, April 2. Between 3 and 4 o'clock on the afternoon of that day, the trial judge telephoned from his residence to his courtroom clerk, who was then at his

own home, to enter an order granting the motion for a new trial. This order was not entered by the clerk until the following Monday morning, April 5. We agree with the conclusion of the Court of Appeal in that case that a new trial can be granted only by an order of court, and that no such order was made therein until after the power of the court to make it had expired by reason of the statutory limitation. In the *Finkle Case* the action had been tried in the superior court of San Bernardino county before Hon. J. A. Smith, judge of the superior court of Calaveras county, presiding therein. The motion for new trial having been duly made, argued, and submitted in the superior court for San Bernardino county, thereafter Judge Smith at Calaveras county signed a written order, purporting to grant the new trial, on May 5, which was the last day allowed by the statute for acting upon the motion. This order was mailed by Judge Smith to the county clerk of San Bernardino county, but was not received or filed by the latter until May 7, which was two days after the power to grant the motion had expired. The court of appeal correctly held that the motion for new trial had not been granted within the time allowed by law, and must be deemed to have been denied by force of the statute. There is no question but that a new trial may lawfully be granted only by an order of court as distinguished from an order of a judge, or, as we say, an order "at chambers." It may perhaps be doubted that there is any fundamental distinction between these two other than this: That an order of court may lawfully be made only upon notice, whereas an order at chambers may be made ex parte. Without attempting to decide this question, it will be appropriate to consider what elements are essential to the lawful rendition of an order of court. It may be conceded that there must be an application therefor, by motion or otherwise, in a pending action or proceeding, addressed to a court having jurisdiction of the parties and the subject-matter thereof, upon notice to the adverse party or the equivalent thereof (unless notice is waived), and a hearing thereon in open court (or at least an opportunity for such hearing), at which both parties are or have been accorded an opportunity to be present and to be heard. All of these elements were admittedly present in the matter of the granting of the motion for new trial herein. The action was pending in the respondent court, which had jurisdiction of the parties and of the subject-matter, the notice of intention to move for a new trial was duly and regularly served and filed within the time prescribed by law, the motion was brought on for hearing pursuant to due and sufficient notice thereof, the hearing thereof was had in open court, both parties being present thereat, the merits of the motion were fully argued, pro and con, and the mat-

ter submitted to the court for its decision. It remains to consider what physical acts were necessary to be done in order to constitute the rendition of an order of court upon that motion under those circumstances.

[3-6] While petitioner's counsel have not said so in so many words, the conclusion is implicit in their argument that, in order to render a lawful order of court granting or denying the motion for new trial under those circumstances, it was necessary for the respondent judge to betake himself to the courtroom in which the hearing had been had and there mount the bench and formally and audibly pronounce an order granting the motion for a new trial, and that by no other method could such an order be lawfully rendered. We do not subscribe to this view. We are of the opinion that, when all of the elements antecedent to such an order have been duly performed, and when the issue after a hearing thereon duly had has been submitted to the court for its decision, the order of the court thereon may be rendered in either one of two ways: (1) By the pronouncement thereof in open court in the manner above suggested; or (2) by the filing with the clerk in the action of a written order of court signed by the judge. Of course, when the latter method is followed, the signing of the order by the judge does not constitute its rendition; neither does the act of sending it or mailing it to the clerk. It is the filing of the written order, authenticated by the signature of the judge, which constitutes the rendition thereof. It follows that in the Finkle Case, *supra*, the order purporting to grant the new trial was not rendered until after the power of the court to act thereon had expired. In the Shepherd Case, *supra*, an order granting a new trial was never rendered. The matter still remained "in the breast of the court" when its power to act thereon expired by statutory limitation. It has been an unbroken rule of decision in this state for nearly 50 years past that, where an action has been duly tried and submitted to the court for decision, the judgment of the court therein may be rendered by the filing in the action of written findings of fact, conclusions of law and judgment, authenticated by the signature of the trial judge, notwithstanding the act of signing the same was performed by the judge in another county than that in which the action was pending. *Comstock Q. M. Co. v. Superior Court*, 57 Cal. 625; *Walter v. Merced Academy Ass'n*, 126 Cal. 582, 59 P. 136; *Estudillo v. Security Loan, etc., Co.*, 158 Cal. 66, 109 P. 884. See, also, *In re Newman*, 75 Cal. 213, 221, 16 P. 887, 7 Am. St. Rep. 146; *Baker v. Brickell*, 102 Cal. 620, 623, 36 P. 950; *Powell v. Mohr*, (Cal. App.) 230 P. 27; and *Hamblin v. Superior Court* (Cal. Sup.) 233 P. 337.

We perceive no distinction and no basis for

a distinction in this behalf between the rendition of a judgment and the rendition of an order of court. The precise question here presented was involved in the case of *Martin v. Superior Court* (S. F. 11535), decided by us without opinion on March 9, 1925. That was an application for a writ of certiorari to review and annul an order of the superior court of the county of Mono purporting to grant a new trial of an action pending in that court. The order purporting to grant the new trial was signed by the trial judge while in the city and county of San Francisco and forwarded by mail to the clerk of the superior court of Mono county. It was filed by the latter within the time limited by Code of Civil Procedure, 660, and the petitioner therein contended that it was void for the same reasons which are urged in behalf of the petitioner herein. We were of the opinion that the filing in the action of the order signed by the trial judge granting the new trial constituted a lawful rendition of such order as an order of court, and for this reason we denied the application for the writ.

The conclusion which we have reached renders it unnecessary to give further consideration to respondents' contentions that petitioner should not be permitted to impeach the record upon this collateral attack; that the validity of the order, being a matter involved in and which could have been litigated upon the appeal, is *res adjudicata*; and that the petitioner had and still has a plain, speedy, and adequate remedy at law.

The alternative writ heretofore issued herein is discharged and the application for a peremptory writ denied.

We concur: SHENK, J.; WASTE, J.; LAWLOR, J.; SEAWELL, J.; RICHARDS, J.; LENNON, J.

197 Cal. 702

DARLING v. PACIFIC ELECTRIC RY.
(L. A. 8169.)

(Supreme Court of California. Dec. 29, 1925.)

I. Negligence — 83—Elements of doctrine of "last clear chance," stated.

To invoke doctrine of "last clear chance," plaintiff must have been put in a dangerous situation as a result of her own negligence, from which she could not escape by exercise of ordinary care, and defendant, being aware of plaintiff's dangerous situation and her inability to escape therefrom, must have had a clear chance of avoiding injury by exercise of ordinary care, and failed to do so.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Last Clear Chance.]

2. Negligence ⚡83—Physical impossibility to escape from danger not necessary in doctrine of last clear chance.

To apply doctrine of last clear chance, it is not necessary that plaintiff show physical impossibility of escaping from threatened danger; it being sufficient if plaintiff was wholly unaware of danger and hence unable to escape, but on becoming aware of danger plaintiff must thereafter exercise ordinary care to protect herself.

3. Negligence ⚡83—Test of last clear chance stated.

The test of last clear opportunity of avoiding the accident is whether, when both plaintiff and defendant have been guilty of negligence causing accident, the plaintiff has ceased to have any power to prevent it and defendant still retains the power of preventing it by exercise of ordinary care.

4. Street railroads ⚡117(35)—Negligence under doctrine of last clear chance held for jury.

In action for injury from being struck by street car, whether plaintiff was in such a situation, after becoming aware of threatened danger, that she could not by exercise of ordinary care have escaped, and whether motorman knew of plaintiff's situation and could have avoided accident by exercise of ordinary care but negligently failed to do so, were questions for jury.

5. Appeal and error ⚡1002—Conflict of evidence resolved in favor of prevailing party and not disturbed on appeal.

Verdict for plaintiff in personal injury action impliedly resolves conflict in evidence in plaintiff's favor, which conclusion cannot be disturbed by Supreme Court.

6. Street railroads ⚡114(19)—Evidence held to show railroad failed to avail itself of last clear chance to avoid injuring pedestrian.

In action for damages by plaintiff, a woman 67 years old and deaf, struck by street car on congested street, evidence held to sustain verdict for plaintiff on theory that defendant failed to avail itself of last clear chance to avoid injuring plaintiff.

7. Street railroads ⚡103(2)—Pedestrian being negligently in path of car held not to justify motorman in waiting until last moment before endeavoring to avoid accident.

In action by pedestrian for damages from being struck by street car, the mere fact that plaintiff was negligently in path of on-coming car did not justify defendant's motorman in waiting until last moment before endeavoring to avoid accident, but, being aware of plaintiff's position, it was incumbent on motorman to exert all reasonable means to avoid striking plaintiff.

8. Street railroads ⚡114(19)—Evidence held to show pedestrian used reasonable care to escape threatened danger.

In action by pedestrian for damages from being struck by street car, evidence held sufficient to support implied finding that plaintiff exercised such reasonable care to extricate herself on becoming aware of threatened danger as was required under the circumstances.

9. Street railroads ⚡114(19)—Evidence held to show motorman could have avoided accident by promptness in applying brakes.

In action for damages from being struck by street car, evidence held to show that motorman could have avoided accident after knowledge of plaintiff's danger by reasonable promptness in applying brakes.

10. Street railroads ⚡114(19)—Evidence held to show motorman's knowledge of pedestrian's peril.

In action by pedestrian for damages from being struck by street car, evidence held to warrant inference that defendant's motorman knew of plaintiff's perilous position, making doctrine of last clear chance applicable.

11. Witnesses ⚡211(2)—Refusal of physician to testify as to patient's infirmities held proper, in absence of waiver of patient's privilege.

Where physician testified that his patient was physically unable to attend court as a witness to lay foundation for introduction of witness' deposition, it was not error to sustain refusal by physician to testify as to his patient's infirmities, in absence of express or implied waiver of privilege by patient under Code Civ. Proc. § 1881, subd. 4.

12. Witnesses ⚡219(4)—Immunity of physician from examination as to infirmities of patient held to be personal privilege of patient.

Immunity of physician from being examined in civil action as to information acquired in attending patient, granted by Code Civ. Proc. § 1881, subd. 4, is a personal privilege given to patient which no one, except in certain specified cases, has right to waive for him.

13. Witnesses ⚡208(2)—Rule of privilege between physician and patient applies, though patient is not a party to action in which disclosure is sought.

Privilege of patient to have his physician exempt from examination as to information acquired while attending patient applies, though patient is not party to action in which a disclosure is sought and is not present to object.

14. Witnesses ⚡219(5)—Deposition by patient held not to waive privilege of not having physician examined as to his infirmities.

Where physician testified that his patient was physically unable to be a witness at the trial, deposition by patient did not thereby waive his privilege, under Code Civ. Proc. § 1881, subd. 4, not to have physician examined as to patient's infirmities.

15. Evidence ⚡539½(2) — On showing that witness' knowledge was ample to testify to opinion as to distance in which car could be stopped, question as to degree of his knowledge goes to weight, not admissibility.

Where witness showed ample knowledge of street grade and street car to entitle his opinion as to distance in which street car could be stopped to go to the jury, question of degree of his knowledge goes to weight, not admissibility, of his evidence.

16. Appeal and error ⇨971(2)—Evidence ⇨546—Qualification of witness as expert for trial court; if no abuse of discretion, ruling as to qualification of expert not disturbed on appeal.

The qualification of a witness to testify as an expert is a matter within the sound discretion of the trial court, and, where there is no showing of a manifest abuse of such discretion, ruling of court will not be disturbed on appeal.

17. Damages ⇨132(9)—\$15,000 damages for loss of foot held not excessive.

\$15,000 damages awarded to woman 67 years old for loss of foot run over by street car held not excessive.

18. Damages ⇨96—Measurement of damages left to jury.

Court will not establish any precise rule for measurement of damages in actions for personal injuries, but will leave measurement to sound sense and fair judgment of jury.

19. Appeal and error ⇨1004(1)—Verdict not disturbed because excessive, unless not result of cool, dispassionate discretion of jury.

A verdict will not be disturbed because excessive unless the amount of damages is obviously so disproportionate to the injury as to justify the conclusion that the verdict is not result of the cool, dispassionate discretion of jury.

In Bank.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action for personal injuries by Sarah M. Darling against the Pacific Electric Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Karr, R. C. Gortner, and E. E. Morris, all of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondent.

LENNON, J. In this action the plaintiff, Sarah M. Darling, secured a judgment for damages for personal injuries in the sum of \$15,000. The complaint charged the defendant generally with the negligent operation of its electric car, in consequence of which the plaintiff was permanently injured. Defendant answered, denying its own alleged negligence, and interposed as a separate defense the alleged negligence of the plaintiff as one of the proximate contributing causes of the accident.

It appears from the record before us that the plaintiff, Mrs. Darling, was struck by one of the defendant's electric cars on Brand boulevard, between Wilson and Broadway streets, in the city of Glendale. The car ran over plaintiff's left foot, which was so badly crushed as to render amputation necessary. The width of Brand boulevard is 100 feet. It extends north and south, being intersected by Wilson street on the north and by Broadway street on the south. There is a slight downgrade from Wilson street to Broadway

street. The defendant operates its electric cars on double tracks on this thoroughfare, the north-bound cars using the easterly tracks and the south-bound cars using the westerly tracks. The rails of the respective tracks are approximately five feet apart and the tracks are some ten feet apart, leaving intervening a narrow strip of land, wherein are embedded trolley poles, set at about 150 feet apart. The entire boulevard, including the said narrow strip of land, is paved. The location of the accident is in the heart of the business section of Glendale, and, during busy times, the boulevard is subjected to heavy vehicular traffic. It was customary in this portion of Glendale for automobiles to park diagonally to the curbing, and on the day of the accident both sides of the boulevard, on the block between Wilson and Broadway streets, were lined with parked automobiles. The accident occurred on a Saturday noon approximately in the middle of the block of said boulevard. The vehicular traffic was very heavy, as was usual on Saturdays, necessitating, at times, the running of automobiles along the car tracks in order to advance beyond other automobiles moving more slowly. The plaintiff, prior to the accident, had taken her place on the westerly curb of Brand boulevard, near the middle of the block, preparatory to crossing the boulevard. She stepped off the curb and made her way across the boulevard in a southeasterly direction, toward the opposite side thereof. Succeeding in reaching the south-bound car track without encountering any considerable difficulty, Mrs. Darling remained there for a moment, as her direct course across the boulevard from then on was impeded by the heavy traffic moving north on the east side thereof. The street car at this time was a short distance beyond the intersection of Wilson street and Brand boulevard, between 175 and 200 feet from the plaintiff. The car did not stop at this intersection, but continued going due south at a rate of speed between 10 and 12 miles an hour. While crossing the intersection and until within a short distance of the plaintiff, the motorman continuously and vigorously rang the bell of the car.

The trial court instructed the jury that the plaintiff was guilty of contributory negligence as a matter of law and submitted the case to them pursuant to appropriate instructions upon the sole issue of the last clear chance. A general verdict was rendered in favor of the plaintiff, and judgment was entered thereon for the plaintiff, from which the defendant appeals.

In support of the appeal the defendant urges four grounds, viz.: (1) That the evidence is insufficient to justify the verdict; (2) that the trial court erred in restricting the cross-examination of a witness for the plaintiff; (3) that the trial court erred in

overruling the motion to strike from the record the testimony of another witness for the plaintiff; (4) that the verdict was excessive.

[1-3] Upon the first ground appellant urges that there is no evidence justifying the application of the doctrine of last clear chance, inasmuch as it is claimed the plaintiff was proximately negligent down to the time of the accident. The elements of the doctrine of last clear chance, which must be present in any given case in order to warrant the invocation of that doctrine, are these: (1) That the plaintiff has been negligent; (2) that as a result thereof she was present in a situation of danger from which she could not escape by the exercise of ordinary care; (3) that the defendant was aware of her dangerous situation and realized, or ought to have realized, her inability to escape therefrom; (4) that the defendant then had a clear chance to avoid injuring her by the exercise of ordinary care; (5) that the defendant failed to avoid the accident by the use of ordinary care. It is not required of the plaintiff to show that her inability to escape from the threatened danger was a physical impossibility. The doctrine applies equally if she be wholly unaware of her danger and for that reason unable to escape it. Whenever she becomes aware of the danger, however, she must thereafter exercise ordinary care for her protection. *Meeks v. Southern Pacific R. R. Co.*, 56 Cal. 513, 519, 38 Am. Rep. 67; *Everett v. Los Angeles, etc., Co.*, 115 Cal. 105, 127, 43 P. 207, 46 P. 889, 34 L. R. A. 350; *Harrington v. Los Angeles, etc., Co.*, 140 Cal. 514, 522, 74 P. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85; *Thompson v. Los Angeles, etc., Co.*, 165 Cal. 748, 134 P. 709; *Basham v. Southern Pacific Co.*, 176 Cal. 320, 168 P. 359; *Palmer v. Tschudy*, 191 Cal. 696, 218 P. 36. The test of the last clear opportunity of avoiding the accident is whether, when both plaintiff and defendant have been guilty of negligence causing the accident, the plaintiff has ceased to have any power to prevent it and the defendant still retains the power of preventing it by the exercise of ordinary care.

[4-6] There are, then, upon this phase of the case, two questions, viz.: (1) Whether or not there was any evidence showing or tending to show that the plaintiff was in such a situation, after she became aware of the threatened danger, from which she could not by the exercise of ordinary care have extricated herself; (2) whether or not there was any evidence showing or tending to show that the motorman had actual knowledge of her situation and could by the exercise of ordinary care have avoided the accident but negligently failed to do so. It is not disputed that both of these queries were, admittedly, in view of the situation revealed by the evidence adduced on the entire case, questions of fact for the determination of the jury. *Cunningham v. Los Angeles Ry. Co.*, 115 Cal. 561, 47 P. 452; *Wood v. Los Angeles Ry. Corp.*,

172 Cal. 15, 155 P. 68; *Lawrence v. Goodwill*, 44 Cal. App. 440, 186 P. 781; *Unger v. San Francisco-Oakland Terminal Rys.*, 61 Cal. App. 125, 214 P. 510. While there is a sharp conflict in the evidence concerning the circumstances immediately preceding the accident and down to the very time of the accident, the verdict of the jury having impliedly resolved that conflict in favor of the plaintiff, we are precluded from disturbing their conclusion. Upon the triers of fact rests the responsibility to reconcile, if possible, any apparent conflict, whether the same arises upon the entire case or in the testimony of a single witness, and to effectuate all the evidence, when the nature of the case will admit of such a disposition; or if the conflict is irreconcilable, to place their own value on the contradictory evidence. A consideration of all the evidence in the instant case leads us to conclude that there was some substantial evidence to sustain the verdict of the jury in favor of the plaintiff upon the theory that the defendant failed to avail itself of the last clear chance to avoid injuring the plaintiff. Thus it was shown in evidence that at the time of the accident the plaintiff was 67 years of age and was then and had been for many years prior thereto almost stone deaf. The place of the accident was in a busy downtown business section, and, at the time of the accident, the automotive traffic was very heavy. The automobiles, parked diagonally to the curbing, lined both sides of the boulevard on the block in question. This tended to lessen, to some extent, the street space for the moving traffic, necessitating, at intervals, as the evidence indicates, the use of the car tracks and the intervening space between the respective car tracks. The use of this narrow strip was not precluded to vehicles, because the trolley poles thereon were some distance apart, and this permitted the hasty drivers to swerve into the strip in order to advance beyond the slower drivers, and then to cut in ahead of them without danger of an impact with one of the trolley poles.

[7] Standing in his proper place in the front of the car, with no obstruction on the track to conceal what was thereon, the motorman had a clear view of the plaintiff while more than 200 feet away from her. Although he was ringing the bell "furiously," it failed to elicit any perceptible response from the plaintiff. She, meanwhile, was walking down the track in the direct path of the approaching car, indicating that she was unaware of the threatened danger. During all the time that the car was approaching she did not at any time leave the track for a place of safety. It was not until the car was within a distance estimated variously from 35 to 50 feet from her that the realization of the impending peril was first brought home to her. Instinctively turning around, she saw for the first time the on-coming car to her rear. At this time, according to the testimony introduced by the

plaintiff, there was heavy traffic on the west side of the track, south-bound, and there was traffic on the east side of the track, north-bound. Some of the automobiles were using the north-bound car track. One automobile, having cut in ahead of another automobile, was running upon the narrow strip between the tracks immediately opposite the plaintiff. Thus confronted with an imminent peril to her rear and with moving vehicles on both sides barring her exit from her perilous situation, the plaintiff turned to the west, hesitated for a moment—seeing her escape in that direction impossible—and then turned completely around and attempted to make her escape by going to the east side onto the narrow strip of land between the tracks. The hesitation, the palpable inability of the plaintiff to determine upon a final course of action, must have conveyed to the motorman the thought that the plaintiff would not immediately get off the track. Seeing the plaintiff in this obvious bewildered condition, as her actions clearly manifested, seeing her making ineffectual efforts to extricate herself from her precarious predicament, the motorman should have, it is apparent, as a reasonable man under the circumstances, realized that the plaintiff would not be able to escape from the on-coming car. Thus informed of the impending peril and well-nigh inevitable consequences of his continued running of the car at the same rate of speed, the motorman made no effort to slacken the speed of nor to stop the car, but continued at the same speed, apparently hazarding the possibility that the plaintiff would be able to extricate herself before the car would be upon her. It was only when the car was within some 10 feet of the plaintiff that the motorman, doubtlessly awakening to the inevitability of the accident, applied the brakes of the car, within a distance which the car could not be stopped, going at its then rate of speed, under any circumstances. The mere fact that the plaintiff was negligently in the path of the on-coming car did not justify the motorman in waiting until the very last moment before endeavoring to avoid the accident. Obviously aware of the plaintiff's position, it was incumbent on him to exert all reasonable means within his power to avoid running down the plaintiff.

"Persons cannot be recklessly or wantonly run down on a railroad track, however negligent themselves, where the circumstances are such as to convey to the mind of a reasonable man a question as to whether they will be able to get out of the way." *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, 74 P. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85.

[8-10] It is readily conceded, as the appellant argues, that the plaintiff was obliged to exercise ordinary care to extricate herself from the perilous predicament in which she found herself as the result of her own negli-

gence. Considering all the circumstances immediately surrounding the accident, it seems to us that there is sufficient evidence upon which to predicate the implied finding that she did exercise such reasonable care to extricate herself, after she became aware of the threatened danger, as was required under the circumstances. While the plaintiff did not immediately walk from the track with calm decision, yet she endeavored to the best of her ability to escape; but, due to circumstances beyond her control, her efforts were ineffectual. Realizing, as he must have done, the situation of the plaintiff, it must have appeared to the motorman, as it would have appeared to any ordinarily prudent person, that unless the speed of the car was slackened or the car altogether stopped an accident would inevitably ensue. This raises the question whether, if the brakes had been applied with reasonable promptness, the accident could have been avoided. The answer to this question is to be found in the fact shown in evidence that a very slight slowing down of the car would have given Mrs. Darling sufficient time to escape. She was struck by the protruding fender of the car only after she had almost cleared herself from the on-coming car. A second or two more and she would have reached a place of safety. Appellant asserts, however, that there is no positive evidence that the motorman operating defendant's electric car had actual knowledge of the plaintiff's perilous position, and, in the absence thereof, there is no room for the application of the doctrine of last clear chance. There is substantial, uncontradicted evidence, however, that the motorman had a clear view of the track for a considerable distance ahead. Between the car and the plaintiff there was nothing on the track to distract him. His vigorous ringing of the car bell, in connection with those circumstances, is a clear indication that he was attempting to warn the plaintiff of the approach of the car. Any other inference would be clearly unwarranted by the evidence. That the ringing of the bell was not to warn the witness Mrs. Tarbell of the approach of the car is made manifest by the fact that she was never on the track and gave no indication, as far as the record shows, that she was about to precipitate herself into a position of danger. Moreover, in addition thereto, the motorman continued ringing the bell, apparently, with the same force after he had passed the point where Mrs. Tarbell was standing.

[11] Dr. Harold P. Hare was called by the plaintiff for the purpose of testifying that another witness, A. M. Minnock, was physically unable to be present in court. This was for the purpose of laying a foundation for the introduction of Minnock's deposition, taken some time prior thereto. It is unquestioned that the relation of physician and patient had been established as a matter of law. The

physician, after testifying generally on direct examination that Minnock could not be present in court, was interrogated by counsel for the appellant, who endeavored to elicit the exact nature of the patient's infirmities. Upon his own motion the physician refused to testify in this behalf upon the ground that to do so would be to violate a professional confidence. The court sustained the witness in his refusal to testify, and in so doing no error was committed.

Section 1881 of the Code of Civil Procedure provides, in part:

"There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: * * * (4) A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient. * * *

[12, 13] This is a personal privilege given to the patient, and on one, except in certain specified cases, has the right to waive the same for him. *Estate of Flint*, 100 Cal. 391, 34 P. 863; *Freel v. Market St. Ry. Co.*, 97 Cal. 40, 31 P. 730; *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 P. 1019; *Lissak v. Crocker Estate Co.*, 119 Cal. 442, 445, 171 P. 638; *Estate of Nelson*, 132 Cal. 182, 64 P. 294; *McClenahan v. Keyes*, 188 Cal. 574, 206 P. 454. This rule of privilege applies although the patient is not a party to the action in which a disclosure is sought and is not present to object. *Matter of Myer*, 184 N. Y. 54, 58, 76 N. E. 920, 6 Ann. Cas. 26; *Sparer v. Travelers' Ins. Co.*, 185 App. Div. 861, 173 N. Y. S. 673. There was no express or implied waiver of this privilege by the patient in the instant case, and, in the absence thereof, the physician was clearly within his rights in refusing to testify concerning a matter which could not be divulged without a breach of professional confidence.

In support of its contention in this behalf appellant relies upon the case of *In re Mullin*, 110 Cal. 252, 42 P. 645. That case is not in point. It is clearly distinguishable from the instant case. In the *Mullin* Case the question of privilege arose over the testimony of a physician who had attended the deceased testator professionally during his last illness and, in addition thereto, was a subscribing witness to the will in controversy. The physician was permitted, over objection, to testify concerning the condition of and the nature of the affliction of his deceased patient. On appeal it was contended that the admission of this testimony in evidence was in violation of the privilege accorded by section 1881 of the Code of Civil Procedure. In reference thereto the court said:

"* * * These objections are not to be upheld. In making his attending physician a sub-

scribing witness to his will the deceased did exactly what he effected in the case of his attorney at law—waived the privilege and invited a full and proper examination of the matters and facts upon which their lips would otherwise have been sealed."

[14] Appellant argues, however, that in giving his deposition Minnock, the patient, waived the privilege accorded by section 1881 of the Code of Civil Procedure the same as the testator did in the *Mullin* Case in making his physician a subscribing witness to his will. The rule enunciated in the *Mullin* Case, however, cannot be extended to embrace such a situation as is presented in the instant case. In the case of a will the subscribing witnesses are necessary to the attestation of the same, and in making a privileged person a subscribing witness the testator must be deemed to have actually waived the privilege, for it is incumbent upon such witness to testify, if called upon, in order to prove the will, concerning the soundness of the mind of the testator. In the instant case, however, the physician was called as a witness only for the purpose of explaining the absence of the person whose deposition was sought to be offered in evidence. He did not testify, nor did he attempt to testify, concerning the person's competency to make such deposition. The instant case, therefore, cannot be said to be controlled by the *Mullin* Case, and in the absence of a waiver by the patient it cannot be said that the trial court improperly restricted the cross-examination of the witness with reference to privileged matter.

[15] There is no merit in the contention that the trial court erred in refusing to strike from the record the testimony of the witness George T. Marshall. This motion to strike was based upon the theory that the witness was not shown to have had sufficient knowledge as to the weight and structure of the defendant's car or as to the grade of the street to entitle him to testify. Marshall testified that he had been employed for many years as a motorman for various street car corporations, including the defendant corporation; that he was familiar with the type of car which struck the plaintiff; and that he was familiar with the place of the accident. He stated, in addition thereto, in response to a hypothetical question, that the car could be stopped within about 20 feet, if it were going at the rate of 10 miles an hour. If the car were going at the rate of 12 miles an hour he said: There would not be much difference at that speed." Marshall further testified that—

"If there was a 1 per cent. grade (on Brand boulevard between Wilson street and Broadway street), that would require very little more distance to stop, at that speed the car was supposed to be traveling. * * *

Defendant introduced evidence—the testimony of its civil engineer—that the grade

**VITAGRAPH, Inc., v. LIBERTY THEATRES
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(S. F. 11731.)**

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was approximately 1.115 per cent. Appellant asserts, therefore, that the testimony of Marshall rested upon a false assumption, as the testimony of the civil engineer "if uncontradicted * * * was binding upon the court and jury," and that therefore Marshall's conclusion as to distance should have been stricken out. It is obvious that this objection went rather to the weight of the witness' testimony than to his ability to testify. If the witness disclosed an ample knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than to its admissibility. *Howland v. Oakland, etc., Ry. Co.*, 110 Cal. 513, 42 P. 983.

[16] The qualification of a witness to testify as an expert is a matter within the sound discretion of the trial court, and where there is no showing of a manifest abuse of such discretion the ruling of that court will not be disturbed upon appeal. *Union C. Co. v. Madera, etc., Irr. Co.*, 179 Cal. 774, 178 P. 957; *Kinsey v. Pac. Mutual Life Ins. Co.*, 178 Cal. 153, 172 P. 1098.

[17-19] The amount of damages awarded by the jury to the plaintiff was not so large or so disproportionate as to be palpably the result of prejudice and passion. While the plaintiff was not engaged in any gainful occupation, yet the permanent loss of her limb, the excruciating pain she suffered, and the decreased capacity to move around, were, doubtless, the inducing causes in leading the jury to award the stated amount of damages, rather than, as appellant contends, sympathy. We do not think that the sum awarded as damages for the permanent loss of the plaintiff's limb was excessive in that it can be said that the award was clearly the result of passion and prejudice. Courts have repeatedly refrained from attempting to establish any precise rule for the measurement of damages in actions for personal injuries, but, rather from necessity, leave the measurement to the sound sense and fair judgment of the jury. A verdict, therefore, "will not be disturbed because excessive, 'unless the amount of damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury.'" *Morgan v. S. P. Co.*, 95 Cal. 501, 30 P. 601; *Aldrich v. Palmer*, 24 Cal. 513; *Rystinski v. Cent. Cal. T. Co.*, 175 Cal. 336, 165 P. 952; *Redfield v. Oakland C. S. Ry.*, 110 Cal. 286, 42 P. 822, 1063; *Meek v. Pacific Elec. Co.*, 175 Cal. 53, 164 P. 1117; *Bisinger v. Sac. Lodge No. 6*, 187 Cal. 578, 203 P. 768.

Judgment affirmed.

We concur: **LAWLOR, J.**, Acting C. J.; **SHENK, J.**; **SEAWELL, J.**; **RICHARDS, J.**; **WASTE, J.**; **HOUSER**, Justice pro tem.

1. Contracts —41—Defendant could not insist on strictest proof of due execution of contract for rental of photo plays.

Where both parties to contract for rental and exhibition of photo plays recognized and acted under contract in part performance thereof, and defendant received and retained some of benefits accruing to it thereunder, it could not insist on strictest proof of contract's due execution by plaintiff.

2. Damages —62(3)—Plaintiff required to minimize damage, where threatened by injury as result of tort or breach of contract by another.

Where injury or damage to plaintiff's property is threatened as a result of tort or breach of contract by another, plaintiff must use reasonable care and diligence to protect his property against threatened loss or injury, and for failure to do so he will not be permitted to charge defendant for loss or injury which was due to his own neglect.

3. Damages —163(2)—Defendant has burden of proving any mitigation of damages for tort or breach of contract.

Under rule requiring injured party to minimize damages threatened as a result of tort or breach of contract by another, burden of proof is on defendant to prove facts in mitigation of damages.

4. Damages —163(2), 189—Plaintiff established prima facie case entitling it to recover, as damages, amount defendant agreed to pay for photo plays; burden on defendant to prove facts in mitigation of damages.

Plaintiff proving contract for rental and exhibition of photo plays and part performance thereof, and defendant's refusal to pay therefor, established a prima facie case entitling it to recover, as damages, in view of Civ. Code, § 3302, amount which defendant agreed to pay for such films, and burden of proof was then on defendant to prove facts in mitigation of such damages.

5. Damages —184—Defendant did not sustain burden of proving facts in mitigation of damages for breach of contract for rental of photo plays.

In action for damages for breach of contract for rental and exhibition of photo plays, defendant held not to have sustained burden of proving facts in mitigation of plaintiff's damages.

6. Damages —184—Evidence held to sustain finding that plaintiff could not have leased photo plays refused by defendant.

In action for damages for breach of contract for rental and exhibition of photo plays, evidence held to sustain finding that plaintiff, by exercise of reasonable care, could not have leased or sublet to others pictures, or any part thereof, which were refused by defendant.

7. Evidence ☞98—Finding on issue against party on whom rests burden of proof, where no evidence produced thereon.

Where no evidence is produced on an issue, finding thereon must be against party on whom rests burden of proof.

8. Contracts ☞329—Action for breach of contract to rent photo plays held premature as to those films not delivered to defendant.

Action for breach of contract for rental and exhibition of photo plays held premature as to those films which had not been delivered or tendered to defendant, and which, under contract, no payment thereon had become due from it.

9. Damages ☞159(6)—Plaintiff not entitled to recover damages for anticipatory breach of contract to rent and exhibit photo plays.

Complaint, pleading full performance by plaintiff, held not sufficient to permit recovery of damages for anticipatory breach of contract to rent and exhibit photo plays as to those films not delivered or tendered to defendant under contract; measure of damages recoverable therefor being governed by Civ. Code, § 3300.

10. Damages ☞124(4)—Measure for damages for anticipatory breach of contract to rent photo plays stated.

Action for damages for anticipatory breach of contract to rent and exhibit photo plays, under Civ. Code, § 3300, would proceed upon theory that contract had been abandoned, and measure of recovery would be difference between amount agreed to be paid by defendants and value to plaintiff of license and use of films covered by contract.

11. Contracts ☞10(1)—Contract for exhibition of photo plays not lacking in mutuality because plaintiff might terminate it on happening of certain contingencies.

Contract for rental and exhibition of photo plays held not lacking in mutuality, so as to be unenforceable, because of contingencies on happening of any one of which plaintiff was authorized to terminate agreement, where each of such contingencies was predicated on a happening beyond control of plaintiff.

12. Contracts ☞10(1)—Want of mutuality no defense to an executed contract.

Want of mutuality is never a defense to an executed contract.

13. Contracts ☞10(1)—Any want of mutuality in contract for rental and exhibition of photo plays held cured.

Any want of mutuality in contract for rental and exhibition of photo plays held cured as to films delivered to defendant by performance of contract by plaintiff.

14. Appeal and error ☞177(8)—Supreme Court required to reverse and remand cause, though no occasion for retrial of any issues of fact therein.

Although there was no occasion apparent for retrial of any issues of fact in cause tried below, Supreme Court, on appeal, was required to reverse and remand cause, where additional findings were necessary, since it cannot make findings of fact.

In Bank.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by Vitagraph, Inc., against the Liberty Theatres Company of California and others. Action dismissed as to other defendants. From the judgment for plaintiff, the named defendant appeals. Reversed.

Lindsay & Conley, of Fresno, for appellant.

Milton A. Nathan, of San Francisco (Edward Schary, of Fresno, of counsel), for respondent.

MYERS, C. J. Plaintiff, a distributor of photo plays, entered into a contract with defendant, an exhibitor of such plays, whereby plaintiff agreed to deliver to defendant the films of six certain photo plays to be thereafter produced, and to license defendant to exhibit each of them in turn for a period of one week, and defendant agreed to pay therefor the sum of \$300 for each such picture, payable one week in advance of the exhibition thereof. These payments were evidently to be made for the license to exhibit these photo plays, together with the loan and use of the films for that purpose. Defendant accepted, used, and paid for the first two photo plays which were produced and delivered to it, but refused to accept the third and fourth, and, when the films thereof were sent to defendant, it returned them to plaintiff, without exhibiting them, and notified plaintiff that it would not accept the remaining two photo plays provided for in the contract. Thereupon plaintiff brought this action to recover \$1,200 damages for the breach of the contract, being \$300 each for the third and fourth films, which had been tendered and refused, and \$300 each for the fifth and sixth films, which had not been tendered at the time the action was commenced. At the trial the action was dismissed as to all defendants other than the Liberty Theatres Company of California, a corporation, and plaintiff recovered judgment against this defendant for the full amount sued for, except that it was not awarded interest upon the principal sum thereof as prayed for in its complaint. The defendant appeals from the judgment and urges as grounds for reversal: First, that there was no proof that the contract sued upon was ever executed, either by the respondent or by the appellant; second, that no effort was made by the respondent to minimize its loss or damage after the alleged breach of the contract sued upon; third, that the contract sued upon is lacking in mutuality and is therefore unenforceable; and, fourth, that the judgment is excessive.

[1] The contract, which was in writing, purported by its terms to be entered into by and between the respondent, as party of the first part, and the appellant, as party of the

second part. It was signed in behalf of respondent by its salesman and countersigned by its branch manager, and also countersigned by the manager of its sales promotion department. It was signed also by the president and general manager of the appellant corporation, and was evidently a transaction in the ordinary course of appellant's business. It was not signed in the corporate name of appellant, however, but its president and general manager merely affixed his own signature thereto as "Exhibitor." It may be conceded that the evidence is insufficient to directly establish antecedent authorization for the execution of this contract by the respective corporations, and also that the purported execution thereof is technically defective. On the other hand, the evidence shows that both parties recognized the contract as being in existence and acted under it for a period of several months. Each of the parties performed the contract according to its terms up to the time of the delivery of the third film, which was nearly eight months after the date of signing of the contract. Both parties having recognized and acted under the contract in the part performance thereof, the appellant, having received and retained some of the benefits accruing to it thereunder, is in no position to insist upon the strictest proof of its due execution. *Reedy v. Smith*, 42 Cal. 245; *Bloom v. Hazzard*, 104 Cal. 310, 37 P. 1037; *Sparks v. Mauk*, 170 Cal. 122, 148 P. 926.

[2] Under its second point appellant contends that, when it breached the contract by refusing to accept and pay for the films, it then became respondent's duty to make every effort to lease those films to some other exhibitor and to obtain as much rental as possible therefor; that the measure of respondent's damages would be limited to the amount of the difference between the amount of rental which could have been thus obtained and the amount which the appellant had agreed to pay; and that the respondent, having failed to produce any evidence upon this subject, is not entitled to recover any damages whatsoever. Appellant invokes the rule sometimes referred to as the duty of minimizing damages. It is a recognized rule of law that, in a case where inquiry or damage to a plaintiff's property is threatened as the result of a tort or breach of contract by another, the duty rests upon the plaintiff to use reasonable care and diligence to protect his property against such threatened loss or injury, and, if he fails to do so, he will not be permitted to charge the defendant for that portion of his loss or injury which was due to plaintiff's own neglect in this behalf. This rule has been repeatedly recognized and applied in this state, as well as elsewhere. For example, in *Mabb v. Stewart*, 147 Cal. 413, 81 P. 1073, where the defendant wrongfully deprived the plaintiff of water which was required for the irrigation of her orchard, the plaintiff stood by and

permitted her trees to die for want of water, when she could easily have procured the necessary water elsewhere at a relatively small expense, and this court held that it was her duty under such circumstances to minimize her damage by procuring the water elsewhere, and thus to save her trees, and that her recovery was limited to the amount which it would have cost her to do so. The real basis of this conclusion is that the loss of the trees was the proximate result, not of the defendant's original wrong, but of plaintiff's subsequent neglect.

[3-7] In the case of *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 567, 112 P. 454, the defendant had contracted to furnish the plaintiff with boxes for the packing of its fish product. The boxes furnished were not up to the standard of the contract, but plaintiff accepted and used them and thereafter brought action for damages. Defendant contended that by the acceptance and use of the boxes plaintiff estopped itself to recover damages, but this court pointed out that it was the duty of the plaintiff to use the boxes under the circumstances in order to minimize the damages, because to do otherwise would have resulted in the loss of its fish product, and would thus have enormously increased the damage. In that connection this court said:

"A plaintiff, where a defendant has violated his contract, is charged with the general duty of doing every reasonable thing to minimize his own loss, and thus reduce the damages for which defendant has become liable by his breach."

So, also, in the case of *Ash v. Soo Sing Lung*, 177 Cal. 356, 170 P. 843, plaintiff had sold his crop of fruit on the trees to defendant, who agreed to prop the limbs, so as to prevent them from breaking under the weight of the fruit. Defendant having failed to do so, it was held that the duty rested upon the plaintiff, after knowledge of defendant's breach, to use ordinary care and diligence to protect his trees from further injury, and that, if he failed to do so, he could not charge the defendant with such portion of the loss as resulted proximately from his own subsequent neglect. No case has been called to our attention wherein this rule as to the duty to minimize the damages has been applied to a situation in which the defendant's breach of duty consisted solely of the failure or refusal to pay a liquidated sum of money when due, and it may, perhaps, be doubted that the rule is applicable to such a case. It would seem that the situation of the respondent is in this respect analogous to that of a lessor whose lessee has repudiated the lease and given notice that he will not perform it. It is held in such case that the lessor may elect to stand upon his contract and may recover the full rent for the term, when it has become due, in accordance with the terms of the

contract, or he may elect to treat the contract as abandoned and relet the premises to another tenant, in which event he can recover as damages only the difference between the rent he was to receive and the rent actually received from the subsequent tenant. *Respinl v. Porta*, 89 Cal. 464, 26 P. 967, 23 Am. St. Rep. 488; *Bradbury v. Higginson*, 162 Cal. 602, 123 P. 797. If this analogy is sound, it follows that the respondent herein had a right to stand upon its contract and to recover the full amount which had become due thereunder in accordance with its terms. Civ. Code, § 3302. Assuming, however, the applicability to the present case of the rule which requires an injured party to minimize the damages, the appellant is not benefited thereby herein, at least in respect of the amount awarded on account of the third and fourth photo plays. The cases which recognize and give application to this rule uniformly hold that the burden of proof is upon the defendant to prove the facts in mitigation of damages. *Crosby v. Plummer*, 111 Me. 355, 89 A. 145; *Milage v. Woodward*, 186 N. Y. 252, 78 N. E. 873; *Tradesman Co. v. Superior Mfg. Co.*, 147 Mich. 702, 111 N. W. 343, 112 N. W. 708; *Alderson v. Houston*, 154 Cal. 1, 10, 16, 96 P. 884; *Seymour v. Oelrichs*, 156 Cal. 782, 802, 106 P. 88, 134 Am. St. Rep. 154; 1 *Sedgwick on Damages* (9th Ed.) p. 447; 17 *Cor. Jur.* 1025. When respondent proved the contract, the performance thereof by the delivery of the third and fourth films, and appellant's refusal to pay therefor, it established at least a *prima facie* case entitling it to recover as damages the amount which appellant had agreed to pay for those films. *Alderson v. Houston*, supra, at page 10 (96 P. 884). It was then for the appellant to prove facts in mitigation of those damages, and this it did not do. It is generally held to be the duty of the defendant to plead the facts in mitigation of damages if he would rely thereon, and this the appellant did not do. The trial court did, nevertheless, make a finding:

"That said plaintiff, by the exercise of reasonable care and diligence, could not have leased or sublet or hired to others the pictures, or any part thereof, which were refused by said defendant. * * *

Appellant asserts that this finding is unsupported by the evidence. There is some slight evidence to sustain it. One of the witnesses testified that when the films were rejected by appellant it was then too late to arrange with any other exhibitor for their exhibition, but if there was no evidence whatever upon this issue the finding would still be sustained by the evidence, under the rule that where no evidence is produced upon an issue the finding thereon must be against the party upon whom rests the burden of proof.

[8-10] As to the fifth and sixth photo plays, we are of the opinion that this action is premature, and that the respondent is not enti-

tled to recover therefor herein. At the time this action was commenced those films had not been delivered or tendered to the defendant and under the terms of the contract no payment therefor had become due from the defendant. Respondent points out that before the commencement of the action appellant notified it that it would not accept or pay for the remaining films, and respondent suggests that its complaint herein is sufficient to state a good cause of action for an anticipatory breach of contract. *Roehm v. Hoerst*, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953; *Select Pictures Corp. v. Australasian Films (D. C.)* 260 F. 296. It may be doubted that an action for damages for an anticipatory breach will lie in a case where there are executory covenants unperformed on the part of the plaintiff which are precedent to those which have been repudiated by the defendant, the performance of which has not been prevented by the defendant. *Bradbury v. Higginson*, supra, at page 609 (123 P. 797). As this question has not been briefed or argued herein, we shall not undertake to pass upon it. Assuming that under the circumstances of the present case an action would lie to recover damages as for an anticipatory breach with respect to the fifth and sixth pictures, the measure of the damages recoverable therefor would be governed by section 3300 of the Civil Code, and we are of the opinion that respondent's pleading and proof is insufficient to sustain an award under that section. Such an action would proceed upon the theory that the contract had been abandoned, and the measure of recovery would be the difference between the amount agreed to be paid by defendant and the value to the plaintiff of the license and use of the films covered by the contract. There was neither allegation nor proof directed to this issue with relation to the fifth and sixth photo plays. Neither was there, with respect to these, any allegation or proof of the readiness or ability of the plaintiff to perform. The complaint was framed upon the theory that the plaintiff had fully performed the entire contract. The trial court so found, but this finding, in its relation to the last two photo plays is contrary to the evidence. We find no merit in appellant's suggestion that the contract herein should be construed as providing for the leasing or licensing of but three films instead of six.

[11-13] In support of its contention that the contract is so lacking in mutuality as to be unenforceable, appellant points to a long list of contingencies specified in the contract upon the happening of any one of which the respondent is authorized to terminate the agreement. Appellant asserts that because of these provisions the contract "is so one-sided that to all intents and purposes the respondent had the right under its terms to terminate the agreement at its option, while no such right or privilege was granted to the distributor." If this were the fact, we are cited to

no authority which would support the conclusion that the contract is thereby rendered void; but it is not the fact. Each of the contingencies upon the happening of which the respondent has the right to terminate the agreement is predicated on a happening beyond the control of the respondent. Moreover, want of mutuality is never a defense as to an executed contract, and, even though the contract herein were utterly one-sided, the want of mutuality was cured in so far as the third and fourth films are concerned by the performance of the contract on the part of the respondent.

[14] It follows from what has been said that the respondent is entitled to recover herein the amount agreed to be paid for the third and fourth photo plays, while, as to the fifth and sixth, the action herein is premature. While there is no occasion apparent for a retrial of any of the issues of fact herein, this court cannot make findings of fact, and must therefore remand the cause. Upon the going down of the remittitur, the trial court may revise its findings of fact and conclusions of law in accordance with the conclusions herein expressed, either upon the evidence heretofore received herein or upon such further evidence as it may see fit to receive.

The judgment is reversed.

We concur: SHENK, J.; SEAWELL, J.; WASTE, J.; RICHARDS, J.; LAWLOR, J.; LENNON, J.

197 Cal. 674

NEHER v. KAUFFMAN et al. (L. A. 8442.)

(Supreme Court of California. Dec. 28, 1925.)

1. Escrows ⇨4—Contract for sale of property construed to require deed of conveyance to be delivered into escrow for use of purchaser on payment of money required by contract.

Contract for sale of property, in view of escrow agreement and practical construction by the parties, held to evince an intention that deed of conveyance was to be delivered, not to purchaser directly, but into escrow, to be there held and used for his benefit upon payment by him into escrow of money which he was required to pay at time specified in contract.

2. Escrows ⇨4—Execution and acknowledgment of deed of conveyance held sufficient performance by vendors of contract for sale of property.

Under contract for sale of property, by which deed of conveyance was to be delivered into escrow, to be there held for purchaser, held that execution and acknowledgment of deed of conveyance by vendors, and delivery into escrow, constituted sufficient performance by vendors in so far as delivery of deed was concerned.

3. Appeal and error ⇨204(2), 237(2)—Error in receiving incompetent testimony held not to require reversal, where no objection or motion to strike out.

Error in admitting incompetent testimony of plaintiff that he had done everything to complete contract for sale of property that he was required to do, as involving a conclusion, held not to require a reversal, where testimony was received without objection, and there was no motion to strike it out.

4. Quieting title ⇨44(4) — Evidence held to sustain finding of performance of contract for sale of property in so far as it concerned delivery of deed.

Evidence held to sustain finding of performance of contract for sale of property by vendor, in so far as it concerned delivery of deed.

5. Escrows ⇨5—Vendors' agreement in contract for sale of property to furnish a guaranty of title held not a concurrent covenant.

Where, in a contract for sale of property, deed of conveyance was to be delivered into escrow for use of purchaser upon payment of money required by contract, vendors' agreement to furnish a guaranty of title held not a concurrent covenant, where escrow instructions provided that guaranty of title should show title to be vested in escrow, which could not be done until deed had been filed for record, and until money had been paid by purchasers.

6. Escrows ⇨5—Escrow instructions in contract for sale of property were to be regarded as part of original contract.

In contract for sale of property, escrow instructions, providing that deed of conveyance was to be delivered into escrow and there held for purchaser's use upon payment of money required by contract, which were signed on same day and as part of same transaction, were to be regarded as part of contract between parties; it being immaterial whether they were merely supplemental, or whether they constituted a subsequent contract in writing, modifying original contract.

7. Contracts ⇨237(2), 238(1)—Written contract may be modified by later written contract; covenants and agreements of one party thereto furnish sufficient consideration.

A contract in writing may be modified by later contract in writing, and covenants and agreements of one party thereto furnish a sufficient consideration to support promises and agreements of other party thereto.

8. Appeal and error ⇨931(1)—Reviewing tribunal required on appeal to construe evidence to support judgment.

Reviewing court is required on appeal to construe evidence to support judgment, to accept as true that evidence which tends to sustain findings and judgment, unless it is inherently incredible, and to reject as untrue evidence which conflicts therewith.

9. Appeal and error ⇨994(3)—Trial court exclusive judge of credibility of witnesses.

Trial court was exclusive judge of credibility of witnesses.

10. Vendor and purchaser ⇨95(1)—Refusal to grant defendants equitable relief from forfeiture of contract for sale of property held not error.

Failure to grant defendants equitable relief from forfeiture of contract for sale of property, under Civ. Code, § 3275, *held* not error, where plaintiff did not lull defendants into any false sense of security, and defendants did not rely on, or were not misled by, anything claimed to have been said or done by plaintiff, and, even if plaintiff had waived part of payment required by contract, defendants would not have been able to pay remaining part on date required, or any substantial portion thereof.

11. Evidence ⇨413—Evidence of conversations between parties prior to making of written contract of sale held properly excluded.

Court did not err in excluding evidence of conversations between parties prior to making of written contract for sale of property, where it was not claimed that such conversations would aid in solving any ambiguity in contract, and it did not appear that they would have been material to any issue before court.

12. Appeal and error ⇨1056(2)—Any error in excluding evidence of parol agreement in contract for sale of property held not prejudicial.

Any error in excluding testimony of parol agreement, by which plaintiff would waive part of purchase price in contract for sale of property, *held* not prejudicial, where agreement, if made, was negated and supplanted by written contract providing for postponement of time of payment of purchase price.

13. Witnesses ⇨236(1)—Questions asked witness on direct examination held properly excluded as being too broad.

Questions asked a witness on direct examination, as to why he had not paid sum required by contract for sale of property within time specified in contract, *held* properly excluded as being too broad.

14. Evidence ⇨151(1)—Purchaser's testimony as to belief in and reliance on vendor's promise held competent.

Testimony of purchaser in contract for sale of property, that he believed in and relied on alleged promise of vendor that he would waive payment of part of purchase price, was competent.

15. Appeal and error ⇨1058(2)—Any error in excluding testimony not prejudicial in view of later testimony.

Any error in excluding testimony of purchaser, in contract for sale of property, as to his belief and reliance on promise of vendor to waive payment of part of purchase price, *held* not prejudicial, where purchaser's later testimony substantially covered testimony excluded.

16. Quieting title ⇨42 — Amendment to answer in suit to quiet title held not to constitute a defense, or to entitle defendants to equitable relief.

In suit to quiet title to premises as against cloud created by recordation of contract for sale thereof, amendment attempting to excuse

defendants' breach by alleging that they were misled and lulled into a false sense of security by plaintiff's promises, *held* not to constitute a defense or to entitle defendants to equitable relief from forfeiture, where it did not appear that plaintiff said or did anything which would have a tendency to mislead defendants to their injury, or upon which they would have been justified in relying.

17. Pleading ⇨236(1)—Allowance or disallowance of amendments during course of trial discretionary with trial court.

Allowance or disallowance of amendments to pleadings during course of trial is a matter resting largely in discretion of trial court.

18. Pleading ⇨238(4)—That minute entry of order denying application for second amendment to answer during trial was not made until after conclusion thereof held not erroneous.

Where, during course of trial, defendants asked leave to file a second amendment to their answer, and court did not grant request at the time, nor did defendants insist upon a ruling thereon, that minute entry of order denying application was not made until after conclusion of trial *held* not erroneous, especially where defendants never prepared or tendered for filing any proposed amendment.

19. Appeal and error ⇨931(1)—Duty of reviewing court to construe conflicting findings so that they will harmonize.

It is duty of a reviewing court to construe findings susceptible of construction which eliminates conflict so that they will harmonize, though they are also susceptible of a construction which results in a conflict.

In Bank.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Otto H. Neher against Milton Kauffman and others. Judgment for plaintiff, and defendants appeal. *Affirmed.*

Woodruff & Shoemaker, of Los Angeles, for appellants.

Tanner, Odell & Taft and Lawler & Degnan, all of Los Angeles, for respondent.

MYERS, C. J. The defendants appeal from a judgment in favor of plaintiff, quieting his title to the premises described in the complaint as against a cloud created by the recordation of a copy of a contract for the sale of the premises executed by the plaintiff to the defendant Kauffman, attached to which was an assignment thereof from Kauffman to defendant Newton and an assignment from Newton to defendant Caldwell. The complaint is in the customary short form of a complaint to quiet title. It alleges ownership and possession of the described premises in the plaintiff, that the defendants claim some interest or estate therein, and that such claim is without right. The answer admits the ownership and possession of the plaintiff

in and to the premises, and admits the defendants' claim and interest therein; denies that such claim is without right; alleges that it arises under and by virtue of the contract of sale above referred to, and alleges further:

"That heretofore these answering defendants have offered to purchase said premises in accordance with the terms of said contract, and have offered to pay to the said plaintiff all sums of money due to him in accordance with the terms of said contract upon a transfer of said premises and the furnishing of a guaranty certificate of title, as provided for in said contract, but that said plaintiff has failed and refused to accept said offer, and has failed and refused to transfer and convey said premises or furnish a guaranty certificate of title, as provided for by said contract. That these defendants are able, ready, and willing to carry out and perform each and all of the terms, covenants, conditions, and agreements of said contract to be kept and performed by the purchaser, but said plaintiff wrongfully and unlawfully refuses to comply with any of the terms thereof."

On the opening day of the trial the defendants were permitted, over the objection of the plaintiff, to file an amendment to their answer, wherein they alleged:

"That subsequent to the making of said agreement dated December 11, 1923, and prior to the 15th day of February, 1924, the plaintiff so dealt and negotiated with said defendant Milton Kauffman as to cause him to believe that said defendant would not be required to pay more than the sum of \$50,000 on the 15th day of February, 1924, and so as to lull said defendant into a false sense of security and to depend upon the plans which said defendant was making to pay said sum of \$50,000 only by the 15th day of February, 1924, with the knowledge and approval of said plaintiff; * * * that plaintiff never gave any notice to said defendant, on or prior to February 15, 1924, that plaintiff intended to stand strictly upon the terms of said contract or attempt to enforce the forfeiture clause therein contained, or declare forfeited the sum of \$10,000 paid by said defendant under said agreement, for failure merely on the part of said defendant to pay the sum of \$100,000 on the 15th day of February, 1924, and that on the other hand said defendant was led to believe by the acts and conduct of the plaintiff as aforesaid that said defendant would be allowed to pay the sum of \$50,000 by February 15, 1924, and keep said agreement in force and effect; that, by reason of the facts and circumstances, hereinbefore mentioned and alleged, it is inequitable for the plaintiff to enforce a forfeiture under said agreement, and said plaintiff is estopped to claim or assert a forfeiture under said agreement, or to terminate the rights or interests of the defendants, or any of them, under said agreement."

The court found that the contract of December 11 was entered into as alleged in the answer; that it was modified in certain respects by escrow instructions executed by the parties January 4, 1924, and by a supplemental agreement of January 12, 1924; that the plaintiff duly performed on his part all the

conditions of said agreement as so modified, but that the defendants had wholly failed to pay the sums required to be paid by them, or any part thereof, other than the sum of \$10,000, which was paid at the time of the execution of the contract of December 11, as a result of which they had forfeited all interest in or to the premises in question; and that they are not entitled to any relief from such forfeiture. The contract of December 11 was in the following terms:

"Know all men by these presents: That Otto H. Neher for valuable consideration this 11th day of December, 1923, agrees to sell to Milton Kauffman, and the said Milton Kauffman agrees to buy from Otto H. Neher, the following described real property: [Description.]

"Total purchase price \$460,000, payable as follows: \$10,000 cash, the receipt of which is hereby acknowledged; \$50,000 on or before January 15, 1924, payable to Otto H. Neher outside of escrow; \$50,000 on or before February 15, 1924, without interest, payable to Title Insurance & Trust Company; \$350,000 mortgage as set forth in escrow instructions with Title Insurance & Trust Company, No. 713329, buyer agrees to assume interest to accrue on said mortgage from December 15, 1923. Rents, taxes, and insurance to be prorated to December 15, 1923. Buyer to pay for escrow fee, and internal revenue stamps on mortgage note, above those provided in escrow No. 713329 T. I. & Tr. Co. Seller to furnish guaranty of title from Title Insurance & Trust Company, showing title free from incumbrances, except second half of taxes, 1923-24. Tax year to begin July 1, 1923, subject also to restrictions and conditions as may be of record. Seller to assign lease (now of record) on property to the buyer.

"Time is of the essence of this contract, and, should the buyer fail to comply with the terms hereof, then the seller shall be released from all obligations in law and equity, to convey said property, and the buyer shall forfeit all right thereto and to all moneys theretofore paid under this contract.

Otto H. Neher.

"Milton Kauffman."

On January 4, 1924, the plaintiff and the defendant Kauffman signed and delivered escrow instructions to the Title Insurance & Trust Company for the evident purpose of carrying out the contract of December 11, 1923. These instructions consist of two separate instruments, one signed by the plaintiff, and the other signed by the defendant Kauffman, but they both bear the same date the same title and escrow number. They match one another as to their terms and conditions (with one exception to be hereafter noted), and their contractual terms and conditions are in precise accord with those specified in the contract of December 11, with the following exception, namely: The contract of December 11 does not specify to whom the deed of conveyance is to be made nor in whom the guaranty of title to be furnished by seller shall show the title to be vested, whereas the escrow instructions provide that the deed of conveyance shall be

made to the Title Insurance & Trust Company, and that the guaranty of title shall show the title to be vested in such grantee. January 12, 1924, the parties entered into a supplemental agreement in writing, whereby the plaintiff extended the time for the payment of the first \$50,000 provided for in the contract and in the escrow instructions from January 15 to February 15, and in consideration thereof the defendant Kauffman agreed to employ the plaintiff to prepare the plans and supervise the construction of a building to be erected upon the premises involved in the transaction. Other than the \$10,000 which was paid upon the signing of the contract of December 11 nothing was ever paid by the defendants, either to the plaintiff, or into the escrow. The contract of December 11 was not acknowledged or certified so as to entitle it to be recorded, but on February 15, 1924, defendant Kauffman executed an assignment to defendant Newton of all his right, title, and interest in, to, and under the contract of December 11, 1923, and in, to, and under the escrow of January 4, 1924. To this assignment was attached a copy of the contract of December 11, and the assignment, with the copy attached, having been acknowledged and certified by a notary public, was then filed for record. Upon the following day a similar assignment from Newton to Caldwell was executed, acknowledged, and recorded. Thereupon, and on February 16, 1924, plaintiff asserted a forfeiture by defendants of their rights under the contract, and thereafter brought this action to clear his title of the cloud created by the recordation.

Appellants contend (1) that the vendor failed to perform or tender performance of conditions precedent to or concurrent with performance by the purchaser, and the attempted forfeiture was unauthorized and unavailing; (2) that the findings relative to the terms and conditions of the contract and the performance thereof by plaintiff are not supported by the evidence; (3) that under the showing made in this case it is extremely harsh and inequitable to enforce a forfeiture, and that the vendee and his assigns should be granted relief therefrom under Civil Code, § 3275; and (4) that the court erred in its rulings as to the admission of evidence.

[1-7] It is conceded herein that the vendor cannot successfully claim a forfeiture because of default of the vendee, unless he (the vendor) has performed or offered to perform those conditions upon his part which are precedent to or concurrent with the performance as to which the vendee is claimed to be in default. There is no merit, however, in appellants' contention that the contract of December 11 should be construed as requiring the delivery of a deed of conveyance on December 15, 1923, merely because this was the date specified for the prorating of rent, taxes, and insurance. The contract is not fairly suscep-

tible of such a construction, and, if it were, the conduct of the respective parties is conclusive that they did not so construe, understand, or intend it. There is more reason in appellants' contention that, under the contract of December 11 they are entitled to a deed and a guaranty of title upon the payment of \$100,000, and, these conditions being concurrent, the vendor could not put them in default except by tendering performance. If the contract of December 11 were the only writing between the parties, it might be difficult to avoid the conclusion here contended for by appellants, except for the fact that it appears quite clearly from the terms of this contract itself that the parties intended its performance to be consummated through and by means of an escrow. It is provided therein that the first \$50,000 is to be paid to plaintiff "outside of escrow"; that the second \$50,000 is to be paid to Title Insurance & Trust Company (obviously in escrow); that the buyer is "to pay for escrow fee." When these provisions of the contract are given consideration, in the light of the practical construction placed thereon by the parties in going into escrow with the Title Insurance & Trust Company shortly thereafter for the carrying out of the contract, the intention of the parties is apparent that the deed of conveyance was to be delivered, not to the defendant directly, but was to be delivered into escrow, to be there held and used for his benefit, upon the payment by him into escrow of the money which he was required to pay at the time specified in the contract. It is in evidence that in connection with the escrow a deed of conveyance was prepared by the Title Insurance & Trust Company, was executed by the plaintiff and by his wife as grantors, was acknowledged by them before a notary public, and certified by him and delivered in escrow, where it remained until February 16, when the papers were withdrawn by the plaintiff. This, under the circumstances, was sufficient performance in so far as the delivery of the deed is concerned. *Gethin v. Walker*, 59 Cal. 502.

It is true that the deed itself was not produced in evidence, the plaintiff testifying that he had made a search for it and was unable to find it. Neither was there any direct evidence as to its contents, other than the fact that the Title Insurance & Trust Company was named therein as grantee. The plaintiff did testify, however, in answer to a question of counsel for defendants as to what he had delivered in escrow, that he had handed in "everything to complete the deal, everything I was required to do." It may be conceded that this testimony was incompetent as involving a conclusion of the witness. It was received without objection, however, and there was no motion to strike it out. There is no evidence in contradiction of it, and there is no suggestion anywhere in the evidence that the nonpayment of the money was due to any claimed defect of title or other failure

of performance on the part of plaintiff. It was due solely to the inability of the defendants to raise the money. It cannot be said, therefore, that the finding of performance, in so far as it concerned the delivery of the deed, is unsupported by the evidence. We are unable to conclude that plaintiff's agreement to furnish a guaranty of title was, under the circumstances of this case, a concurrent covenant. It was provided in the escrow instructions signed by the defendant, as well as in those signed by the plaintiff, that the guaranty of title should show the title to be vested in the grantee, the Title Insurance & Trust Company. This could not be done until the deed had been filed for record, and this in turn could not be done until the money had been paid by the defendants. These conclusions render it unnecessary to discuss the point made by the respondent that the defendants, by notifying the plaintiff on February 13 of their inability to perform the contract, relieved him of the obligation to perform or offer to perform on his part. We find no merit in appellants' contention that the court erred in admitting the escrow instructions in evidence, and that these instructions were incompetent to affect the correlative rights and obligations of the parties. These instructions, having been signed on the same day and as a part of the same transaction, are to be read and considered together. When so read and considered, if they contain all of the necessary constituent elements to make a contract, they are to be regarded as a contract in writing between the parties. *Tuso v. Green*, 194 Cal. 574, 229 P. 327. It is immaterial whether the escrow instructions herein be regarded as merely supplemental to, and by way of performance of, the contract of December 11, or whether they be regarded as a subsequent contract in writing, modifying the terms of the prior contract. A contract in writing may be modified by a later contract in writing, and the covenants and agreements of one party thereto furnish a sufficient consideration to support the promises and agreements of the other party thereto.

The contention that the instructions herein do not match is predicated upon the circumstance that the plaintiff's instructions contained a provision that, "if you are unable to comply with these instructions within the time specified [2/15/24], said instrument shall be returned to me on my written demand." Defendant's instructions contained a clause providing that, "if you are unable to comply with these instructions by 2/4/24, said money and instrument shall thereafter be returned to me on my written demand." From a reading of defendant's instructions, in the light of the contract of December 11, to which it obviously relates, it is readily inferable that the insertion of the date "2/4/24" was due to a clerical mispision, and that it was intended to insert the date "2/15/24." When, in addition thereto, we read plaintiff's instruction,

which is undeniably a part of the same transaction, this inference is the more probable, and we have no doubt that this was the conclusion reached by the trial court.

It follows from what we have said that the court did not err in denying defendants' motion for a nonsuit.

[8-10] Appellant's contention that the trial court should have granted them equitable relief from the forfeiture under the provisions of section 3275 of the Civil Code is predicated upon the allegations of the amendment to their answer and the evidence offered in support thereof. The trial judge expressed himself as of the opinion that the amendment did not state facts sufficient to entitle the defendants to any relief, but nevertheless he permitted the amendment to be filed, and he admitted substantially all of the competent evidence which was offered thereunder by the defendants. The respondent confidently asserts that, if we should give the utmost effect in favor of the defendants to the evidence produced by the upon this issue, it would be insufficient to justify the court in granting the relief sought by them. But that question is not before us. It is the duty of a reviewing court upon appeal to construe the evidence so as to support the judgment, to accept as true that evidence which tends to sustain the findings and judgment (unless it is inherently incredible), and to reject as untrue the evidence which conflicts therewith. Substantially all of the material facts testified to in behalf of defendants in support of their claim for equitable relief were either directly contradicted by the testimony of the plaintiff himself or were inferentially contradicted by the testimony of other witnesses produced by him. The trial court was the exclusive judge of the credibility of these witnesses. If we accept as true the testimony of the plaintiff and his witnesses, we must conclude that the plaintiff did not say or do anything to cause the defendants to believe that they would not be required to pay more than \$50,000 on February 15, or to lull them into any false sense of security; that the defendants did not rely upon anything so claimed to have been said or done by the plaintiff, and were not misled thereby, and, furthermore, that, even if the plaintiff had waived the payment of \$50,000 on February 15, the defendants would not have been able to pay the remaining \$50,000 to be paid on that date, or any substantial portion thereof. In such state of fact there was no error in denying the equitable relief prayed for.

[11-13] It does not appear that the court erred in excluding evidence of the conversations between the parties prior to the making of the contract of December 11. It was not claimed that such conversations would aid in solving any ambiguity or uncertainty in the written contract, and it was not shown to the trial judge, nor has it been made to appear to us, that they would have been mate-

rial to any issue before the court. If it be assumed that the court erred in excluding testimony as to conversations between the parties subsequent to December 11 and prior to January 12, still it does not appear that appellants could have been prejudiced thereby. The defendant Kauffman was permitted to testify that, at a conversation on January 12, immediately after the signing of the written agreement of that date, the plaintiff orally agreed and promised in effect that he would take an interest with the defendant in the purchase of the property to the extent of \$50,000, pursuant to which he would "take care of" or waive the payment of so much of the purchase price. It may be inferred that, if he had been permitted to do so, the defendant would have testified that the plaintiff made a similar promise or parol agreement at a time prior to January 12, but it is difficult to conceive that the defendant's case could have been benefited by such testimony. If such a promise or parol agreement was made prior to January 12, it was negated and supplanted by the written contract executed on that date, which provided, not for the waiver of the payment of \$50,000, but for the postponement of the time of payment thereof for a period of one month. The fact is, as evidenced by the finding, that the trial judge did not believe the defendant's testimony upon this subject, and we cannot conclude that his credibility would have been any greater had he been permitted to testify that the plaintiff made similar promises prior to January 12. There was no error in sustaining the objection to the question, "Why didn't you pay Mr. Neher the sum of \$100,000 on or before February 15, 1924?" and other similar questions. The question upon direct examination was too broad, and would open the door to all sorts of incompetent and immaterial matters.

[14-18] Complaint is made that the defendant Kauffman was precluded from testifying that he believed in and relied upon the promise which he testified was made to him by the plaintiff on January 12. His testimony as to his own belief and his own reliance was undoubtedly competent. Objections were sustained to a number of questions directed to this point, some of them perhaps erroneously but the defendant was permitted to testify in effect that he depended upon that statement and promise of the plaintiff on January 12, and continued to depend upon it thereafter until February 7, at which time he commenced to doubt that the plaintiff intended to perform his promise. This testimony substantially covered the ground upon this point. All of the rulings upon the admission of evidence which are claimed to have been erroneous related to the special defense pleaded in the amendment to the answer which was filed at the commencement of the trial.

We are in accord with the opinion expressed by the trial judge that this amendment failed to state facts sufficient to constitute a defense or to entitle the defendants to equitable relief. Substantially all of the allegations thereof were no more than mere conclusions of the pleader. No facts were alleged therein from which it would appear that the plaintiff said anything or did anything which would have a tendency to mislead the defendants to their injury, or upon which they would have been justified in relying. During the course of the trial the defendants asked leave to file a second amendment to their answer. The court did not rule upon this request at the time, nor did defendants insist upon a ruling thereon. Some time after the conclusion of the trial a minute entry was made of an order denying this application. We find no error therein. The allowance or disallowance of amendments to pleadings during the course of a trial is a matter resting largely in the discretion of the trial court. *Milliken v. Valencia*, 47 Cal. App. 16, 189 P. 1049, and cases there cited. But, aside from this, no error can be predicated upon this ruling, for the reason that the defendants never prepared or tendered for filing any proposed amendment.

[19] It is contended that the court made conflicting findings of fact. It is true that the findings are susceptible of a construction which results in a conflict. But they are also susceptible of a construction which eliminates the conflict, and in such case it is the duty of the reviewing court to so construe them that they will harmonize.

The judgment is affirmed.

We concur: **LAWLOR, J.; WASTE, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; LENNON, J.**

197 Cal. 733

MARTIN et al. v. HOLM et al. (L. A. 7724.)

(Supreme Court of California. Dec. 31, 1925.

Petition for Modification Denied

Jan. 28, 1926.)

1. Evidence — 441(8)—Objection to evidence of representations of grantors as to restrictions properly sustained.

Since as between grantors and their grantees the deeds between them constituted the final and exclusive memorial of whatever intention may have existed, in action to establish and impose general plan of building restrictions, trial court properly sustained objections to testimony as to grantors' oral and written representations at time of and prior to sale of lots by the original owners.

2. Covenants — 69(2)—Building restrictions held, under facts, to be covenants running with land.

Where grantors agreed in sale of lots that subsequent deeds should contain building re-

strictions, and thereafter lots were sold containing either restrictions or reference thereto, or reference to recorded agreement, restrictive covenants referred to *held*, under facts, to run with land, and not personal to grantors.

3. Injunction ⇨128—Evidence held to show grantees took lots with notice that restrictions were intended for benefit of entire estate.

Where owners of land sold lots therefrom, and agreed with grantees that subsequent deeds should contain building restrictions, and thereafter sold lots by conveyance containing restrictions or reference to recorded agreement, and subsequently conveyed lots to their children by deeds which contain no restrictions, evidence *held* to show that children took estate with notice that restrictions were intended for benefit of the entire estate.

4. Covenants ⇨84—Building restrictions may be created on a division and conveyance in severalty to different grantees.

Building restrictions providing for location of residences on lot and minimum cost thereof are in the nature of reciprocal negative easements, and may be created on a division and conveyance in severalty to different grantees of an entire tract.

5. Injunction ⇨62(3)—Covenants to warrant equitable relief restriction need not be binding at law.

To warrant equitable relief in case of infraction of building restriction on entire tract of land, it is not essential that it should be binding at law, nor that any privity of estate should exist between the parties, jurisdiction attaching on ground that an action at law will not do complete justice in case where performance was contemplated by the parties.

6. Injunction ⇨62(1)—Restrictive covenants enforced, where subsequent purchaser takes with notice.

Personal covenants or agreements, bestowing benefits and imposing restrictions on use of land, may be enforced in equity, where a subsequent purchaser from covenantor takes with notice of an existing equitable claim or interest in favor of another.

7. Injunction ⇨62(1)—Equity in proper case enforces personal covenant or agreement relative to land.

Where a proper case is presented, equity will enforce a personal covenant or agreement relative to land as effectually as would a court of law had the covenant been one clearly running with the land.

8. Judgment ⇨681—Judgment in former suit held *res adjudicata* as to the validity of building restrictions.

Where some of defendants in former action to determine validity of building restrictions were plaintiffs in the instant action, and the remaining plaintiffs were successors in interest of former defendants, and defendants in present suit were children and grantees of plaintiffs in former suit, and the question of building restrictions was the same issue, judgment

in former suit as to validity and force of building restrictions *held res adjudicata*.

9. Judgment ⇨682(1)—Defendants by notice of judgment took lots bound by building restrictions.

In suit to establish general plan of building restrictions, principal defendants, having notice of judgment in former action between their grantors and plaintiffs, *held*, under facts, to have taken lots bound by covenants concerning the land entered into by their grantor, question of such building restrictions having been the issue in the former action.

10. Lis pendens ⇨13—Judgment conclusive between parties and their successors in interest having notice of pendency of action.

In view of Code Civ. Proc. §§ 1908, 1911, a judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to commencement of action, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of pendency of action.

11. Judgment ⇨634—Estoppel by judgment, not limited to form of action, invoked when parties are in privity with parties to first action and same issue is presented.

Estoppel created by judgment of court of concurrent jurisdiction directly on a point is not limited to an action which is identical in form with the former action, or where same parties are plaintiff and defendant in each action, but may be invoked when in second action the parties are in privity with the parties to the first action, and the same issue is presented which was determined in former suit.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by James R. Martin and others against Louisa Holm, executrix of the last will and testament of Ferdinand Holm, deceased, and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Chandler P. Ward and Howard W. Wright, both of Los Angeles, for appellants.

Haas & Dunnigan, of Los Angeles, and H. E. Forster, for respondents.

WASTE, J. Plaintiffs brought this action to establish and impose a general plan of building restrictions upon certain lots owned in fee by the defendants, who are the children, and heirs and grantees, of the original owners of a subdivided tract of land, and who are erecting buildings for business purposes in an alleged strictly residential tract. Trial was had before the court sitting without a jury, and the parties entered into a written stipulation by which the essential facts are agreed upon. Judgment was entered for the defendants, and plaintiffs prosecute this appeal.

In 1904 Ferdinand and Emma Holm, hus-

band and wife, were the owners of a parcel of land, since subdivided, and now known as "Robert Marsh & Co.'s Western Heights tract in the city of Los Angeles." On January 26th of that year, but before any subdivision was had, the owners sold a portion of the land, now lots 12 and 13 in the tract, to James R. Martin. At the time, and as part of the transaction, an agreement was entered into which reads as follows:

"Know all men by these presents that we, Emma Holm and Ferdinand Holm, of the city of Los Angeles, county of Los Angeles, state of California, are held and firmly bound unto James R. Martin, of the same place, in the sum of \$5,000.00 gold coin of the United States of America, to be paid to the said James R. Martin, his executors, administrators, assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, firmly by these presents, sealed with our seals and dated this 26th day of January, 1904.

"The condition of the above obligation is such that whereas, the said Emma Holm is the owner in fee simple of the following described real property situate, lying and being in the city of Los Angeles, county of Los Angeles, state of California: [Description of property.]

"Whereas, said Emma Holm and Ferdinand Holm, her husband, have sold and conveyed to James R. Martin a portion of the above-described real property [describing same], for the sum of \$5,000, in hand paid by said James R. Martin.

"Whereas, as a further consideration of said sale, Emma Holm and Ferdinand Holm have agreed and do hereby agree to cause a subdivision to be made of the premises herein first above described, and duly record the map of such subdivision in the office of the county recorder of said county, to be known as the Western Heights tract, and conform in all respects to that plat of said premises attached hereto and made a part hereof, in which the premises conveyed to said James R. Martin and secondly herein described, shall be known to be lots 12 and 13 of such subdivision located at the northwest corner of Western avenue and Twentieth street, having a frontage of 156 feet on Western avenue, with a depth of 165 feet on Twentieth street.

"That all deeds conveying lots in said subdivision shall contain building restrictions providing that during the period of 30 years, no residence costing less than \$4,000 shall be located on any lot facing on Washington street, Twentieth street, or Twenty-First street, and not less than \$5,000 on any lot facing on Western avenue. That such dwellings shall face the street upon which said dwelling is erected and not otherwise, and shall not be placed at a less distance than 30 feet from the property line of said lots, and that no flats, hotels, rooming houses, lodging houses, stores or business houses of any nature or description shall ever be placed or erected upon any of said lots.

* * *

"Now the condition of this obligation is such that, if the above bounden Emma Holm and Ferdinand Holm, their heirs, executors and administrators shall and will cause said subdivision to be made and accepted and recorded,

and shall and will observe the building restrictions, shall and will fill the said lots, and grade and gravel, curb and sidewalk said property within the time and in the manner herein set forth and provided, without cost or expense to the said James R. Martin, then this obligation to be void, otherwise to remain in full force and virtue.

Emma Holm,
"Ferdinand Holm,"

This agreement, which will be hereinafter referred to as the "Holm-Martin agreement," was recorded shortly after its execution in the office of the county recorder of Los Angeles county. The tract was subdivided, and a map of the subdivision, but containing no matter by way of creating restrictions on the property, was duly filed and became of record. On the 27th of October, 1904, Emma Holm and Ferdinand Holm sold and conveyed to William Miles, Sr., since deceased, lots 16 and 17 of the tract. The deed to Miles, which was also duly recorded, contained the following stipulation:

"Provided, however, that this conveyance is made and accepted upon each of the following conditions, which shall apply to and be binding upon the grantee, his heirs, devisees, executors, administrators and assigns, namely: That said premises shall be used for residence purposes only; that no apartment house, double house, flat, lodging house, hotel, nor any building or structure whatever other than a first-class private residence of at least two stories in height with the customary outbuildings, including a private stable, shall be erected, placed or permitted on said premises, or any part thereof, that such residence shall cost and be fairly worth not less than \$5,000, which residence shall not nor shall any porch or projection therefrom, except steps, be located less than 35 feet from the front line of said premises, and shall face the front line of said premises, namely, on Twentieth street; that no outbuilding or private stable shall be erected, placed, or permitted upon said premises at a distance of more than 30 feet from the rear line of said premises, nor until such a resident shall have been erected on said premises.

"Provided, that as to the grantor herein the breach of any of the foregoing conditions shall cause said premises to revert to the said grantors, their heirs and assigns, each of whom respectively shall have the right of immediate re-entry upon said premises in the event of any such breach; and as to the owner and the heirs, devisees, executors, administrators or assigns of any owner of any other lot or lots in said Western Heights above described, adjoining the above-described premises, the above-mentioned conditions shall operate as covenants running with the land, for the benefit of all such adjoining lots and owners of such adjoining lots in said tract, their heirs, devisees, executors, administrators or assigns, and the breach of any such covenant or the continuance of any such breach may be enjoined, abated, or remedied by appropriate proceedings by any or either of such owners, their heirs, devisees, executors, administrators, or assigns.

"Provided, also, that the breach of either of the foregoing conditions or any re-entry by reason of such breach shall not defeat or render

invalidate the lien of any mortgage or deed of trust made in good faith for value as to said land, and any such residence, outbuilding, or private stable located as above provided, or any part thereof; provided, however, that the breach of either of said conditions or the continuance of any such breach may be enjoined, abated, or remedied by appropriate proceedings, and provided, also, that each of the foregoing conditions shall remain at all times in full force and effect as against any owner of said premises, or any part thereof, by reason of any breach thereof by any such owner, whether such ownership is acquired by purchase, foreclosure, devise, inheritance, or in any other manner.

"And it is further covenanted and agreed by and between the parties hereto that the parties of the first part will not and they hereby agree not to grant, sell, or convey any interest in or to any part or parcel of the Western Heights tract, as the same is delineated and shown upon a map thereof recorded in book 5, page 155, of Maps, in the office of the county recorder of Los Angeles county, without inserting in the grant thereof each and every of the covenants and restrictions herein contained, and the parties of the first part further covenant and agree that any subsequent grant of any of the above-described property shall be subject to all covenants and restrictions herein contained.

"Provided, that all and each of the restrictions and conditions and covenants herein contained shall in all respects terminate and end, and be of no further effect, either legal or equitable, either on any property in said Western Heights, or on the parties hereto, their heirs, devisees, executors, administrators or assigns on and after January 1, A. D. 1944."

Subsequently, Ferdinand Holm and Emma Holm conveyed to various grantees many lots of the tract; the deed in each instance containing a reference to the "Miles deed form of restrictions," or setting forth the same in identical, or substantially identical, language. The deed to one lot contained the language: "Subject to building restrictions now of record." Deeds to other lots contained substantially the language of the "Miles deed form of restrictions," excepting as to the time of expiration of the restrictions. Another deed contained the language: "Subject to any existing incumbrance appearing of record." The deeds to other lots contained the following restrictions:

"This conveyance is made and accepted subject to the following conditions and restrictions, which shall bind the grantee, their heirs, devisees, executors, administrators, or successors, and in the event of the breach of any of the said conditions or restrictions said premises hereby conveyed shall revert to the grantor, its successors or assigns, each of whom respectively shall have the right to immediately re-enter upon said premises in the event of such breach. The said conditions and restrictions shall operate as covenants running with the land for the benefit of all adjoining lots and the owners of all such adjoining lots in said tract, their heirs, devisees, executors, administrators, successors or assigns; it be-

ing expressly understood that said condition and restrictions hereinafter contained shall in all respects terminate and end, and be of no further effect, either legal or equitable, after January 1, A. D. 1939, and that the breach of any of said conditions or restrictions, or any re-entry by reason of such breach, shall not defeat or render invalid the lien of any mortgage or deed of trust made in good faith for value as to said land.

"No apartment houses, double house, flat, lodging house, hotel, or any building or structure other than a first-class private residence to cost and be fairly worth not less than \$7,000, and shall be located not less than 35 feet from the said front line of any lot, and only one residence shall be placed on a lot, and shall face the said front line thereof; namely, on Washington street.

"The said premises shall not be conveyed or transferred to any person or persons other than of the white or Caucasian race, nor shall any oil wells or machinery for conducting any business whatever be permitted thereon."

On the 6th day of September, 1910, Ferdinand Holm, in consideration of love and affection, conveyed to his wife, Emma Holm, lots 9, 10, and 11 of the Western Heights tract. The deed contained no restrictions, and made no reference to any restrictions as to the use of the property thereby conveyed. Emma Holm subsequently conveyed the three last-mentioned lots, in consideration of love and affection, to her three children, the defendants Adolph, Louisa, and Lillian S. Holm. This deed likewise contained no restrictions and no reference thereto.

After the tract was laid out and placed on the market, and prior to the commencement of this action, many residences were erected and improvements of great value were made. These residences and improvements complied with the requirements of the Holm-Martin agreement and the stipulations contained in the deed to Miles. They also conformed to and complied with all the requirements contained in the several deeds executed by Emma and Ferdinand Holm to the respective purchasers. The defendants Adolph Holm, Louisa Holm and Lillian S. Holm have, at various times since September, 1920, leased to parties, who are defendants here, certain portions of lots 10 and 11, and the lessees erected and maintained thereon certain buildings, in violation of, and contrary to, the purported restrictions. On the day of the filing of the complaint in this action the defendants had commenced the erection of another store building on lot 11, and at the date of the trial had completed and were maintaining it in violation of the restrictions. These buildings, to be used for business purposes, were erected over the written protest and objections of the various plaintiffs, served on the defendants, who, at the time of the service of the notice, and now, dispute the right of the plaintiffs to assert any such restrictions, and deny the validity thereof.

The foregoing facts present the basis for

the actual controversy and dispute which has arisen between plaintiffs and defendants relating to the legal rights and duties of the respective parties to this action which reference to the alleged building restrictions in the Western Heights tract, and the obligation of the defendants to preserve and abide by and comply with the same. It is the contention of the defendants that the property in the tract is not burdened with building restrictions of any sort whatsoever.

[1] In support of their right to the relief prayed for, appellants rely, first, and in part, on estoppel, based on oral and written representations, made at the time of and prior to sales of lots by the original owners, to the effect that the entire Western Heights tract was restricted against business uses. As plaintiffs in the court below, they therefore attempted to show that, when the tract was subdivided and the lots were placed on sale, maps and literature were given to prospective purchasers, and to those who bought lots, which contained information concerning the character of the purported restrictions. The trial court very properly sustained the objection of the defendants to the admission of any such evidence. The original owners may have had a general plan of restriction in mind. They may have led the various grantees to believe that the alleged restrictions were executed as part of a general scheme; but it is not the intent of the grantors that governs in such cases. It is the joint intent of the grantors and their grantees. As between the grantors and each of their grantees, the deeds between them constitute the final and exclusive memorial of whatever intention may have existed. *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 566, 117 P. 677, 37 L. R. A. (N. S.) 5; *McBride v. Freeman*, 191 Cal. 152, 156, 215 P. 678. In *Werner v. Graham*, 181 Cal. 174, 185, 183 P. 945, 949, the court, speaking through Mr. Justice Olney, said:

"This whole discussion may in fact be summed up in the simple statement that if the parties desire to create mutual rights in real property of the character of those claimed here [building restrictions] they must say so, and must say it in the only place where it can be given legal effect, namely, in the written instruments exchanged between them which constitute the final expression of their understanding."

[2] As further supporting their claim that all the lots in Western Heights tract are subject to the building restrictions, appellants rely upon the conditions set forth in the Holm-Martin agreement, and the terms and stipulations contained in the many deeds executed by Ferdinand and Emma Holm to purchasers of lots in the tract. It is not claimed by the appellants that the Holm-Martin agreement, in and of itself, effected a restriction upon any of the property owned by the Holms at the time of its execution.

They concede that, as between the parties thereto, it amounted to a mere personal covenant which did not run with the land, but argue that, because it was subsequently referred to in many, if not all, of the deeds from the Holms to other purchasers in the tract, it is important as an expression of the intention of the owners of the property with respect to the manner in which the tract should thereafter be subdivided and restricted. The contention that valid building restrictions, amounting to covenants running with the land, were created by the execution of the various deeds by Ferdinand and Emma Holm to the subsequent purchasers of lots in the tract presents the vital question raised by the appeal.

The respondents contend, and the trial court was apparently of the view, that the facts of this case brought it squarely within the facts and the rule applied in *Werner v. Graham*, supra. We do not think so. In that case the court said (page 183 [183 P. 949]):

"It is undoubted that when the owner of a subdivided tract conveys the various parcels in the tract by deeds containing appropriate language imposing restrictions on each parcel as part of a general plan of restrictions common to all the parcels and designed for their mutual benefit, mutual equitable servitudes are thereby created in favor of each parcel as against all the others. The agreement between the grantor and each grantee in such a case as expressed in the instruments between them is both that the parcel conveyed shall be subject to restrictions in accordance with the plan for the benefit of all the other parcels and also that all other parcels shall be subject to such restrictions for its benefit. In such a case the mutual servitudes spring into existence as between the first parcel conveyed and the balance of the parcels at the time of the first conveyance. As each conveyance follows, the burden and the benefit of the mutual restrictions imposed by preceding conveyances as between the particular parcel conveyed and those previously conveyed pass as an incident of the ownership of the parcel, and similar restrictions are created by the conveyance as between the lot conveyed and the lots still retained by the original owner. Of this character is *Alderson v. Cutting*, 163 Cal. 504, 126 P. 157, Ann. Cas. 1914A, 1."

In the *Alderson Case* referred to, the tract had been platted by its owners for purposes of sale. The plaintiff and the defendant were purchasers of adjoining lots after the subdivision. All deeds made by the owners contained provisions relating to the location and kind of buildings which might be placed upon the lots. Each of the deeds also declared that the conditions stated should, as to each owner of any other lot in the tract, his heirs, successors, or assigns, operate as covenants running with the land for the benefit of such other lots, or their owners. The court held that the validity of the restrictions involved was not open to question, and that in case of

their violation relief might be sought by the owner of any lot in the tract for the benefit of which the restrictions were imposed.

In the case now before us, and aside from the Holm-Martin agreement, we have the deed of the owners of the subdivided tract to Miles, incorporating most clearly and directly a general plan of building restrictions operating "as covenants running with the land, for the benefit of all such adjoining lots and owners of such adjoining lots in said tract, their heirs, devisees, executors, administrators or assigns." As indicative of the fact that the restrictions were intended to be covenants running with the land, and not merely conditions on which the conveyances were made, and that it was not intended that the original grantors, their heirs or assigns should alone have the right to act, it was further provided that—

"The breach of any such covenant or the continuance of any such breach may be enjoined, abated, or remedied by appropriate proceedings by any or either of such owners, their heirs, devisees, executors, administrators or assigns."

In further confirmation of the fact that the original grantors had in mind a general plan of building restrictions for the tract, and intended it for the benefit of all the lots, including their own, we find the personal covenant contained in the deeds that they will not convey any interest in any part or parcel of the Western Heights tract without inserting in the grant thereof the covenants and restrictions contained in the Miles deed, and the owners "covenant and agree that any subsequent grant of any of the * * * property shall be subject to all covenants and agreements herein contained." On the execution of this deed a mutual servitude sprang into existence between lots 16 and 17, conveyed to Miles, and the adjoining lots. As the various conveyances from the original owners followed, each, by appropriate reference or language, imposing the same restrictions as those contained in the Miles deed, the burden and the benefit of the mutual restrictions imposed by the preceding conveyances, as between the particular parcel conveyed and those previously conveyed, passed as an incident of the ownership of the particular parcel, and similar restrictions were created by the conveyances as between the parcel conveyed and the adjoining lots still owned by the original owners of the tract. *Werner v. Graham*, supra. See, also, note to *Stevenson v. Spivey*, 132 Va. 115, 110 S. E. 367, found in 21 A. L. R. 1276. We are, therefore, unable to agree with the conclusion of the trial court that the language contained in the deeds from the original grantors to their several grantees, other than the respondents, created only personal covenants, and not covenants running with the land, and have no force and effect. The phraseology of the covenant here in question indicates that it was

for the benefit of the adjoining property. The deeds executed by the original owners of the tract in this case have not been brought here, but we think it follows, from the stipulated facts reflected in the findings as to what covenants and references to covenants already of record were contained in those instruments, that each purchaser from the owners was aware of the plan, and took with the understanding that all the deeds were to contain the covenant, and bought with that consideration in view. Furthermore, they had constructive notice of the Miles deed. These facts do not admit of the contention that the covenant was only for the advantage or benefit of the grantors, or that it was other than for the benefit of all the lands and each purchaser. *De Gray v. Monmouth Beach, etc., Co.*, 50 N. J. Eq. 329, 340, 342, 24 A. 388. See, also, *Hemsley v. Marlborough Hotel Co.*, 62 N. J. Eq. 164, 50 A. 14.

[3, 4] The deed from Ferdinand Holm to his wife, Emma, of lots 9, 10, and 11 contained no restrictions, no reference to any, and none were contained or referred to in the deed from Emma Holm conveying the same property to her children, the respondents Adolph Holm, Lillian S. Holm, and Louisa Holm. The final and important question is, therefore, Are these lots which are the subject of this litigation burdened with the restrictions imposed by the general scheme laid out by the original owners for the improvement of the entire tract? The law is well settled that building restrictions of the character shown are in the nature of reciprocal negative easements, and may be created upon a division and conveyance in severalty to different grantees of an entire tract.

"Although some of the lots may have written restrictions imposed upon them and others not, if the general plan has been maintained from its inception, if it has been understood, accepted, relied on, and acted upon by all in interest, it is binding and enforceable on all interest. It goes with the land, and is equally binding on all purchasers with notice." *Allen v. City of Detroit*, 167 Mich. 464, 469, 133 N. W. 317, 319 (36 L. R. A. [N. S.] 890).

[5] But to warrant equitable relief in case of infraction of such restriction it is not essential that it should be binding at law, or that any privity of estate should exist between the parties. Jurisdiction attaches upon the ground that an action at law for damages will not do complete justice in cases in which it appears from the character and purpose of the contract that its performance was contemplated by the parties, and not merely damages for the breach. In such a case the complaint of the parties seeking to restrain the injurious breach of the restrictions is somewhat in the nature of a bill quia timet, in which equity acts to prevent a mischief rather than to redress it. *Lewis v. Gollner*, 129 N. Y. 227, 234, 29 N. E. 81, 26 Am. St. Rep. 516. In another case it was said:

"Upon this point, the better opinion would seem to be that such agreements [building restrictions] are valid, and capable of being enforced in equity against all those who take the estate with notice of them, although they may not be strictly speaking real covenants, so as to run with the land, or of a nature to create a technical qualification of the title conveyed by the deed. This opinion rests on the principle that, as in equity that which is agreed to be done shall be considered as performed, a purchaser of land, with notice of a right or interest in it, subsisting in another, is liable to the same extent and in the same manner as the person from whom he made the purchase, and is bound to do that which his vendor had agreed to perform." *Whitney v. Union Railway Co.*, 77 Mass. (11 Gray) 359, 363 (71 Am. Dec. 715).

The rule is the same in this jurisdiction.

[6, 7] As was pointed out in *McBride v. Freeman*, supra, at page 155 (215 P. 678), there can be no doubt that even personal covenants or agreements bestowing benefits and imposing restrictions upon the use of land may be enforced in equity, where a subsequent purchaser from the covenantor takes with notice of an existing equitable claim or interest in favor of another. Where a proper case is presented, equity will enforce a personal covenant or agreement relative to land as effectually as would a court of law had the covenant been one clearly running with the land. *Hunt v. Jones*, 149 Cal. 297, 300, 86 P. 686, 688. In that case the court quoted from *Pomeroy's Equity Jurisprudence* (2d Ed.) §§ 688 and 689, viz.:

"The third, and, in its practical effects, by far the most important rule is, that a party taking with notice of an equity takes subject to that equity. The full meaning of this most just rule is, that the purchaser of an estate or interest, legal or equitable, even for a valuable consideration, with notice of an existing estate, interest, claim or right, or to some subject-matter, held by a third person, is liable in equity to the same extent and in the same manner as the person from whom he made the purchase; his conscience is equally bound with that of his vendor, and he acquires only what his vendor can honestly transfer. * * * A purchaser with notice of a prior contract to sell or lease takes subject to such contract, and is bound in the same manner as his vendor to carry it into execution. * * * On the same principle, if the owner of land enters into a covenant concerning the land, concerning its uses, subjecting it to easements or personal servitudes and the like, and the land is afterwards conveyed or sold to one who has notice of the covenants, the grantee or purchaser will take the premises bound by the covenant, and will be compelled in equity either to specifically execute it, or will be restrained from violating it; and it makes no difference whatever with respect to this liability in equity whether the covenant is or is not one which 'in law runs with the land.'"

See, also, *Bryan v. Grosse*, 155 Cal. 132, 135, 99 P. 499.

While the respondent children of Mrs.

Holm may argue that, because of the absence of restrictions in their deed, or reference therein to a plan showing a general scheme of improvement, they took their estate without any notice, express or constructive, that the restrictions which are the subject of the present controversy were intended for the benefit of the entire estate. *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36, 50, 68 P. 308, 313. The evidence and the findings point convincingly to the fact that they had such notice of the covenants that they took their estate bound thereby, and should be restrained from violating them. They are the owners of but 3 out of the 53 lots into which the tract was subdivided by their father and mother. Before they acquired these lots from their mother, they knew that the property in the tract, including lots 9, 10, and 11, were burdened with the restrictions. While the trial court found that it was not true that the respondent children became the owners of the lots with either actual or personal knowledge of the existence of any agreement creating restrictions on the property, that finding is based solely on its construction of the provisions in the various deeds executed by the original owners of the tract, and its conclusion that the provisions in the various deeds to plaintiffs, or their grantors, were only personal covenants, and did not amount to covenants running with the land. The court did find, however, that the defendants became the owners of the lots with actual as well as constructive knowledge of the Holm-Martin agreement, and with constructive knowledge of the contents of the "Miles form of deed," and the contents of the deed. It also found that in the year 1914, which was before the respondents acquired any interest in lots 9, 10, and 11, Ferdinand and Emma Holm, then owning lots 9, 10, and 11, united with the owners of lots 1 to 8, inclusive, as plaintiffs in an action brought in the superior court of Los Angeles county (*James v. Martin*, No. B13343), the purpose of which was to remove restrictions and to quiet title of the plaintiffs against the claims of the defendants, many of whom are the plaintiffs here, that building restrictions had been imposed on all the lots in the tract by the Holm-Martin agreement, the Miles form of deed, and the subsequent deeds from Ferdinand and Emma Holm to their grantees. The defendants there answered setting up as a defense substantially the claims they now assert as plaintiffs in this action. Ferdinand Holm died, and this respondent Louisa Holm, his executrix, was substituted as a party plaintiff in the action in his stead. After due trial, the court found that each and every lot in the tract owned by the plaintiffs and defendants in the action, which included lots 9, 10, and 11 owned by Ferdinand and Emma Holm, were within the description set forth in the Holm-Martin agreement, and that many of the deeds contained "other, further, and different

and more stringent provisions for building restrictions." Judgment was entered for the defendants, and no appeal was taken. This judgment was rendered before Emma Holm deeded lots 9, 10, and 11 to her children, and the trial court, in the present action, found that the respondents here, "Louisa, Adolph and Lillian S. Holm, each had actual knowledge of such judgment," which finding is supported by the evidence.

[8] Appellants contend that the judgment in *James v. Martin*, determined that lots 9, 10, and 11 are subject to the restrictions sought to be established in this case. The respondents concede that, if such effect is to be given to the judgment, the issue has become *res adjudicata*, and that this is so whether or not the judgment was based on an erroneous interpretation of the law, as no appeal was taken. They earnestly contend, however, that the issues tendered by the third amended complaint in *James v. Martin*, and by the matters set up in the answer thereto, were not the same as those presented in the controversy here. We are of opinion that the issues in the two cases are substantially the same. The pleadings and the findings in the former action establish practically the facts relied on by appellants here. The same agreement, the same deeds, and the same covenants were pleaded there, and found to exist as are pleaded and found to exist in the present action. Some of the defendants in the former action are plaintiffs here. The remaining plaintiffs here are the successors in interest of the former defendants by title subsequent. The principal defendants here are the respondent children of Ferdinand and Emma Holm, who were plaintiffs in the quiet title suit. The parties are here litigating the same issue; namely, the question of the building restrictions. The language of the judgment in *James v. Martin* is—

"that the building restrictions as set forth in the third amended complaint and in the answers of the defendants * * * are binding upon the property therein described and are in full force and effect."

[9-11] It must follow, therefore, that by reason of the notice they had of the judgment in *James v. Martin*, the respondents, Adolph Holm, Louisa Holm and Lillian S. Holm, took lots 9, 10, and 11 bound by the covenants concerning the land entered into by their grantor. We are also of opinion that by reason of the judgment in the former suit the issue as to the validity and force of the building restrictions imposed on the lots in the Western Heights tract has become *res adjudicata*. A judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action, litigating for the same thing under the same title and in the same capacity, provided they

have notice, actual or constructive, of the pendency of the action. That is deemed to have been adjudicated in a former judgment which appears on its face to have been so adjudged, or which was actually and necessarily included therein, or necessary thereto. Code Civ. Proc. §§ 1908, 1911. The validity and effect of the building restrictions here under consideration were actually and necessarily included in the judgment rendered in *James v. Martin*. The estoppel created by the judgment of a court of concurrent jurisdiction directly upon a point is not limited to an action which is identical in form with the former action, or where the same parties are plaintiff and defendant in each of the actions, but may be invoked whenever, in the second action, the parties are in privity with the parties to the first action, and the same issue is presented for determination which was determined in the former suit. *Lamb v. Wahlenmaier*, 144 Cal. 91, 93, 77 P. 765, 103 Am. St. Rep. 66.

The judgment is reversed.

We concur: MYERS, C. J.; SHENK, J.; RICHARDS, J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.

197 Cal. 649

**TULARE IRR. DIST. v. SUPERIOR COURT
OF CALIFORNIA IN AND FOR TU-
LARE COUNTY et al. (S. F. 11700.)**

(Supreme Court of California. Dec. 28, 1925.)

1. Appeal and error ☞458(3)—Suspension of operation of injunction pending appeal therefrom not authorized by statute.

Superior court is not authorized by statute to order suspension of operation of injunction issued by it under an appeal therefrom.

2. Equity ☞1—Superior court has same jurisdiction in equity possessed by English Courts of Chancery on July 4, 1776, unless prohibited by statute.

Where not prohibited by statute, superior court, under Const. art. 6, § 5, has all the jurisdiction in equity which was possessed by the English Courts of Chancery on July 4, 1776.

3. Appeal and error ☞458(3)—Superior court may suspend injunction until appeal is heard and determined.

Superior court has power to suspend or stay injunction until an appeal may be heard and determined.

4. Prohibition ☞10(1)—Province of writ of prohibition is to arrest proceedings of inferior tribunal when without or in excess of jurisdiction.

Under Code Civ. Proc. § 1102, the sole province of writ of prohibition is to arrest proceedings of inferior tribunal or persons exercising

judicial functions without or in excess of jurisdiction.

5. Appeal and error ⚡458(3) — Court may suspend operation of injunction, regardless of which party is plaintiff or defendant.

Superior court, in exercise of jurisdiction, may suspend operation of injunction until appeal is determined, regardless of which party is the plaintiff or the defendant, as equitable jurisdiction is the same in one case as in the other.

6. Trial ⚡400(1) — Court has jurisdiction to change conclusions of law to conform to decree intended to be entered.

Where court, after making findings of fact and conclusions of law granting injunction, decided to suspend operation of injunction, if essential to validity of decree intended to be entered that conclusions of law specify effective date of injunction as upon determination of appeal, court would have jurisdiction to change its conclusions of law accordingly, as under Code Civ. Proc. § 664, judgment or decree is ineffectual for any purpose until entered.

7. Judgment ⚡504(1), 518 — Prohibition ⚡11 — Inconsistency between conclusions of law and judgment may be remedied only by direct attack on judgment; erroneous judgment not subject to collateral attack by prohibition.

Any alleged inconsistency between conclusions of law and judgment may be remedied only by a direct attack on the judgment, and not by prohibition which is a collateral proceeding subject to rules governing collateral attack.

8. Injunction ⚡193 — Order staying injunction, made after entry of decree, becomes part thereof, and operates concurrently therewith.

Separate order made by court staying injunction after entry of decree in conformity with conclusions of law, while strictly not part of decree, would be in effect part thereof and operate concurrently therewith.

9. Appeal and error ⚡458(3) — Trial court considers question of maintaining status quo only as guide in exercise of its discretion.

Question of maintaining status quo of parties arises only in consideration by trial court of rules which should guide it in the exercise of its discretion, and does not go to jurisdiction of court to determine question one way or other.

10. Constitutional law ⚡316 — Eminent domain ⚡2(1) — Suspending operation of injunction pending appeal not violative of due process of law nor taking of property without adequate compensation.

Under Code Civ. Proc. § 1049, action is deemed pending until its final determination on appeal; hence suspending operation of injunction pending an appeal therefrom is not deprivation of property without due process of law and without adequate compensation, contrary to Const. U. S. Amend. 14, and Const. Cal. art. 1, § 14.

In Bank.

Application by the Tulare Irrigation District for a writ of prohibition prayed to be directed to the Superior Court of California

in and for Tulare County and Albert Lee Stephens, Judge. Writ denied.

W. R. Bailey and Farnsworth, McClure, Burke & Maddox, all of Visalia, H. Scott Jacobs, of Hanford, and Wheaton A. Gray, of Los Angeles, for petitioner.

Sloss & Ackerman, of San Francisco, W. G. Irving, of Riverside, and Power & McFadzean, of Visalia, for respondents.

SHENK, J. This is an application for a writ of prohibition to restrain respondent court and judge from making an order suspending a permanent injunction pending appeal.

It appears from the petition that, on July 15, 1916, an action was commenced in the superior court of Tulare county by some of the petitioners, but not by all of them, against the Lindsay-Strathmore irrigation district, the purpose of which was to obtain a permanent injunction restraining the defendant irrigation district from pumping water from a tract of land in Tulare county known as the Rancho de Kaweah, and from conveying said water away from said lands and away from the watershed of the Kaweah river for use in the irrigation of lands in the defendant district.

It was alleged in the complaint in said action that the Tulare irrigation district is a political subdivision and body corporate, organized and existing under and by virtue of the Irrigation Act of 1887 (Stats. 1887, p. 29); that the defendant Lindsay-Strathmore irrigation district is also a political subdivision and body corporate, organized and existing under and by virtue of the Irrigation Act of 1897 (Stats. 1897, p. 254) and situated wholly within the county of Tulare, about 12 miles in a southerly and southeasterly direction from McKay Point, and embracing within its boundaries about 14,000 acres of land, divided into numerous private holdings; that from time immemorial the Kaweah river had flowed and does now flow from its source in the Sierra Nevada Mountains in the county of Tulare in a westerly direction to McKay Point, where it forks or divides, the northerly channel being known as the St. John's river, and the southerly channel as the Lower Kaweah river and Mill creek; that said river forms a distinct watershed on the western slope of said mountains until it reaches McKay Point; that from that point it spreads out through its numerous branches into what is known as the Kaweah delta, until it is many miles in width from north to south, and which comprises approximately 300,000 acres of land; that in this delta are located the cities of Visalia, Tulare, and other towns, and many hundreds of farms upon which are growing fruit trees, timber, alfalfa, and other agricultural crops, and upon which there are thousands of people and large num-

bers of live stock; that all of said farms and lands and people require the whole of the water of the Kaweah river, both surface and subterranean flow, for irrigation and domestic uses; that the underground flow is necessary to furnish a foundation for the surface water flowing in said river and its branches and the ditches and channels leading therefrom, and to hold up the underground water table beneath the surface of said lands in order to make the same productive; that the lowering of said water table or underground flow will gradually diminish the productive qualities of said lands; that the lands adjoining said delta, including the lands embraced within the boundaries of the Lindsay-Strathmore irrigation district, are higher than the lands in said delta, and are composed mostly of adobe and clay; that water will not readily seep through the same, and that the impervious condition thereof confines the surface and underground waters of said river to the said delta; that the Tulare irrigation district is the owner of the Tulare irrigation district canal leading out of the St. John's river; that some of the petitioning ditch owners are appropriators of water from the Lower Kaweah river, some are appropriators from both of said rivers, and that the petitioners, other than the ditch companies, are the owners of the lands riparian to either one or the other of said rivers; that all of said owners and appropriators were such prior to 1915, and have continuously used said water except as such use has been interfered with by the defendant district; that, within six months prior to the commencement of said action, the defendant district contracted to purchase and went into the possession of, and claimed to own, a tract of land known as the Rancho de Kaweah, comprising about 1,100 acres, and situated about 4 miles from McKay Point and lying on both sides of the Lower Kaweah river and within one-half mile from the St. John's river; that said Rancho de Kaweah overlies the underground body of water of said delta; that, immediately after the defendant district took possession of said Rancho de Kaweah, it bored 3 wells in different locations therein to a depth of 100 feet down into said underground body of water, and obtained a large quantity of water therefrom; that said wells were bored for the purpose of the irrigation of lands within the boundary of the defendant district and conducting the same outside of said watershed; that said defendant threatens to and will, if not restrained by the court, bore 37 more wells, and construct pumping plants thereon, for the purpose of pumping water from said wells for irrigation purposes on the lands of the district; that, if the defendant be permitted to bore said wells and construct said pumping plant and take said water, the water so taken will substantially diminish the quantity of water in said underground body of water

otherwise available to the plaintiffs, to the irreparable injury and damage of the plaintiffs; that the defendant district has no right to take any of said waters away from said watershed or to diminish the surface or underground flow of said Kaweah river for the purpose of supplying the lands of the said district with water for irrigation or other uses.

It further appears from said petition that during the pendency of said action numerous other parties appeared as interveners and set forth their alleged rights substantially in the same form as the original plaintiffs in said action. The defendant in due time filed its answer to the complaint, and to the complaints in intervention, in which it put in issue generally and specifically the allegations of the complaint; denied that the underflow waters of the Kaweah river are necessary to supply water for the irrigation of the lands of the complainants; and alleged that, except immediately below the bed of said river and of said streams, there is no underflow thereof; denied that any part of the underflow waters of said river were necessary or available for use in irrigating the lands of the complainants; and alleged that, underlying the surface of the lands of the complainants and of said delta, is a broad body of diffused and percolating water, many miles in width, moving at right angles to the surface contours of said lands and at various depths beneath the surface of the same, which water does not constitute any portion of the underflow of said river or streams, and eventually drains into the trough of the valley, and is lost for any and all useful purposes; admitted that it owned the Rancho de Kaweah, and had bored 3 wells prior to the commencement of said action, and that it has subsequently bored 34 wells upon its said lands, and is pumping as much as 55 cubic feet of water per second from said wells; and alleged that, subsequent to the commencement of said action, it constructed its irrigation system at a cost to it of approximately \$1,600,000, and has by means of said system caused the water pumped from said wells to be conveyed to lands within said district for the irrigation and domestic use of thousands of people living thereon, and that the aggregate amount of waters pumped from said wells was 13,500 acre feet during the season of 1918, and 14,800 acre feet during the season of 1919; denied that it had or will cause any injury or damage to the complainants in pumping the amount of water it has been pumping or any amount not in excess of 25,000 acre feet; denied that any water taken by it not in excess of 25,000 acre feet would substantially or at all diminish the quantity of water in the said underground body of water alleged to be available to the complainants. In the event that the court should find that the defendant, by reason of its said pumping operations, was caus-

ing any diminution in the amount of the water which would naturally flow in said streams, the defendant prayed that the court apportion said waters so that it may take the maximum of 25,000 acre feet, and it is alleged that water in that amount can be taken from the wells of the defendant and conveyed to the lands within defendant district without interfering with the rights of the complainants. It is further alleged that all of the lands embraced within the boundaries of the defendant district are susceptible of a high decree of cultivation, and that more than 14,000 acres thereof are susceptible of the cultivation and growth of oranges and other citrus fruits; that more than 9,000 acres thereof are planted to citrus fruits, and that more than 7,500 acres are now in bearing; that said citrus fruits cannot be grown or produced without irrigation; that there is no other source of supply of water for irrigation of said lands within said district other than the water produced by the pumping operations in and upon the said Rancho de Kaweah; that, if the defendant becomes unable to use said water by reason of an injunction in said action or otherwise, the trees, fruits, and vegetables growing on said lands will die, and all of said lands will become arid and waste.

The allegations and denials of the pleadings as above epitomized somewhat in detail show the extent of the issues involved in the litigation, and indicate the importance of the problem confronting the trial judge when called upon to exercise the discretion which the defendant irrigation district contends he may and should exercise in its favor.

One phase of this litigation has heretofore been before this court. *Lindsay-Strathmore Irrigation District v. Superior Court*, 182 Cal. 315, 187 P. 1056. The decision in that matter, filed February 12, 1920, effected a mistrial. A retrial was commenced before the respondent judge on the 28th day of November, 1921. Evidence was taken comprising some 27,000 pages of typewritten transcript and many hundreds of exhibits. After argument, the cause was submitted for decision on the 8th day of February, 1924. On May 16, 1925, the respondent judge signed and filed his findings of fact and conclusions of law in favor of the plaintiffs. Before filing the same, he announced that such would be his decision, whereupon counsel for the defendant district on May 7, 1925, served and filed a notice of motion wherein it was recited that the defendant had been advised that the court intended to enter a decree enjoining the defendant from taking water from its wells on the Rancho de Kaweah; that in good faith it intended to perfect and prosecute an appeal from said judgment to this court; and that, if said judgment be enforced pending appeal, said appeal in any event would be of no avail; and notice was given that the defendant would move the said

court, before the entry of said decree, for an order to be incorporated in said decree or made concurrently therewith suspending the operation of said injunction pending the appeal to this court. The said motion came on to be heard and was argued on May 15, 1925, the day before the findings of fact and conclusions of law were filed. On the following day, to wit, May 16th, the said findings of fact and conclusions of law were filed as aforesaid and the court took under advisement the motion of the defendant for an order staying the injunctive relief. Thereafter, on the 14th day of July, 1925, the respondent judge announced that it was his intention to grant said motion, and that the same would be granted on the 28th day of July following, whereupon this petition was filed on July 24, 1925, pursuant to which an alternative writ of prohibition was issued.

In the answer and return subsequently filed the respondent judge, among other things, alleges that certain of the petitioners, complainants in said action, were not parties thereto at the time of the commencement thereof; that they were made parties at later dates, to wit, some on the 14th day of June, 1920, some on the 20th of November, 1920, and the last one on the 15th day of January, 1921. It is further alleged that the construction of the plant and system of wells, pumps, pipe lines, canals, and other works constructed by the defendant district had been commenced and prosecuted to a considerable extent prior to the commencement of said action on July 15, 1916, and that said works were substantially completed by the defendant district during the year 1917, and were in full operation and use in the month of April, 1918, long before the first appearance of numerous parties plaintiff in said action whose names are set forth in said answer and return.

At the time of the commencement of said action, no application was made by the plaintiffs for a preliminary injunction, and no action was taken by the plaintiffs for injunctive relief until the 14th day of March, 1921, when application was made to the respondent court for a preliminary injunction restraining the defendant district from taking or diverting any of the underground waters underlying the Rancho de Kaweah or any of the surface waters of the Kaweah river as it passes through said rancho away from said lands at any time when there should be flowing in the Kaweah river at McKay Point not to exceed 1,140.7 cubic feet of water per second. Thereafter, on April 6, 1921, the said court made its order that the defendant should, pending the determination of said action, be permitted to operate its pumps on the Rancho de Kaweah, on condition that it restore to the channel of the Kaweah river, at all times when the flow of said river at McKay Point should be less than 1,144 cubic feet per second, such quantity of water, not to exceed 15 cubic feet per second, as added to that

then flowing at McKay Point would equal 1,144 cubic feet per second, except that such restoration need not be made between the 15th day of November of each year and the 15th day of the following April, and that a preliminary injunction be issued, restraining the defendant from taking or diverting any underground water underlying the Rancho de Kaweah away from said lands, excepting at the times and in the manner above stated. Thereafter, on or about the 25th day of August, 1921, a preliminary injunction was issued by said court in accordance with said order, was served on the defendant, and has ever since been in full force and effect except as to a modification thereof favorable to the defendant, made on the 24th day of August, 1922.

It is further alleged in said answer and return that it is the intention of the respondent judge, unless prohibited from so doing by this court, to determine and grant the defendant's motion for a suspension of said injunction pending appeal, said order for suspension to be contained in the judgment hereafter to be entered in said action or to be made concurrently with the entry of said judgment, and to continue pending an appeal to this court, and that it is his intention in making such order to impose upon the defendant such terms and conditions as to him may seem just and equitable, and which terms and conditions will, in his opinion and judgment, provide adequate security for compensating the said complainants for any damage or loss they may suffer by reason of such operations by said defendant pending appeal, in the event that such judgment should be affirmed on appeal or the appeal therefrom be dismissed.

It is further alleged that, in the trial of said action, many complicated questions of law and of fact were involved, and were presented to the trial judge; that he has decided such issues of law and fact in accordance with his best judgment; that he is of the opinion and believes that the defendant district is advised by its counsel that it has good and meritorious grounds of appeal from the judgment to be entered against it, and that he believes the said district intends in good faith to prosecute such appeal; that he believes that a number of questions of law and fact, decided and found by him in his findings and conclusions on file, and material to said judgment, are novel, and that the said district should in justice and equity have an opportunity to test the correctness of said judgment by taking an appeal therefrom. The respondent judge further alleges that, after a careful consideration of all the evidence in the case, "if an injunction absolutely restraining defendant from taking water by means of wells and pumps from the Rancho de Kaweah, or otherwise, as directed by the conclusions of law filed in said action, and as intended to be incorporated in the decree to be

made and entered in said action, shall be enforced pending an appeal by said defendant from such judgment, any appeal by said defendant from such judgment would be entirely nugatory and without value to said defendant."

It is further alleged that the lands within the defendant district require water for irrigation in order to make them productive or valuable for any purpose other than pasturage; that said lands are highly developed, the greater part thereof being planted to citrus trees which cannot be grown or maintained without sufficient water for irrigation; that said lands so planted to citrus trees, aggregating 9,000 acres or thereabouts, are of the value of \$1,250 an acre, if supplied with sufficient water, but, without water for irrigation would be of not to exceed \$50 an acre; that other lands within said district are planted to valuable crops which require irrigation; that there is no adequate supply of water within said district for the irrigation of said lands, and that there is no available supply elsewhere which could be developed and brought to said lands within many months, or at all, if such decree of injunction shall be enforced immediately and remain effective; that, if such injunction be put into force and effect pending an appeal from said judgment, the defendant district will, during the pendency of such appeal, be unable to supply adequate water within said district to irrigate the trees, plants, and crops growing thereon; that the citrus and other trees growing upon the irrigated part of said lands in said district will die and be destroyed, the majority of the lands within said district will become arid and waste, and the plant and system for the pumping and transporting of water from the Rancho de Kaweah to said district and for the distribution thereof to said lands within said district, constructed by the district at a cost of \$1,600,000 or thereabouts, will be rendered useless and of little or no value.

It is further alleged that, if said injunction be put in force and effect during the pendency of said appeal, and the said district should succeed in obtaining a reversal of said judgment, such reversal would be utterly useless and without value or benefit to the appellant. It is also alleged that, from a consideration of all the evidence in the case, the respondent judge believes that the loss and inconvenience which would be suffered by the complainants in said action from the continuation of the pumping by the defendant during the pendency of said appeal under proper terms and conditions to be imposed as a part of any order suspending said injunction would be relatively small, as compared with the loss and damage to the district from the enforcement of such an injunction pending an appeal, and that such loss and damage to complainants for the period of the pendency of the appeal could be compensated in

money, and the payment of such compensation could be adequately secured; that the respondent judge is informed and believes that a suspension of the operation of such injunction pending an appeal would not destroy any right of the complainants, or any of them, established or protected, or to be established or protected by the judgment so to be entered.

The petitioners contend that the respondent court is wholly without jurisdiction to make said order. The question therefore is: Has the superior court the power, in the exercise of a sound discretion, to suspend the operation of an injunction to which it has decided the plaintiff is entitled, pending an appeal from the judgment?

[1,2] It is conceded by all parties that there is no statutory authority in this state for the exercise of such power. It is also conceded that, where not prohibited by statute, the superior court, under section 5 of article 6 of the Constitution, has all the jurisdiction in equity which was possessed by the English Courts of Chancery on July 4, 1776. Prior to 1772 the Courts of Chancery of England did not exercise the power to suspend proceedings in equity pending appeal, for the reason that the taking of the appeal had that effect. But since that time the contrary rule has prevailed. *Hovey v. McDonald*, 109 U. S. 150, 160, 3 S. Ct. 136, 27 L. Ed. 888. The modification of the rule was brought about by the exercise by the Chancery Courts of the power to enforce their judgments, orders, and decrees, or some portions thereof, notwithstanding the appeal. In 1807 a committee of the House of Lords was appointed to inquire into decrees in equity and reported:

"That according to very ancient practice in this House, appeals to this House were considered by the House as staying proceedings in the courts of equity, the orders, judgments, or decrees, of which had been called in question by such appeals, and that such practice in very remote times might obtain without much inconvenience in the administration of justice. The committee, however, finds, that for a very long course of years past the courts of equity have never forborne to proceed, notwithstanding appeals against their orders, decrees, or judgments, and with knowledge that such appeals had been lodged in this House, except in cases in which their judicial discretion has induced them, upon the application of parties interested, to stay or modify such proceedings on account of such appeals; and that such habitual practices of the courts of equity have frequently and repeatedly fallen within the knowledge and under the observation of this House, whilst the appeals were depending therein. The committee therefore conceive, that, according to the present practice of this House, appeals do not stay proceedings in such courts in the causes, in which the appeals are made; and that such causes may be proceeded on in the courts of equity, unless such courts should make order thereon to the contrary in causes in which they may be applied to for that purpose, or unless, in

special cases, this House should interpose by special order; and the committee, attending to the nature of proceedings in courts of equity, and the numerous appeals, which in each cause may be lodged in this House against the orders and decrees of the court, and the effect, which the suspension by appeals of their proceedings must have, are of opinion, that the practice as now understood, cannot be departed from without introducing consequences the most oppressive to the suitors in courts of equity, and the utmost inconvenience in the administration of justice in such courts."

This report was agreed to by the House of Lords. *Waldo v. Caley*, *Willan v. Willan*, 16 Ves. 206, 216, 33 Eng. Reprint, 723. Lord Chancellor Eldon refers to the rule in the following language:

"Now, however, it is settled by the highest authority, that of the House of Lords itself, that an appeal from a court of equity to that House does not stay execution of the decree; but it is consistent with that regulation, that a special application may be made either to the House of Lords, or to the court below, with this observation: That it is much more expedient that the application should, if it can, be made to the House, than to the court below, as the order upon that occasion, may be the subject of appeal, and it is difficult to determine how far appeals may go." *Hugeunin v. Baseley*, 15 Ves. Jun. 180, 33 Eng. Rep. 723.

It therefore appears that "for a long course of years" prior to 1807 the English courts of chancery exercised the power to stay proceedings in equity pending appeal. The petitioner has cited no case or historical treatise, and we have discovered none, which holds or indicates that such power was not exercised as early as 1772, and we find no authority for holding that they did not possess that power more remotely, even though they did not exercise it. Indeed, as early as 1697 it is intimated in *Horner v. Popham*, 1 Eng. Reprint, 152, that on an appeal from the House of Lords to Parliament, the House of Lords would have authority to stay proceedings in equity pending appeal. In speaking of the English chancery practice, it is stated, in *Daniel's Chancery Pleading and Practice* (6th Am. Ed.) at page 1469, that an appeal does not stop or hinder any proceedings on the decree or order appealed from *unless by special order of the court*. It is further stated that the court will in some cases, upon special application of the appellant, suspend the proceedings under a decree pending an appeal.

The Earl of Halsbury, Lord High Chancellor of Great Britain for nearly 20 years, says in his work on the Laws of England, vol. 17, p. 211, § 465, under the title "Injunction":

"An appeal does not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the court appealed from or any judge thereof or the court of appeal may direct; and no intermediate act or proceeding will be invalidated except so far as the court appealed from directs. * * * If irreparable damage will be done to the appellant

in the meantime, the operation of the injunction may be stayed on terms."

The purpose of the stay or postponement of the effective date of the injunction is to protect appellant from having his right of appeal rendered nugatory or merely nominal if he should succeed. *Monkhouse v. Corporation of Bedford*, 17 Vessey, Jr., 380, 34 Eng. Rep. 147; *Walford v. Walford*, L. R. 3 Ch. Appeals, 812; *Polini v. Gray*, 12 Ch. Div. 438. The last case cited was an equitable action to determine the rights of claimants to a fund. The plaintiffs failed in the court of first instance and prosecuted an appeal. They contended that, if they should ultimately succeed in the House of Lords, that success would be useless to them unless an interim order were made for preserving the fund. Assuming the contention to be correct, the court said:

"The question is whether this court has jurisdiction to prevent such a consequence. It appears to me on principle that the court ought to possess that jurisdiction, because the principle which underlies all orders for the preservation of property pending litigation is this, that the successful party in the litigation, that is, the ultimately successful party, is to reap the fruits of that litigation, and not obtain merely a barren success. That principle, as it appears to me, applies as much to the court of first instance before the first trial, and to the court of appeal before the second trial, as to the court of last instance before the hearing of the final appeal."

See, also, *Attorney General v. Colney Hatch Lunatic Asylum*, vol. 4, Ch. Appeals, 146; *Attorney General v. Proprietors of the Bradford Canal*, vol. 2, Equity Cases, 71; *Shelfer v. City of London Electric Lighting Co.*, 2 Ch. 388.

It has been generally held by the courts of the United States and by the courts of the several states where the matter is not controlled by statute that courts of equity possess the power here contended for by the respondents. In recognition of such power, the Supreme Court of the United States in 1878 promulgated the rule wherein it provided that:

"When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or a judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party."

Hovey v. McDonald, 109 U. S. 150, 161, 3 S. Ct. 136, 27 L. Ed. 888.

The respondents have cited numerous other cases which support their contention. Quotations from them would appear to be superfluous. A citation of some of them will suffice. *Leonard v. Ozark Land Co.*, 115 U. S. 465, 6

S. Ct. 127, 29 L. Ed. 445; *In re Haberman Mfg. Co.*, Petitioner, 147 U. S. 525, 13 S. Ct. 527, 37 L. Ed. 266; *American Strawboard Co. v. Indianapolis Water Co.*, 81 F. 423, 26 C. C. A. 470; *Interstate Commerce Commission v. Louisville & N. R. Co.* (C. C.) 101 F. 146; *Green Bay & M. Canal Co. v. Norrie* (C. C.) 113 F. 923; *Green v. Winter*, 1 Johns. Ch. (N. Y.) 77; *Schenck v. Conover*, 13 N. J. Eq. (2 Beasley) 31; *Riehle v. Heulings*, 38 N. J. Eq. 83, and note; *McAlpin v. Universal Tobacco Co.* (N. J. Ch.) 55 A. 999; *Davis v. Tarwater*, 13 Ark. 52; *Thompson v. McKim*, 76 Har. & J. Md. 302; *Genet v. D. & H. Canal Co.*, 113 N. Y. 472, 21 N. E. 390; *Genin v. Chadsey*, 12 Abb. Prac. (N. Y.) 69; *Howe v. Searing*, 19 How. Pr. (N. Y.) 14; *Pach v. Geoffroy*, 65 Hun, 619, 19 N. Y. S. 583; *Laney v. Rochester Ry. Co.*, 81 Hun, 346, 30 N. Y. S. 893; *Remsen v. Metropolitan El. Ry. Co.*, 17 App. Div. 637, 45 N. Y. S. 536; *Tenement House Dept. v. Moeschén*, 41 Misc. Rep. 446, 85 N. Y. S. 19; *State ex rel. Burrows v. Superior Court*, 43 Wash. 225, 86 P. 632; *Lund v. Idaho & W. N. R. Co.*, 48 Wash. 453, 93 P. 1071; *Waters v. Dunn*, 18 Idaho, 450, 110 P. 258.

But the case of *State ex rel. Burrows v. Superior Court*, supra, is so directly in point both as to the law and the facts as to entitle it to particular notice. It was an application for a writ of prohibition to prevent the superior court of the state of Washington from entering an order suspending a prohibitory injunction pending an appeal to the Supreme Court. The plaintiffs in the pending action were the owners of an improved stock farm through which a navigable fresh-water river flowed. The defendants maintained a log boom on the river below the farm which at times obstructed the flow of the river so as to back up the water and cause the same to overflow the farm lands. The plaintiff brought an action to perpetually enjoin the defendant from maintaining the obstruction. After trial on the merits, the court announced its findings and conclusions in favor of the plaintiffs. Before findings and conclusion were signed and filed and before judgment was entered, the defendants applied to the trial court for an order suspending the injunction pending appeal. The trial judge announced that he would make such an order on terms, but delayed making it pending an application to the Supreme Court for the writ of prohibition. The findings of fact and conclusions of law and the decree were then signed and entered. It was conceded, as it is here conceded, that there was no statute authorizing the trial court to grant such a stay. It was contended by the respondent superior court, as it is urged by the respondents here, that independent of the statute, the trial court, by virtue of its equity jurisdiction, had inherent power to suspend the operation of the injunction pending the appeal. The court said:

"The power of the trial court in this respect is the question presented upon this hearing.

This court has repeatedly held that the trial court would not be required by mandate to order a stay or fix a bond which should operate to supersede a prohibitory injunction pending appeal, and that a statutory supersedeas could not stay such decree. [Citing cases.] * * * The trial court in this case is a court of general equity jurisdiction. * * * It has all the powers of the English Chancery Court, and may grant and enforce its decrees in such manner as the justice of the particular case requires. The power of suspending the operation of injunctive decrees has frequently been exercised by courts of general chancery jurisdiction. [Citing cases.] * * * We have no doubt of the inherent power of a court of original jurisdiction to grant a suspension of injunctive decrees pending appeal, where justice may require it, and where the status of the parties is not changed, providing such right is not taken away by statute. Our statute does not deny such power."

The writ of prohibition was denied.

In 22 Cyc., at page 970, under the title of "Injunctions," the writer says:

"The court may in its discretion suspend the operation of an injunction. It may in the very decree itself provide that the operation of the injunction shall be stayed for a certain length of time or until the happening of a condition, and it is within the discretion of the court to stay the operation of the decree pending an appeal therefrom, until the hearing of the appeal on the merits."

See, also, 32 C. J. 388; 38 L. R. A. (N. S.) note, p. 440 et seq., and cases cited.

[3] It must therefore be said that the Chancery Courts in England have from an early day exercised the power to suspend or stay injunctions until an appeal may be heard and determined. It must also be said that courts of equity in the United States, both state and federal, when uncontrolled by statute, have exercised the same power. It follows that the superior court in this state likewise possesses that power.

The petitioner contends that the case of *United Railroads v. Superior Court*, 170 Cal. 755, 151 P. 129, Ann. Cas. 1916E, 199, denies such power in the superior court, but such is not the case. In that proceeding it appeared that the superior court in an injunction suit pending before it had granted, on application of the plaintiff, a preliminary injunction pursuant to section 527 of the Code of Civil Procedure, restraining the defendant from performing certain acts during the pendency of the action. Thereafter and before the trial of the cause on its merits the defendant made application to that court for an order "staying the operation of the preliminary injunction" theretofore issued "until the final and full determination" of the cause. The plaintiff then filed a petition in this court for a writ of prohibition to restrain the superior court from entertaining and passing upon the defendant's application. As stated in the opinion, the only question presented for determination by the court was this:

"In view of the provisions of our law, constitutional and statutory, has a superior court, which, by order duly and regularly made upon notice and hearing, has granted a temporary or provisional injunction absolutely restraining a defendant from the commission of certain acts during the pendency of the action, without reserving any right of revocation or modification, the power to subsequently make an order staying the operation of said injunction until the final determination of the cause, or until a contemplated appeal from said order has been heard and determined?"

The question was answered in the negative, and the court said:

"It is declared by our Civil Code that 'provisional injunctions are regulated by the Code of Civil Procedure' (Civ. Code § 3421). By sections 525 to and including 533 of the Code of Civil Procedure, in a title headed 'Provisional Remedies in Civil Actions,' there is provided a full and complete system of law and procedure as to granting, refusing, modifying and dissolving temporary injunctions. It is clearly and unequivocally provided therein in what cases such an injunction may be granted and in what cases it may not be granted. * * * From what we have said as to our *statutory provisions* on the subject of such injunctions [temporary injunctions], it is manifestly our opinion that they unequivocally have the effect of precluding any such exercise of power on the part of the trial court." (Italics added.)

It is strongly intimated in the above-quoted question which this court framed as the only one for determination, that, if the order for the preliminary injunction had contained a provision reserving to the court the right to revoke or modify the preliminary injunction which it was then ordering, such power could have been reserved. We do not decide that question, for it is not involved here, but the intimation fortifies the conclusion that the only theory upon which that case was decided was that, in view of our *statutory provisions* regulating and providing a "full and complete system of law and procedure as to granting, refusing, modifying and dissolving temporary injunctions," and without reserving to itself the right to revoke or modify such an injunction, the court's power in the premises had spent its force and been exhausted.

[4] Further with reference to the scope of our Code provisions relating to injunctions, it is said in 14 Cal. Jur. at pages 296 and 297:

"The Code provisions regulating injunctions do not curtail the general grant of equity power vested in the superior courts by the Constitution nor affect their general chancery power to preserve the fruits of a possibly successful litigation to appellants from an adverse judgment against them. It follows that the superior court has equitable jurisdiction at the time of rendering judgment for the defendant, either to continue in force a preliminary injunction so as to maintain the status quo of the subject-matter of the litigation pending an appeal, or to make an original injunction order at such time restraining the successful party pending such ap-

peal from interfering with appellant's property, notwithstanding the right to a perpetual injunction, which was the primary object of the action, may be denied by the judgment itself."

This statement is supported by the citation of authorities in this state, but is based particularly on the leading case of *City of Pasadena v. Superior Court*, 157 Cal. 781, 109 P. 620, 21 Ann. Cas. 1355. Both the petitioners and the respondents herein cite and rely on that case. The petitioners contend that the rule laid down there is exclusive, that is to say, that it sanctions the power of the superior court to enjoin the defendant pending an appeal where a permanent injunction is denied, but that it does not constitute, and impliedly denies, authority in the superior court to suspend the operation of a permanent injunction pending an appeal from a judgment in favor of the plaintiff. The respondents contend that there is no distinction in principle between staying the hand of the defendant in behalf of the plaintiff, when the court has decided that the plaintiff is not entitled to an injunction, and staying the hand of the plaintiff in behalf of the defendant when the court has decided that the plaintiff is entitled to an injunction, and that in each case the power is referable to the same equitable jurisdiction of the trial court. We agree with the respondents that there is no distinction between the power exercised by the court in the *Pasadena Case* and the power which the respondents herein intend to exercise. Lord Justice Cotton said, in the case of *Polini v. Gray*, 12 L. R. Ch. Div., at page 446:

"I see no difference in principle between staying the distribution of a fund to which the court has held the plaintiff not to be entitled, and staying the execution of an order by which the court has decided that the plaintiff is entitled to a fund."

That there is no such distinction may be readily comprehended, if it be assumed that the parties to the action pending in the respondent court be reversed; in other words, let it be supposed that the *Lindsay-Strathmore* irrigation district, feeling itself aggrieved because of a threatened interference with its water supply on the part of the *Tulare* irrigation district, had brought an action for a permanent injunction to restrain the latter from interfering with the rights of the plaintiff, and, upon a trial on the merits, the court should have found that the plaintiff was not entitled to an injunction, and should dissolve a temporary injunction theretofore issued. In such a case it would readily be conceded, under the authority of the *Pasadena Case*, that the trial court would have jurisdiction to issue an injunction to restrain the defendant from a threatened interference with the plaintiff's rights pending appeal. The same result would be accomplished as is intended to be accomplished in the action

now pending where the parties are reversed, namely, to preserve from destruction the property of the appellant pending final determination of the case on appeal. It should be remembered that we are here dealing with a question of jurisdiction, for it is the sole province of the writ of prohibition to arrest proceedings of an inferior tribunal or persons exercising judicial functions when without or in excess of jurisdiction. Code Civ. Proc. § 1102; 21 Cal. Jur. 583, and cases cited.

[5] It would appear self-evident that the question of jurisdiction would not depend upon which litigant happened to get into court first. There is therefore no doubt that the court may exercise its jurisdiction regardless of which party is the plaintiff or the defendant, and that the equitable jurisdiction is the same in the one case as in the other.

[6-8] To his findings of fact, the respondent judge appended his conclusions of law, wherein he decided that the complainants were "entitled to a judgment and decree of this court, determining their respective rights, as aforesaid, and to a perpetual injunction of this court forever enjoining and restraining the said defendant," etc., but, as above noted, no such judgment or decree has been entered. It is the contention of the petitioners herein that the signing of the decree in accordance with the findings and conclusions is merely a ministerial act, and that no decree may now be signed and entered except in strict conformity with said conclusions of law. In ordinary actions at law, it is, of course, the rule that the signature of the judge is not necessary to the validity of the judgment (14 Cal. Jur. 914, and cases cited), but "it has been the almost invariable custom in this state for decrees in equity to be so signed" (*Byrne v. Hoag*, 116 Cal. 1, 5, 47 P. 775). Ordinarily the judgment or decree is ineffectual for any purpose until entered. Section 664, Code Civ. Proc.; *Consolidated Const. Co. v. Pac. Elec. R. Co.*, 184 Cal. 244, 193 P. 238; 14 Cal. Jur. 937. Until the decree is entered, it is merely a purpose in the breast of the court, and may be changed as the judge may determine. 14 Cal. Jur. 916. Indeed, at any time before the entry of the decree, the court may change its conclusions of law upon the facts that have been found. *Condee v. Barton*, 62 Cal. 1; *Crim v. Kessing*, 89 Cal. 478, 489, 26 P. 1074, 23 Am. St. Rep. 491. If, therefore, it be essential to the validity of the decree intended to be entered by the respondent judge that the conclusions of law specify the effective date of the said injunction as upon the determination of the appeal favorable to the respondents, the court would have jurisdiction to change its conclusions of law accordingly, for no judgment or decree has yet been entered. But in our view of the matter such a change would be unnecessary, especially as affecting the result of the present proceeding, for two reasons: First, because any alleged inconsistency between the conclusions

of law and the judgment may be remedied only by a direct attack on the judgment (*Crim v. Kessing*, supra), and not by prohibition which is a collateral proceeding, subject to the rules governing a collateral attack excepting in cases not material here (21 Cal. Jur. 604); and, secondly, if the said decree be entered in exact conformity with the conclusions of law, the court would have the power by a separate order, made concurrently with the entry of the decree, staying the injunction pending appeal, and such order, while strictly not a part of the decree, would be in effect a part thereof and operate concurrently therewith. *City of Pasadena v. Superior Court*, supra; *United Railroads v. Superior Court*, supra, 764.

[9] The petitioners further contend that the making of the contemplated order will not preserve the status quo of the subject-matter of the litigation, but will preserve a condition which the defendant district has deliberately created since the action was commenced. This contention is based on the fact that additional wells were bored on the Rancho de Kaweah, expensive improvements were constructed by the defendant district and vast improvement of land areas took place after the commencement of said litigation. The contention is also based on the rule that ordinarily when the status quo is referred to the status at the commencement of the action is in contemplation. The respondents insist that this rule should not be applied to the situation of the defendant district, for the reason that numerous parties complainant in said action were not parties thereto until long after the completion of the works by the defendant, and that the asserted rule should not operate to the benefit of those who were not in litigation with the defendant district until after the said works were completed. It is unnecessary to here solve that problem, for, assuming that the rule as contended for by petitioners is correct, it is not invariable as an examination of the authorities discloses. Concerning the rule that should apply in a proceeding identical with the present one, the Supreme Court of Washington said, in *State ex rel. Burrows v. Superior Court*, supra:

"Justice to litigants usually requires that the status of the parties at the time of the judgment should be maintained pending appeals."

See, also, *Chester Traction Co. v. Philadelphia W. & B. R. Co.*, 174 Pa. 284, 34 A. 619.

This is especially true when no preliminary injunction was sought by the plaintiffs until some 5 years after the commencement of said action (*Johnson v. Seabury & Johnson*, 69 N. J. Eq. 696, 61 A. 5), since the legitimate function and purpose of a preliminary injunction is to preserve the status quo until, upon final hearing, the court may grant full relief (*Beach on Injunctions*, § 112; *Powhatan Coal & Coke Co. v. Ritz*, Judge, 60 W. Va. 395, 56 S. E.

257, 9 L. R. A. [N. S.] 1225). Where statutes have been enacted, regulating or controlling the powers of the court concerning discretionary supersedeas on appeal in injunction proceedings it has been provided that "the status existing immediately before the entry of the judgment appealed from shall be maintained." *Jones v. Walter* (Ky.) 70 S. W. 191, 24 Ky. Law Rep. 878. We are in accord with the contention of respondents that the question of maintaining the status quo only arises in the consideration by the trial court of the rules which should guide it in the exercise of its discretion, and does not go to the jurisdiction of the court to determine the question one way or the other. Other rules may also be considered by the trial court. Counsel for petitioners state that, in the numerous cases examined by them with reference to the power of courts of equity to stay or suspend prohibitory injunctions pending appeal, they find that such power was exercised under one or the other of the following conditions, or for one or the other of the following purposes:

"(1) To preserve the status quo as it existed at the commencement of the action; (2) to preserve the subject of the litigation pending the appeal; (3) the stay was authorized by express statute."

It is thus impliedly conceded by petitioners that the preservation of the status quo as it existed at the commencement of the action is not the exclusive function of the order. The function of the contemplated order sought by respondents may therefore reasonably fall within the second purpose, viz. to preserve the subject of the litigation pending the appeal. While, strictly speaking, the subject of the litigation as disclosed by the allegations of the complaint in the pending action is the right of the defendant district to take water from the Rancho de Kaweah, but, under the allegations of the answer in said action, and the showing made by the answer and return herein, the subject of said litigation includes also the preservation from destruction of the extensive property and works of the defendant district and the valuable improvements on the lands within the district; just as in the *Pasadena Case* the subject of the litigation from the standpoint of the city was the naked right of the plaintiff in that action to maintain its telephone poles and wires in the streets of the city, but from the standpoint of the said defendants the preservation of its physical properties was also involved. From the trial court's standpoint, under such circumstances, the one right may not be considered apart from the other.

[10] Finally, it is contended by the petitioners that the making of the contemplated order will deprive them of their property without due process of law and without adequate compensation. Obviously there is no merit in this contention. The said action is still pending and will be deemed pending until its final

determination on appeal. Section 1049, Code Civ. Proc. We, of course, express no opinion as to the merits of the appeal, but it may not be gainsaid that reversals do occur. For the purpose only of the consideration of this contention of the petitioners in this proceeding, it may be said that the asserted rights of the petitioners may never be established. If they do not finally prevail, it may not be said that they have presently such a vested right in the property in the litigation as may be protected under the due process clause of the Fourteenth Amendment and section 14 of article 1 of our Constitution, as against a valid order or judgment of the court finally deciding that their alleged claims are unfounded. This contention of the petitioners assumes that their rights have been finally adjudicated, which of course is a false premise, as such rights are still in litigation. A similar contention was made in *State ex rel. Burrows v. Superior Court*, supra, where it was held to be untenable. See, also, 15 Cal. Jur. 121, 122.

In his verified answer and return to the alternative writ herein, the respondent judge states, as above noted, that in making the contemplated order he intends to impose upon the defendant and appellant such terms and conditions as to him may seem just and equitable, and that such terms and conditions will, in his judgment, provide adequate security for compensating the complainants on account of any damage or loss which the latter may suffer by reason of the operations of the defendant district pending appeal, in the event the judgment be affirmed or the appeal dismissed, and that without the contemplated order any appeal by the defendant "would be entirely nugatory and without value" to said defendant. He arrives at these conclusions "after careful consideration of all the evidence in the case." Contemplating the results which he sets forth as attending the consequences of an immediately effective injunction, it may properly be said, as was said in the *Pasadena Case*, as page 795, 109 P. 626; "Common fairness and a sense of justice readily suggests" that, while the defendant in good faith is prosecuting its appeal, it "should be in some manner protected in having the subject-matter of the litigation preserved" until the appellate court can settle the controversy. The exercise of the power which the respondents propose to exercise is "incidental to the right of appeal," and the contemplated order may be deemed a part of the injunction itself. See *American Trading Co. v. Superior Court*, 192 Cal. 770, 772, 222 P. 142. To recognize the constitutional right of the defendant to an appeal from the judgment, and at the same time to deny the right of the trial court, which it unquestionably possesses in the action pending before it, to prevent the appeal from becoming nugatory, would be in effect to deny the right of appeal.

It is unnecessary to pass upon other points raised by the parties in view of the conclusions herein expressed.

The peremptory writ is denied, and the proceeding is dismissed.

We concur: MYERS, C. J.; WASTE, J.; LAWLOR, J.; SEAWELL, J.; LENNON, J.; RICHARDS, J.

75 Cal. App. 283

MAY v. HUNT, HATCH & CO. et al.
(Civ. 5260.)

(District Court of Appeal, First District, Division 2, California. Nov. 21, 1925.)

1. Sales — 418(5)—Measure of damages for seller's breach when part payment made stated.

Where buyer paid part of purchase price, on seller's breach, buyer was entitled, under Civ. Code, § 3308, to recover excess of value of property to him over amount which would have been due seller had contract been fulfilled, and findings awarding buyer payment made in addition thereto was erroneous.

2. Sales — 418(1)—Interest not recoverable until time of entry of judgment, where amount of plaintiff's claim not ascertained until then.

As amount of buyer's claim for seller's breach of contract on which part payment had been made was not ascertained until judgment was entered, plaintiff's right to interest did not arise until then.

Appeal from Superior Court, Los Angeles County; W. D. Dehy, Judge.

Action for breach of contract by Chas. W. May against Hunt, Hatch & Co., a corporation, and another. From a judgment against it, Hunt, Hatch & Co. appeals. Reversed, with directions.

Fred Mansur, of Los Angeles, for appellant.

George Beebe and J. Marion Wright, both of Los Angeles, for respondent.

STURTEVANT, J. The trial court awarded a judgment against the defendant corporation, based on a breach of contract to deliver four carloads of grapes which the plaintiff alleged he had bought from the defendant. From that judgment the defendant has appealed and has brought up the judgment roll. The appellant attacks the manner in which the judgment was made up, and also the amount of the judgment. We think that the attack is well founded, and that the judgment must be reversed.

In his complaint the plaintiff alleged that he bought from the defendant four carloads of Zinfandel grapes at \$110 per ton, and that he paid down \$1,000, and agreed to pay the balance of said purchase price on delivery of

said grapes. The record does not disclose how many tons constituted a carload, nor what was the total amount of the purchase price.

The trial court made findings as follows:

"IV. By reason of the failure, neglect, and refusal of the defendant Hunt, Hatch & Co. to sell and deliver said grapes to plaintiff so agreed to be sold and delivered as aforesaid, plaintiff has been damaged in the sum of \$1,320, same being the excess of the value of said grapes to plaintiff, which value is and was the value of \$6,160, over the amount which would have been due to defendant under said contract if the same had been fulfilled, which amount was and is the sum of \$4,840.

"V. That defendant Hunt, Hatch & Co. have failed and neglected to return to plaintiff the sum of \$1,000 so paid by plaintiff on the purchase price of said grapes, as aforesaid, and has never returned or repaid same to plaintiff, and by failure to return same plaintiff has been damaged in the further sum of \$1,000, with interest thereon from September 7, 1920."

[1] The plaintiff evidently omitted to carefully read the statute before framing his complaint, and thereafter allowed the trial court to frame its findings carrying out the same error. The statute defining the measure of damages to be followed in such a case is:

"The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has not been fully paid in advance, is deemed to be the excess, if any, of the value of the property to the buyer, over the amount which would have been due to the seller under the contract, if it had been fulfilled." Civ. Code, § 3308.

When the plaintiff and defendant made the contract in suit and the plaintiff paid the defendant \$1,000 on account, there remained "due to the seller under the contract, if it had been fulfilled," not the full purchase price, but the purchase price less \$1,000. When this court reads the finding, "over the amount which would have been due to defendant under said contract if the same had been fulfilled, which amount was and is the sum of \$4,840," this court sees that the finding as written exactly follows the wording of the statute, and this court must assume that the \$1,000 had been deducted. If it had been deducted then it is patent as the appellant contends that, in finding No. V., the trial court erroneously allowed for the second time to the plaintiff the sum of \$1,000. That being so, the appellant was clearly prejudiced to the extent of the \$1,000.

[2] In making findings and preparing the judgment the parties seem to have had considerable trouble over the item of interest. When section 3308 of the Civil Code is properly construed, the question regarding interest on the initial payment is eliminated from the case. As the amount of the plaintiff's claim was not ascertained until the judgment

was entered, plaintiff's right to interest did not arise till the time of the entry of judgment. *American-Hawaiian, etc., Co. v. Butler*, 17 Cal. App. 764, 121 P. 709.

The judgment is reversed, and the trial court is directed to rewrite its findings, following section 3308 of the Civil Code as construed by this court, and to find the ultimate facts as they appear to the trial court in the light of the evidence that was heretofore introduced by the parties, and thereafter to enter judgment accordingly.

We concur: LANGDON, P. J.; NOURSE, J.

75 Cal. App. 266

DILLON v. PRUDENTIAL INS. CO. OF AMERICA et al. (Civ. 5211.)

(District Court of Appeal, First District, Division 2, California. Nov. 20, 1925. Hearing Denied by Supreme Court Jan. 18, 1926.)

1. Automobiles ⇨244(4)—Finding driver was agent within scope of employment sustained.

Evidence held to sustain jury's findings that defendant automobile driver was agent of codefendant insurance company, and using automobile within scope of his employment, at time of collision with plaintiff's car.

2. Automobiles ⇨193(8)—Automobile held reasonable means for conveyance of insurance agent.

In action for injuries sustained in automobile collision, automobile driven by defendant insurance agent, assigned district of over 200 square miles, and permitted by codefendant employer to select any reasonable means of traveling about, held reasonable means of conveyance.

3. Automobiles ⇨245(4)—Scope of employment of driver held for jury.

Whether defendant automobile driver was acting within scope of employment by codefendant insurance company at time of collision with plaintiff's car, and use of automobile in performance of his duties was reasonably contemplated, were questions of fact, jury's determination of which will not be disturbed, where submitted under appropriate and explicit instructions.

4. Automobiles ⇨194(2)—Insurance company's collector and solicitor held agent, not independent contractor.

One collecting insurance premiums, soliciting policies, etc., under detailed regulations from insurance company and agreement to give entire time between specified hours to carrying out its instructions, paid weekly salary, and subject to discharge at any time, held not an independent contractor, but an agent of such company, which was liable for injuries due to his negligent operation of automobile.

5. Automobiles ⇨193(8)—Insurance agent's use of automobile held authorized.

Where a district of over 200 square miles was assigned to insurance agent, some means of conveyance, such as automobile, with which

damages sued for in action against him and insurance company were inflicted, was impliedly authorized.

6. Appeal and error ⇨1066—**Superfluous instructions correctly stating law not prejudicial.**

In action against automobile driver and his employer for damages caused by collision with plaintiff's car, superfluous instructions, correctly stating law of principal and agent, could not have prejudiced defendants.

7. Automobiles ⇨245(4)—**Whether driver was employee or subcontractor held for jury.**

Conflicting inferences from facts held to warrant submission to jury of question whether driver of automobile colliding with plaintiff's car was subcontractor or employee of codefendant insurance company.

8. Automobiles ⇨244(2)—**Finding of negligence causing collision sustained.**

Evidence held to justify finding that defendant negligently drove automobile colliding with plaintiff's car at street intersection.

Appeal from Superior Court, Alameda County; Benjamin K. Knight, Judge.

Action by W. P. Dillon against the Prudential Insurance Company of America and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Knight, Boland, Hutchinson & Christin, of San Francisco, for appellants.

Philip M. Carey, of Oakland, and Elliott Johnson, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendants from a judgment against them for \$10,000, in an action brought to recover for personal injuries to plaintiff and damage to his automobile, alleged to have been caused by the negligence of defendant McDonald in operating his automobile while he was engaged upon the business of the other defendant, Prudential Insurance Company.

On behalf of the defendant and appellant Prudential Insurance Company it is urged that defendant McDonald was not such an agent or employee of his codefendant company at the time of the accident as to enable plaintiff to invoke the doctrine of respondeat superior; that McDonald was not acting as agent for the company at the time of the accident, because he was on his way to and had not reached the place of his employment; that the use of the automobile by McDonald was not within the scope of his employment. Those questions of fact were all submitted to the jury under most comprehensive instructions, and the jury has decided them in favor of the plaintiff. It only remains to us, upon appeal, to find in the record some substantial evidence justifying these findings.

[1] We shall set forth the facts which undoubtedly influenced the jury in reaching its conclusions and which sustain those conclu-

sions. Defendant McDonald was working for the defendant company under a contract which required him to give his entire time to the business of the company. He was to work 8 hours each day, from 8 in the morning until 4 in the afternoon. His duties were to collect premiums due upon insurance, solicit new insurance, deliver policies issued by the company, attend meetings of agents, etc. His district extended from Alameda to Richmond and from Oakland to Hayward, Cal., an area of over 200 square miles. He was allowed to use any reasonable mode of conveyance in "covering" this territory. The company provided no means of conveyance, and exercised no control over the same, but its superintendent admitted that there was no objection to any reasonable means of conveyance which McDonald might employ. McDonald had been working for the company for 19 months previous to the accident. He was paid a regular weekly salary and a commission upon new business. The contract of employment between the defendants specified minutely the agent's duties; they are very numerous, and require much traveling about and contact with many persons every day. McDonald owned an automobile, which he had been driving for about 3 months before the accident. He stated that he had driven the car every day, and averaged about 100 miles a day with it. It is true he stated he did not use the automobile in his house-to-house canvass for the company, and it is obvious that this could not be done with convenience or satisfaction. However, his duties were not limited to such work, and the size of his district was such that it could not have been "covered" in a house-to-house canvass.

On the occasion of the accident, McDonald was going to Oakland to report at the office of the company there and attend a meeting of agents at about 9:30 o'clock in the morning. The accident occurred at the intersection of Pacific avenue and Ninth street, within the territory assigned to McDonald by the company. He stated that he passed over this intersection about 3 times a day; that on some days he might go over it 50 times in one day in his automobile; that he had a policy holder on each corner on each block there; that he had written the policies held by those persons and collected the premiums upon them. It is pertinent to remark here that the plaintiff testified that when he first saw McDonald's automobile it was standing opposite a little gate 75 south of the south side of Pacific avenue. At the time of the accident, McDonald had with him a satchel containing policies to be delivered to policy holders or to be returned to the company. These policies aggregated about \$40,000 worth of insurance. An officer of the company had ridden in McDonald's automobile with him, although McDonald stated he had not done so in the course of the company's business. McDonald

testified that the accident occurred in his territory, and that he traveled in that vicinity a great deal and took care of everything for the company in that region.

With these facts before us, it becomes unnecessary to discuss the cases cited by appellant upon the question of agency. Each case is decided upon its own peculiar facts, and is not helpful in a case presenting different facts. In the instant case the jury was instructed that, in determining whether a particular act is within the scope of a servant's employment, it should be determined whether or not the particular act was done in the transaction of the business in which the servant was employed, and, if it was, the servant was acting within the scope of the employment; that, in determining whether McDonald was acting within the course and scope of his employment for the company, the jury should take into consideration the nature of the employment, the nature of the business of the company, the hours of employment, the territory where the employment required him to be, and the duty, if any, which he was performing for the company at the time of the accident, and any and all circumstances disclosed by the evidence. The jury was further instructed that, in order to charge the insurance company, it was necessary for it to find that at the time of the accident McDonald was the agent of the company, was acting within the course and scope of his employment as such agent, and at that time was performing his duties in a manner necessary to his employment or in a manner reasonably contemplated by his employer. Repeatedly the court emphasized in its instructions to the jury that, in order to charge the insurance company, the jury must find that at the time of the alleged negligent act of McDonald he was performing his duties for the company in a manner necessary to the employment, or in a manner reasonably contemplated by the employer.

We think the jury was justified in concluding, as it did, that, at the time of the accident, McDonald was engaged in performing duties required by his contract of employment in a manner reasonably contemplated by the employer. The situation is distinguishable from one where the employee goes to work at a specified place at a specified time. Here McDonald was employed from 8 o'clock in the morning until 4 in the afternoon. His duties included numerous activities within a certain territory. He was not employed merely when he reached the Oakland office of the company for the meeting to be held at 9:30 o'clock that morning. He was employed to "cover" a specified territory, in which the accident happened, and to perform a multitude of duties therein. As a part of his duties, he was obliged to go to the meeting at the company's office. His duties were field duties. The place of his employment was within the territory comprising the cities of Alameda, Rich-

mond, Berkeley, San Leandro, Oakland, and Hayward, Cal. The place of his employment was not at the office of the company. This distinguishes this case from the authorities dealing with situations where an employee was on his way to a restricted, definite, exclusive business office or place of employment.

[2] As to the reasonableness of the means of travel employed by the agent, certainly an automobile was a reasonable means of conveyance in a district as extended as that assigned to McDonald, and the superintendent of the insurance company testified that the agent was permitted to select his own means of traveling about, and that the company objected to no reasonable means. The case of *Dishman v. Whitney*, 121 Wash. 157, 209 P. 12, 29 A. L. R. 460, presents facts closely analogous to those in the instant case: An employer was held liable for injuries occasioned by its salesman in driving his automobile. The court stated the facts with reference to the use of the automobile as follows:

"At the time Whitney was employed, nothing was said about transportation, or the means by which he should get about the city to see prospective customers. After he had been employed for a time, the evidence shows, or at least a reasonable inference from the evidence is to the effect, that one of the managers of the company, under whose supervision Whitney came, knew that he was using an automobile in his business. No objections were made thereto, and it appears to have been perfectly satisfactory that Whitney should use the car, or any other mode of travel that he might elect."

[3] In the instant case the question whether or not the agent was acting within the scope of his employment at the time of the accident, and the question whether or not it was reasonably contemplated that the agent should use an automobile in the performance of his duties, were questions of fact submitted to the jury under appropriate and explicit instructions, and with the determination of the jury upon these questions this court cannot interfere.

[4] It is contended by appellant insurance company that McDonald was not an agent, but an independent contractor. He was working under detailed regulations from his employer, and under an agreement to give his entire time between specified hours to carrying out the instructions of the company. He was paid a weekly salary, and could have been discharged at any time. In the case of *Pearson v. Potter Co.*, 10 Cal. App. 245, 101 P. 681, it was said:

"The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished; or, in other words, not only what shall be done, but how it shall be done."

The company's book of rules and regulations under which McDonald was working

prescribed with the utmost detail his duties, his aims, his purposes, and the various results to be accomplished in the performance of the same. The case of *Brown v. Industrial Accident Comm.*, 174 Cal. 457, 163 P. 664, seems closely in point. That case presented the question of whether a real estate salesman, engaged to sell property in a certain district, was an employee or independent contractor. It was held that he was an employee, and the determining factors there are largely present in the instant case. It was said:

"But Skidmore [the agent] did not contract to produce any particular result. The contract was fully performed on his part when he had devoted all his time to endeavoring to sell Brown's lots, irrespective of the number of sales, if any, which he might make. He could leave the service of the petitioner at any time without being charged with a breach of contract, and was liable to discharge as an employee. The results obtained, so far as Skidmore was concerned, were important merely as a means of ascertaining the amount of commissions he should receive, a circumstance which in itself does not create the relationship of an independent contractor. *Cameron v. Pillsbury et al.*, 173 Cal. 83, 159 P. 149. Nor could he delegate others to carry out the terms of the contract. It called for his personal services. Even his commissions were not to be transferred or assigned without Brown's 'written consent and approval.'"

[5] The case of *Lewis v. Natl. Cash Register Co.*, 84 N. J. Law, 598, 87 A. 345, is also helpful here. It holds that a salesman engaged in selling cash registers, under a contract to devote his entire time to that business, conform to the rules of the company, receive a percentage on sales, and pay his own expenses, was an employee and not an independent contractor. It was also held that, although not mentioned in the contract, the use of some means of conveyance was impliedly authorized, and that the selection of an automobile for this purpose was reasonable. Assuredly, in the instant case, some means of conveyance was impliedly authorized with the assignment of so large a district to McDonald. We think there is no merit in the position of the appellant Prudential Insurance Company upon this question.

[6, 7] It is contended that the court gave several instructions to the jury upon the question of principal and agent, which were inapplicable to the evidence, although correctly stating the law, and that these instructions tended to confuse the jury to the prejudice of appellants. We are unable to see how appellants could have been prejudiced by superfluous instructions correctly stating the law. Objection is also made to the action of the court in submitting to the jury the question of whether the relation of McDonald to the insurance company was that of employee or subcontractor. It is contended that it was

a question of law for the court. We think there are conflicting inferences to be drawn from some of the facts bearing upon this question, and there were many circumstances which entered into the conclusion to be reached which made the question a proper one for the jury.

[8] The only other contention is that the evidence does not justify a finding that McDonald was negligent. McDonald's automobile struck the rear and left-hand running board of plaintiff's car, causing it to overturn. There was testimony that McDonald was driving very rapidly, and sounded no warning, and that he skidded about 30 feet after the collision. We need not go into the evidence fully. There was evidence to justify the verdict, and the trial judge so concluded in denying a motion for a new trial.

The judgment is affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

75 Cal. App. 209

SCOUTEN v. HARDING et al. (Civ. 4035.)

(District Court of Appeal, Second District, Division 2. California. Nov. 28, 1925.)

Trial 419—Granting motion for nonsuit, after defendant's evidence had supplied defect in case, held error.

Where plaintiff, in action for labor and material in fumigating orange orchard, stated he had fumigated all trees in orchard, and defendant's motion for nonsuit on ground that amount of labor and material was not shown was denied, after which she introduced testimony showing there were 1,152 trees in the orchard, and was examined by plaintiff under Code of Civ. Proc. § 2055, *held* error to sustain motion for nonsuit at conclusion of testimony, since defendant, by her evidence, had supplied defect in plaintiff's case.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by F. R. Scouten against Hannah F. Harding and another. From a judgment of nonsuit, plaintiff appeals. Reversed and remanded, with instructions.

Wetherhorn, Hoyt & Jones, of Los Angeles, for appellant.

Ames & McFadden, of Anaheim, for respondents.

FINLAYSON, P. J. This is an appeal from a judgment of nonsuit in an action brought by plaintiff to recover the contract price of certain labor performed and material furnished by him in fumigating an orange orchard owned by the defendant Hannah F. Harding, wife of the defendant D. W. Harding. Throughout this opinion the wife will be referred to as the defendant.

It is alleged in the complaint that plaintiff

and defendant entered into a contract whereby the former agreed to fumigate defendant's orange orchard in Orange county for the agreed price of 16 cents per tree and 75 cents per pound of liquid gas used in the process; that plaintiff fumigated 1,181 trees, and used 294½ pounds of liquid gas; that the agreed price for the labor thus performed (1,181 trees at 16 cents per tree) is \$188.96, and that the agreed price for the material used (294½ pounds of liquid gas at 75 cents per pound) is \$220.50, making a total of \$409.46, no part of which has been paid. The answer, while admitting that defendant employed plaintiff to fumigate her orchard, denies that the contract was as alleged in the complaint or that plaintiff performed labor or furnished material as alleged by him, and alleges, as an affirmative defense, that the work was so negligently performed that defendant suffered damage to her orchard in a stated sum.

Much of the testimony of plaintiff's witnesses was stricken out by the court, but that which remained in the record shows that plaintiff, as a part of his case, proved by the manager of his business in Orange county, one George E. White, that in the month of July, 1920, he entered into an agreement with defendant whereby it was agreed that plaintiff should fumigate the orchard upon the terms and conditions alleged in the complaint. Plaintiff also proved by his foreman, one Eli Haskell, who had charge of the crew which did the work, that he and the men under him fumigated all of the trees in defendant's orchard. Haskell identified a certain chart, referred to by him as the "dope sheet," most of the entries upon which he testified were in his handwriting. These entries, however, are not self-explanatory; that is to say, only an expert familiar with the meaning of the notations on the chart could decipher them so as to tell how many trees were actually fumigated or how much liquid gas was actually used. Such explanatory evidence was introduced by plaintiff, but later was stricken out on motion of defendant. At the conclusion of plaintiff's evidence defendant moved for a nonsuit upon the ground, among others, that there was no evidence showing the amount of liquid gas furnished or the amount of labor performed. The motion was denied, and defendant thereupon introduced the evidence of the man who had charge of her orchard at the time when the fumigating was done—one Albert E. Clark—who testified, among other things, that the orchard consisted of two adjacent groves; that in one of these groves there were 16 rows of orange trees of 17 trees to

the row, and in the other grove 16 rows of orange trees of 54 trees to the row, or a total of 1,136 trees, and that, in addition, there was one row of 16 very young trees—making a total of 1,152 trees in the orchard. At the close of Clark's testimony plaintiff was permitted to reopen his case and to put in further testimony by his manager White, as well as the testimony of the defendant, whom plaintiff examined under the provisions of section 2055 of the Code of Civil Procedure. At the conclusion of this testimony defendant again moved for a nonsuit upon the ground that "plaintiff has not presented a prima facie case," and that "he has not proven the measure [sic] of damages." The motion was granted.

We shall not pause to consider appellant's objection that the motion for nonsuit fails to state any ground therefor. We are satisfied that, had the motion been entirely sufficient as to form, there nevertheless would have been no ground for a nonsuit of plaintiff's entire case.

It is a well-settled rule that where, after an improper denial of a motion for a nonsuit, the defendant introduces evidence which supplies the defect in plaintiff's case, the ground for any subsequent motion for a nonsuit is removed. Here the evidence introduced by appellant in support of his case showed that, through the manager of his business in Orange county, he had entered into a contract with respondent to fumigate the latter's orchard; that under the terms of this contract respondent was to pay appellant for his labor at the rate of 16 cents per tree; and that *all* the trees in respondent's orchard were actually fumigated by appellant's foreman and the crew of men working under him. To show the precise amount to which appellant was entitled for the labor thus performed by him, only one other factor remained to be proved, viz. the number of trees in the orchard. If the evidence deduced by appellant was deficient in this respect, the deficiency was supplied by respondent, whose witness Clark testified that there was a total of 1,152 trees in the orchard. Appellant, therefore, made out a prima facie case for at least \$184.32, and this irrespective of whether the evidence was or was not sufficient to entitle him to recover a definite sum for the liquid gas used by him.

The judgment is reversed and the cause is remanded, with instructions to retry all of the issues presented by the pleadings.

We concur: WORKS, J.; CRAIG, J.

75 Cal. App. 292

(242 P.)

Ex parte O'CONNELL. (Civ. 1299.)

(District Court of Appeal, First District, Division 1, California. Nov. 24, 1925.)

1. Divorce ⇨182—Power of court to punish for contempt pending appeal depended on whether injunction was mandatory or prohibitory.

If injunction in divorce proceeding restraining husband from entering parties' dwelling house was mandatory, court cannot punish as a contempt failure to comply with its terms pending appeal, but, if it was prohibitory, enforcement thereof was at all times within court's jurisdiction.

2. Divorce ⇨182—Injunction in divorce proceedings held mandatory, and husband not in contempt for violation thereof pending appeal.

Injunction pendente lite in divorce proceedings in so far as it restrained husband from occupying premises of which both parties had possession, was mandatory, and hence husband was not in contempt by continuing to occupy premises pending appeal.

3. Divorce ⇨182—Wife held not entitled to temporary exclusive possession of dwelling house because holding record title thereto.

In divorce proceeding, wife held not entitled to exclusive possession of dwelling house pending appeal from order enjoining husband from occupying it because she held deed from the husband, where such title had been placed in issue, and husband was holding joint possession of property under marital relation.

Application by Daniel O'Connell for a writ of habeas corpus, directed to the sheriff of the City and County of San Francisco, to secure his release from a judgment of contempt of court. Writ granted.

M. H. Hernan, of San Francisco, for petitioner.

Keyes & Erskine and R. M. J. Armstrong, all of San Francisco, for respondent Sheriff of City and County of San Francisco.

KNIGHT, J. The petitioner, Daniel O'Connell, by virtue of a writ of injunction issued in a divorce proceeding to which he was a party, was ordered excluded, during the pendency of said action, from the dwelling house theretofore occupied by him with his wife under the marital relation, and, for violating said injunction, was adjudged guilty of contempt of court and sentenced to pay a fine and to be imprisoned. He now seeks release on habeas corpus.

The circumstances leading up to the contempt proceedings are as follows: On June 2, 1923, petitioner, upon his cross-complaint, obtained an interlocutory judgment of divorce from Mrs. O'Connell, whereby the property in question was assigned to him as his sole and separate property. Later, by a decree in equity, rendered in a suit commenced

by Mrs. O'Connell in June, 1925, said interlocutory judgment was annulled, upon the ground that said interlocutory judgment had been obtained through extrinsic fraud. Thereupon Mrs. O'Connell, upon notice to petitioner, applied for, and was granted, in the divorce proceeding, said writ of injunction, enjoining petitioner, during the pendency of said action, "from entering the dwelling house now occupied by the said plaintiff and know[n] and designated as No. 900 Balboa street in the city and county of San Francisco, state of California, and from living in said dwelling house during the pendency of said action, and from annoying or harassing the said plaintiff in any way during the pendency of said action, and from attempting to cause or causing or ordering or employing any person whatsoever to alter, repair, or do any work whatsoever on said dwelling during the pendency of said action." Petitioner perfected an appeal from the order granting said injunction, and filed a stay bond, but nevertheless was thereafter adjudged guilty of contempt for having continued in the occupation of the premises in violation of the injunction.

The matter of the decree entered in the suit in equity is important in the instant proceeding only for the purpose of establishing the nullification of the interlocutory judgment of divorce, and in this respect it may be conceded that said decree constitutes a self-executing judgment, requiring no further process of enforcement, and became effective immediately; that, until declared void or reversed on appeal, said decree rendered nugatory for all purposes said interlocutory judgment; and, furthermore, that the operation of said decree in equity, as such self-executing judgment, was not stayed by the appeal therefrom so as to revive, pending appeal, the force and effect of said interlocutory judgment or any of the rights granted thereunder. *Tyler v. Presley*, 72 Cal. 290, 13 P. 856; *Estate of Crozier*, 65 Cal. 332, 4 P. 109; *Bateman v. Superior Court*, 139 Cal. 140, 72 P. 922; *Foster v. Superior Court*, 115 Cal. 279, 47 P. 58.

[1] The controlling question presented for determination in this particular proceeding, however, relates to said writ of injunction, and not to said decree in equity. The question is whether said writ of injunction is mandatory or prohibitory in its nature and effect. If it be mandatory, its operation was stayed by appeal, and it was beyond the power of the court to punish as a contempt failure to comply with its mandatory terms pending appeal; but, if it be prohibitory, its operation could not be stayed by appeal, and the enforcement thereof was at all times within the jurisdiction of the court. *Clute v. Superior Court*, 155 Cal. 15, 99 P. 362, 132 Am. St. Rep. 54; *Mark v. Superior Court*, 129

Cal. 1, 61 P. 436; *Foster v. Superior Court*, 115 Cal. 279, 47 P. 58; *Schwarz v. Superior Court*, 111 Cal. 106, 43 P. 580.

In the case of *Clute v. Superior Court*, supra, the board of directors of a hotel corporation voted to remove Clute from the office of treasurer and the position of manager, and, upon his refusal to turn over possession of the property of said company, including the books, keys, and money, commenced suit to compel him to do so. A temporary writ of injunction was obtained enjoining Clute from collecting and disbursing any money belonging to said company, also from representing himself as manager and treasurer, and "from interfering with, or directing, or attempting to direct or control, the employees of said corporation." Clute's answer to the complaint and the showing made by him in response to the application for the injunction put in issue the right of the persons seeking his removal to act as a board of directors. From the order granting said writ of injunction Clute took an appeal, and thereafter prevented an employee of said corporation from entering the hotel office and taking possession of the keys and books, for which he was adjudged guilty of contempt. Upon application by Clute for a writ of review the Supreme Court said:

"Upon the question whether that injunction was mandatory or purely prohibitory the present application depends. For it is thoroughly settled that, while an injunction which merely has the effect of preserving the subject of the litigation in statu quo is not suspended by an appeal (*Merced Min. Co. v. Fremont*, 7 Cal. 130; *Heinlen v. Cross*, 63 Cal. 44; *Swift v. Shepard*, 64 Cal. 423 [1 P. 493]; *Dewey v. Superior Court*, 81 Cal. 64, 22 P. 333; *Rogers v. Superior Court*, 126 Cal. 183 [58 P. 452]), a mandatory injunction, i. e., one which compels affirmative action by the defendant, cannot be enforced pending a duly perfected appeal (*Foster v. Superior Court*, 115 Cal. 279 [47 P. 58]; *Mark v. Superior Court*, 129 Cal. 1 [61 P. 436]; *Schwarz v. Superior Court*, 111 Cal. 106 [43 P. 580]; *Stewart v. Superior Court*, 100 Cal. 543 [35 P. 156, 563].) If an injunction, though couched in terms of prohibition, is mandatory in effect, a proceeding by the court issuing it to punish a violation as a contempt is in the nature of process for the enforcement of the affirmative feature of the writ. It may be likened to an execution, and, if the enforcement of the injunction has been stayed by an appeal, a writ of supersedeas may properly be issued by the appellate court to arrest further action by the court below. *Tyler v. Presley*, 72 Cal. 290 (13 P. 856), and *Dulin v. Pacific W. & C. Co.*, 98 Cal. 304 (33 P. 123), relied on by respondent, decide nothing in conflict with this view. Both cases dealt with judgments which were operative without any action by the court in which they had been rendered. All that was held was that supersedeas was not applicable to such self-executing judgments. At the hearing of the present application, all the allegations of the petition were admitted to be true. Upon the facts set forth we think it clear that the injunction in question

was mandatory. If Clute was in the actual possession of the hotel and the personal property in it, an order punishing him for preventing another person from entering and taking charge of the books, keys, and other property could have no other purpose or effect than to compel him to turn over his possession to such other, or at least to surrender his theretofore exclusive possession."

Later on in the opinion, in discussing the claim made by Clute that the parties seeking to oust him were not the directors of said company, the court said:

"If his contention was correct, the effect of the order appealed from was to require the possession of the corporate property to be transferred from the corporation itself to strangers. The status of the parties, at the time the injunction was issued, was this: Clute, claiming to hold on behalf of the corporation, was resisting a right of entry claimed by persons who, as he asserted, had no authority from the corporation to take possession. An order turning over the control of the property from him to the other claimants would certainly, if executed, operate to change that status. The injunction was, therefore, mandatory in effect, and this regardless of the fact that, in law, the corporation rather than Clute, may be said to have been in possession. It is, therefore, unimportant that the court inserted in its order of commitment a finding that Clute was not in possession of the hotel or its contents. For the purpose of determining the effect of this injunction as mandatory or prohibitory, we must consider the result of an enforcement of the writ on the position of the defendant, as asserted in the court below. If the injunction compels him affirmatively to surrender a position which he holds, and which, upon the facts alleged by him, he is entitled to hold, it is mandatory."

These same legal principles are found in the case of *Mark v. Superior Court*, 129 Cal. 1, 61 P. 436, wherein some of the earlier cases upon this subject are reviewed, and it was there said:

"An injunction, though restrictive in form, if it have the effect to compel the performance of a substantive act, is mandatory and necessarily contemplates a change in the relative positions or rights of the parties from those existing at the time the injunction is granted or the decree is entered."

[2] In the instant case, upon the rendition of said decree in equity, the parties to said divorce proceeding, by operation of law as well as by the express declaration of said decree itself, were restored to the same position as if said interlocutory judgment had never been entered. In reference to the question of the ownership of said property said decree in equity specifically adjudged "that nothing herein shall be construed as an adjudication by the court of the title or ownership of the real property described in the complaint on file herein." It follows that the effect of said decree was merely to again place said divorce action at issue, *Mrs. O'Con-*

nell claiming, in her pleadings therein, absolute ownership in said property by virtue of a deed to her from petitioner, and petitioner alleging in his pleadings that said property constituted a homestead, and that Mrs. O'Connell's title was merely that of a trustee; and both parties were in actual possession of said property. In that state of the record the plain effect of said injunction pendente lite, in relation to the occupancy of said premises was to oust petitioner from the possession which he theretofore held, and to compel him to turn over to the other party to the litigation, prior to final determination of their respective rights in said property, the sole and exclusive possession thereof. Manifestly, said injunction, in the respect noted, did not operate merely to preserve in statu quo the subject of the litigation, but went further to the extent of attempting to change the status of the parties in relation to the possession of the property in dispute. Therefore, in view of the authorities above cited, it must be held that, in so far as said injunction sought to exclude petitioner from said premises, it was mandatory in its effect, and consequently its operation was stayed by the appeal therefrom.

[3] The contention made on behalf of Mrs. O'Connell that she is entitled to the temporary exclusive possession of said premises on account of the fact that she holds record title thereto under a deed from petitioner is untenable, for the reason that the validity of her title under that deed has been placed in issue by petitioner's cross-complaint, and it is undisputed, as a matter of fact, that up to the time of the issuance of the order of exclusion he was holding joint possession of said property under the marital relation, and, therefore, entitled to retain such possession until the appeal from said order is determined. *Clute v. Superior Court*, supra. We are not unmindful that it has been held in this state that a wife in an ejectment suit may sue her husband to recover possession of property belonging to her separate estate and for damages for withholding the possession thereof. *McDuff v. McDuff*, 45 Cal. App. 53, 187 P. 37. But the suit here, out of which this injunction issued, is not one in ejectment based upon said deed, and, moreover, is readily distinguishable, by the facts, from the case last above cited, because in the decision in that case it is expressly stated that—

"At the time of the commencement of this action the house was not the family dwelling place. The parties were living separate and apart * * * the husband was not asserting his personal marital right of living in the family home [under section 157 of the Civil Code, which provides in part that neither the husband nor the wife can be excluded from the other's dwelling], but was holding possession of the wife's separate property adversely to her as the owner."

Furthermore, in the case last cited the question of the exclusion of the husband from the property pending trial and prior to final determination of the action was not involved. Whether or not, in view of the provision of said section 157 of the Civil Code above adverted to, the court in the instant proceeding may in any event, under the circumstances present, exclude petitioner from the dwelling house, prior to final determination of the action, is a question that is not before us in this proceeding; it being the subject of petitioner's appeal from the order granting said injunction.

The remaining features of said injunction, wherein petitioner was enjoined from harassing and annoying or otherwise interfering with the person of Mrs. O'Connell, and from making any alterations in said premises, are, we believe, purely prohibitive in their nature, and therefore self-executing, and not stayed by appeal. Those features become immaterial here, however, owing to the fact that the act for which petitioner was adjudged guilty of contempt was his refusal to discontinue in the occupation of the premises, no point being made on behalf of Mrs. O'Connell of any other contemptuous act.

Having reached the conclusion that the appeal from the order granting said injunction pendente lite stayed the operation of that injunction in so far as it attempted to compel petitioner to surrender the possession theretofore held by him, it becomes unnecessary to consider the other points raised by petitioner in this proceeding.

The writ is granted, and the petitioner is discharged from custody.

We concur: TYLER, P. J.; CASHIN, J.

75 Cal. App. 359

DAVIS v. YOUNG et al. (Civ. 2957.)

(District Court of Appeal, Third District, California. Nov. 27, 1925.)

Automobiles ⇐381—Agreement by conditional vendee held not to continue lien for repairs after surrender of possession by lienor.

Agreement by conditional vendee of truck with one making repairs, that he would either pay for repairs or return truck within a few days, did not, under Civ. Code, § 2913, continue lien given by section 3051, since it was not made with the owner.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by H. H. Davis against Chas. C. Young and another. Judgment for defendants, and plaintiff appeals. Reversed.

Loren A. Butts, of Fresno, for appellant.
Edward Bickmore and R. R. Sischo, both of Merced, for respondents.

PLUMMER, J. Plaintiff began this action in claim and delivery to recover possession of a certain Dodge truck. Judgment was entered for the defendants, and the plaintiff appeals. The plaintiff in his motion for a new trial and also upon appeal, contends that the evidence is insufficient to support the findings. The correctness of the judgment depends upon whether the defendants, at the time of the prosecution of this action, had a valid lien upon the truck in question for repairs made thereon, based upon the finding that such lien existed.

The evidence shows, and the court found as a matter of fact, that the plaintiff is, and at all the times mentioned in the complaint was, the owner of the truck involved in this action. The transcript further shows that the plaintiff while the owner of said truck entered into a conditional sales contract with one Jack Hirons. The conditional contract reserved and retained title in the conditional vendor until the truck should have been fully paid for. In the month of July, 1924, Mr. Hirons took the truck to the garage belonging to the defendants, or operated by the defendants, in the town of Los Banos, and there had certain repairs made upon the truck to the value of \$207.25. The truck, after the repairs mentioned, was returned to the possession of the said Hirons, and, the contract to purchase not having been complied with, on or about the 16th day of August, 1924, the plaintiff took possession of the truck in question. Thereafter the truck was driven by a driver by the name of Beck. On or about the 20th day of August, 1924, the driver Beck drove said truck into the alley adjoining the garage operated by the defendants for the purpose of having some adjustment made to the carburetor on the truck. It further appears from the transcript that, after leaving the truck in the alley and requesting adjustment to be made as above mentioned, Mr. Beck went away and was gone a short period of time. Upon returning, he found that the truck had been driven into the garage belonging to the defendants; that nothing had been done about adjusting the carburetor, but was told by the defendants that they were going to hold possession of the truck. The testimony also shows that between the time the defendants did the work upon the truck at the request of Mr. Hirons, and before retaking possession thereof as just stated, a period of between three and four weeks elapsed, during which period the truck was being constantly used and driven on the highways between Fresno and Los Banos.

The defendants found their claim of lien upon sections 3051 and 2913 of the Civil Code, section 3051 providing that any one who makes repairs upon personal property at the request of the legal possessor thereof has a lien dependent upon possession for such repairs. Section 3051a of the Civil Code limits the amount of such lien to the sum of \$100,

unless previous notice by personal service or registered letter has been given to the holder of the legal title to the property. Section 2913 reads:

"The voluntary restoration of property to its owner by the holder of a lien thereon dependent upon possession extinguishes the lien as to such property, unless otherwise agreed by the parties, and extinguishes it, notwithstanding any such agreement, as to creditors of the owner and persons, subsequently acquiring a title to the property, or a lien thereon, in good faith, and for value."

There is no conflict in the testimony as to the fact that, after the repairs were made to the truck in question in the month of July, it was restored to the possession of Jack Hirons, and that the truck was thereafter used as above stated. In founding their claim upon section 2913 of the Civil Code, the defendants rely upon the testimony of Sischo and Watkins. The witness Sischo testified as follows:

"Q. Do you remember the occasion of the truck being taken away, after this new motor block was put in? A. Well, the morning before that, I think it was, the morning prior to Hirons taking the truck away, he came in and wanted to stand me off, wanted me to charge these parts and let him have the truck and charge the parts to him; I told him that Young had the truck back there, and I said, 'As far as I am concerned, I am going to have the money for these parts, I am going to be paid for these parts;' so he started back in the shop to see Young, and I went back there with him, and there was a conversation there between the three of us there; and he said he wanted time on the parts and for the labor, claiming he had no money, and wanted to take the truck. 'No,' I said, 'as far as I am concerned, I am going to have either the money or good security,' and then he went out of the place. * * * A. He said he did not have the money to pay for the repairs of the truck at this particular time, and so I told Mr. Young, 'As far as I am concerned, if you want to stand Mr. Hirons off for this truck, I will just charge the parts to you,' so Mr. Hirons told Cy that he

"Mr. Bickmore. Q. What do you mean by 'Cy'? A. Cy Young told him that he—Hirons said that he had a lot of soda water he wanted to deliver and in three or four days would get the money, would have it made in that time, by going around out in the country here with the soda; and he said, 'I have a lot of stuff to deliver, if I can deliver I can get the money and pay you,' and he said, 'If you let me have it for three or four days, I will get the money, and, if I do not, I will bring the truck back in any time that you say and turn the motor over to you;' and then Mr. Young agreed to let him have it, and I charged the parts direct to Mr. Young.

"Q. Do you know how much the sum total of these parts and the work amounted to that was charged on this motor? A. Something over \$200.

"Q. You do not know the exact amount? A. No, sir; something over \$200.

"The Court. That is Young's bill? A. For the parts and labor,

"Q. You say you did not see this man who preceded you on the stand, that day? A. No, sir; I did not. I was not there at the time the truck was taken out.

"Q. Was anything said between Young and Hirons as to what was to be done with the truck in case the bill was not paid? A. He said he was going around in the country and if he did not pay he would return it."

Following is the testimony of the witness Watkins:

"Q. Were you present at any conversation in the shop when Charles Young, known as Cy Young, and Hirons were present, and they had a conversation about the truck? A. Yes, sir. * * *

"Q. And what was said between them with reference to this truck? A. Well, I was working on a Hudson right by the door, and they come back, and was standing right there near where I was working on the Hudson, and, of course, I did not hear everything that was said. I know that Hirons wanted his truck, and we had done little jobs on it before, but he wanted to take it away the same as he had done before and pay for it a few days afterwards, and I heard Mr. Sischo say, well, he wanted his money, he did not care what was done, and Mr. Hirons was working in the soda works, and I told him that he needed the car to make delivery of the soda through the country there, and he said that he would get the money from the soda and would come in and pay the bill or return the truck, and so they let him have the truck with the understanding that he could have at least three or four days until he got this stuff delivered and he would have the money and if not he would bring the truck back to them to keep until he got the money and paid the bill."

This testimony shows beyond any controversy that, whatever the effect of the agreement or conversation had with Mr. Hirons at the time of the delivery of the truck to him after the making of the repairs by the defendants, the delivery was not to the owner of the truck, and therefore section 2913, Civil Code, relied upon by respondents, has no application whatever. The record does not show that any notice was ever given to the owner, or that the plaintiff, the owner of the truck, had any knowledge or notice of the repair being made upon the truck, or that the defendants had any lien, or made any claim of lien upon the truck until on or about the 20th day of August, 1924, when they repossessed themselves of the truck, after the plaintiff had exercised his option in taking possession of the truck from the conditional purchaser, Jack Hirons, on account of Hirons's failure to make the payments specified to be made in the conditional sales contract. It will be noticed also that the conversation held by the two witnesses between Mr. Hirons and the defendants did not, and does not, purport to continue any lien, but at its best constitutes only a promise on the part of Hirons to pay for the repairs, and, if he did not pay for the repairs, to bring the truck

back again, but, as said above, the effect of the conversation as to whether it does, or does not amount to a continuance of the lien is wholly immaterial, for the simple reason that it was not made with the owner of the truck. In the case of *Goodman v. Cal. Trust Co.*, 62 Cal. App. 702, 217 P. 1078, this court, in the first appellate district, had presented to it for consideration a written agreement between a repairman and a conditional vendee, whereby the conditional vendee purported to transfer his interest in a certain automobile to the repairman, and it was argued that the agreement preserved the lien under section 2913 of the Civil Code. The court said:

"However, Green and Gohl permitted Brian to take the automobile out of their possession after he had signed an agreement transferring all his right, title, and interest in the same to them for their protection until the repair bill should be paid. We shall pass the question as to the sufficiency of this writing to retain the lien by evidencing an agreement of the parties that it should continue in effect, because, even though this writing be held sufficient to evidence such an intention upon the part of the parties thereto, nevertheless it would not have that effect as to the bank, the real defendant here. Section 2913, Civ. Code; *Thourot v. Delahaya* [Delahaye] *Import Co.*, 69 Misc. Rep. 351, 125 N. Y. S. 827; *Rehm v. Viall*, 185 Ill. App. 425; *McFarland v. Wheeler*, 26 Wend. (N. Y.) 467. We may disregard, therefore, that writing."

The bank in that case was the real owner, and, as said by the court in that case, the agreement was not with the owner. It is true that the case we have referred to was really decided upon other grounds, but the quotation contains, we think, a correct statement of the law. "The lien having once been lost by surrender of possession cannot be revived by any subsequently reacquired possession." 19 Am. & Eng. Ency. of Law, p. 28, and authorities there cited. The authorities there cited also show that delivery of possession is a surrender of the lien, unless limited by the section of the Code to which we have referred.

It is further argued by respondents that a conversation between counsel, had at the time of the trial, constituted a stipulation that judgment might be entered for the defendants for the amount claimed, irrespective of the provisions of section 3051a, Civil Code, in the event that a valid lien was established, but, owing to the unavoidable conclusion that no lien has been established in this case, we deem it unnecessary to discuss such conversation for the purpose of determining whether it did or did not amount to a stipulation.

Being of the opinion that the testimony is wholly insufficient to support the finding that the owner of the truck had agreed to a continuance of the lien, and that whatever conversation was had concerning the same was with a person who was not the owner of the

truck, it follows that the judgment must be reversed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

75 Cal. App. 205

FLETCHER v. LLOYD et al. (Civ. 5248.)

(District Court of Appeal, First District, Division 2, California. Nov. 16, 1925. Hearing Denied by Supreme Court Jan. 11, 1926.)

1. Trial 404(4)—Findings made held to imply general finding that two of three defendants were not negligent.

Findings that all allegations of complaint and answers of two defendants were true, except as specifically found otherwise, and that plaintiff's injury was caused by automobile driven by third defendant, held to imply general finding, not contradicted by other findings, that first two defendants were not negligent.

2. Appeal and error 1170(10)—Findings defective in form, but supported by evidence, held not reversible error.

That findings in favor of two of three defendants were defective held not prejudicial to plaintiff, and hence not reversible error, in view of Const. art. 6, § 4½, where there was abundant evidence to support them.

3. Appeal and error 1010(1)—Judgment on fact finding supported by any evidence not disturbed.

Judgment on finding for defendants and against plaintiff on issue of negligence may not be disturbed, if finding is supported by any evidence in record.

4. Automobiles 244(2)—Findings on issue of negligence of drivers of colliding automobiles injuring pedestrian held warranted by evidence.

In action for injuries to pedestrian struck by one of two colliding automobiles, evidence held to warrant finding that driver of automobile which struck plaintiff was negligent in passing other automobile, and that driver and owner of latter were not negligent.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Annie K. Fletcher against Charles Lloyd, H. J. Rumsey, and another. From the judgment, plaintiff appeals. Affirmed.

Kimball Fletcher, of Los Angeles, for appellant.

Haas & Dunnigan, of Los Angeles, for respondents.

STURTEVANT, J. The plaintiff commenced an action against the defendants to recover a judgment compensating her for personal injuries sustained in an automobile accident. The defendants answered, and a trial was had before the trial judge sitting without a jury. The trial court made find-

ings against one of the defendants and in favor of the other defendants. The plaintiff appealed from the judgment in favor of the defendants Charles Lloyd and H. J. Rumsey. The defendant W. F. Lloyd has appealed from the judgment in favor of the plaintiff, but on application of the parties the appeal of W. F. Lloyd has been dismissed.

On the afternoon of the 19th day of August, 1920, the plaintiff stood on the south side of West Sixth street near the southeast corner of that street and Park View street, Los Angeles. While standing there she was struck and injured by an automobile approaching from the west. In her complaint, acting upon the theory that the accident to her arose by reason of a negligent collision of two or more automobiles in the street, the plaintiff included as defendants W. F. Lloyd, the owner and driver of the automobile that actually struck her, H. J. Rumsey, the driver of the other automobile, and Charles Lloyd, who owned that machine, but was not riding in it at the time of the accident. The trial court made findings purporting to be in favor of Charles Lloyd and H. J. Rumsey. The appellant attacks those findings as not being supported by the evidence, and claims that the findings should have been made in favor of the plaintiff. In making this attack the appellant claims that the form of the purported findings is such that they are not, as a matter of law, any findings. In the second place, the appellant contends that, if it be conceded that the purported findings are in legal effect findings, then and in that event they are not supported by the evidence. The fourth finding, in so far as pertinent, is as follows:

"That all of the allegations of plaintiff's complaint are true, except as herein specifically found otherwise; * * * that all of the allegations and denials of the answer of the defendant Charles Lloyd are true, except as herein specifically found otherwise; that all of the allegations and denials in the answer of the defendant H. J. Rumsey are true, except as herein specifically found otherwise."

The second finding is as follows:

"That on the 19th day of August, 1920, plaintiff was standing at or near the curb line on the southerly side of West Sixth street, city of Los Angeles, county of Los Angeles, state of California, at a point between the intersections of Park View with said West Sixth street, that defendant W. F. Lloyd drove an automobile in an easterly direction upon said West Sixth street, recklessly, negligently, wantonly, and carelessly, and caused said automobile to collide with the automobile owned by the defendant Charles Lloyd, and said defendant W. F. Lloyd continued to operate said automobile recklessly, negligently, wantonly, and carelessly, and caused said automobile to strike the plaintiff without warning, and hurl said plaintiff violently to the ground, thereby causing plaintiff certain bodily injuries, to wit, two lacerated

wounds on right leg, one lacerated wound on the left leg, a T fracture into the joint of the right tibia, a contusion upon the head, a slight concussion of the brain, and a sprained right wrist, and tore and destroyed the dress, petticoat, and stockings worn by the plaintiff, and that said accident and injuries were in no wise caused by any negligence, recklessness, or want of care on the part of plaintiff."

Other findings were addressed to the issues made by the complaint and the answer of the defendant Charles Lloyd and the defendant W. F. Lloyd and the defendant H. J. Rumsey.

The third paragraph of the first cause of action in plaintiff's complaint charged as follows:

"That on the 19th day of August, 1920, plaintiff was standing at or near the curb line on the southerly side of West Sixth street in the city of Los Angeles, county of Los Angeles, state of California, at a point between the intersections of Park View street with said West Sixth street; that plaintiff is informed and believes, and therefore alleges, that the defendants Charles Lloyd and John Doe drove one automobile and the defendant W. F. Lloyd drove another automobile in an easterly direction upon said West Sixth street, so recklessly, negligently, wantonly, and carelessly as to cause said automobiles to collide, and said defendants, and each of them, continued to operate said automobiles so recklessly, negligently, wantonly, and carelessly as to cause one of the said automobiles to strike the plaintiff without warning, and hurl said plaintiff violently to the ground, causing the plaintiff the bodily injuries hereinafter described; that said accident was in no wise caused by any negligence, carelessness, or want of care on the part of plaintiff."

That cause of action deals with the personal injuries suffered by the plaintiff, and the second cause of action deals with the injuries to the plaintiff's wearing apparel. In the second cause of action the charging portion is framed in the same language. In his answer to the complaint Charles Lloyd pleaded:

"For answer to paragraph III, this defendant denies that either he or the defendant John Doe drove the automobile of this defendant, or that the automobile of this defendant was, at the time and place referred to in said paragraph, driven in any reckless or negligent manner, or in any wanton or careless manner, or so as to cause said or any automobile to collide with said or any automobile, or either automobile, or that this defendant or the defendant John Doe continued to or ever did operate the automobile of this defendant in so or any reckless or negligent or wanton or careless manner, or so as to cause the said automobiles, or either of them, or any other automobile to strike the plaintiff, either without warning or otherwise, or at all, or to hurl said plaintiff to the ground, or in any manner whatsoever, or causing plaintiff's bodily injuries, referred to in plaintiff's complaint, or otherwise; and this defendant further denies that said accident was not caused by an act of negligence and careless-

ness and want of care on the part of the plaintiff."

The same defense was interposed to the charge contained in the second count. In his answer to the first cause of action the defendant Rumsey pleaded as follows:

"This defendant, answering paragraph III of said complaint, denies that on or about the 19th day of August, 1920, or at any other time, that this defendant drove the automobile of Charles Lloyd therein referred to either recklessly or negligently, or that by reason of the driving of said car, or the manner of driving said car, said car was caused to collide with any other automobile, or that this defendant then or there, or at all, operated the automobile of said defendant Charles Lloyd, in any wanton or reckless or negligent or careless manner, or so as to cause one or either of said automobiles to strike the plaintiff, either violently or otherwise, or at all, or that the automobile of said Charles Lloyd, driven by this defendant, did strike the plaintiff, and denies that said accident was in no wise caused by the negligence of the plaintiff."

To the charging part contained in the second cause of action he pleaded the same defense.

[1] Not expressing any approval whatever of the form in which the findings are drawn, nevertheless we think that no serious difficulty is presented in ascertaining what was in the court's mind. In other words, that the findings clearly indicate the facts as found by the trial court. The trial court found:

"That all of the allegations of plaintiff's complaint are true, except as herein specifically found otherwise. * * *"

Then in finding No. 2 the court found specifically that the plaintiff's injury was caused by the automobile driven by W. F. Lloyd. As the plaintiff had alleged that her injury was caused by the joint negligence of W. F. Lloyd, Charles Lloyd, and H. J. Rumsey, we have a specific finding otherwise in so far as the acts of the last two defendants are concerned. Furthermore, as to each of those two defendants the trial court found:

"That all of the allegations and denials of the answer of the defendant — are true except as herein specifically found otherwise. * * *"

[2] As each of those defendants had entered a specific denial of any negligence, we turn again to the specific findings, and we look in vain for any finding to the effect that either of the last-named defendants was guilty of negligence. It follows that the trial court made a general finding that each of those two defendants was not negligent, and that there is nothing in the findings contradictory thereof. The appellant cites and relies upon *Harlan v. Ely*, 55 Cal. 340; *Goodnow v. Griswold*, 68 Cal. 599, 9 P. 837;

O'Brien v. O'Brien, 124 Cal. 422, 57 P. 225. Conceding, without deciding, that before November 3, 1914, those authorities would support the point of this appellant, since the amendment to section 4½ of article 6 of the Constitution, on the date named, we think, under the facts of this case, which we have already stated, and the facts which will be stated in reference to the next point, that the contention of the appellant cannot be sustained. We are led to that conclusion because the error, if it was an error, was certainly not prejudicial to the appellant when the evidence is taken into consideration.

[3] The second contention made by the appellant is to the effect that, if we concede that the trial court has made a finding in legal form in favor of the respondents and against the plaintiff on the issue of negligence, nevertheless the case must be reversed because such finding is not supported by the evidence. Of course, if there is any evidence in the record which would support such a finding, then and in that event this court may not disturb the judgment. Therefore we will turn to and consider that portion of the evidence which was introduced to support the finding.

[4] The nature of the appellant's injuries was such that at the time of the trial she did not purport to give testimony as to how the accident occurred. Alice K. Mortimer accompanied the plaintiff at the time of the accident. Her deposition was taken and was introduced in evidence. The plaintiff called Mr. W. F. Lloyd and examined him as a witness under section 2055, Code of Civil Procedure. If that were all the evidence in the case, it might be conceded that there was some evidence charging the respondents with responsibility to the plaintiff. But there was other evidence introduced. Mr. Tyler testified that immediately before the accident he had parked his car on the same side of the street some 50 feet west of where the plaintiff stood, and that he was in his car in the act of starting to move forward. He stated that before moving he looked back and saw a car coming from the rear. It was moving a mile and a half an hour. It was not as close to the curb as the witness' car. It was a Marmon car, and was occupied by one person. He further testified that the car was moving just a little out as if it was turning out to go around the witness, and that it was about 10 or 12 feet back. Continuing, the witness stated that, as the Marmon car passed, it collided with his car, and that in the same instant the car driven by W. F. Lloyd passed in front of both cars and up to the curb. The Marmon car merely hit the bumper or left rear fender or the aluminum on the running board of the witness' car. When the Marmon stopped, its front wheels were to the rear of the front wheels of Tyler's car. The defendant H. J.

Rumsey was the chauffeur of the defendant Charles Lloyd, and had left his employer's residence to go down town and bring his master home. He was called as a witness, and testified that from Sixth street and Rampart street he proceeded east on Sixth street at the rate of probably 10 miles an hour—just rolling along was all. As he approached Park View, he saw Mr. Tyler's car. Continuing, the witness testified:

"As I was passing or approaching that car from its rear, that is Tyler's car, the south line of my car was north of it. In other words, if I had gone straight ahead as I was traveling without changing my course north or south, I would have cleared Mr. Tyler's car a couple of feet—never go nearer a standing car. I just saw Mr. Tyler's car as I approached and passed it. I had not passed Mr. Tyler's car at the time of the collision. Prior to the time that I passed Park View avenue, and as I approached Mr. Tyler's car, I didn't change my direction either north or south. There was not any horn blown or other signal given of the approach of Mr. W. F. Lloyd's car from the rear that I heard. * * * I did not see Mr. W. F. Lloyd's car until he struck my car. The time I saw him he was right in front. When I saw Mr. Lloyd's car it was headed toward the curb."

Mr. W. F. Lloyd testified:

"I had been continuously moving easterly on Sixth street without stopping anywhere. I was right in the car tracks. I was going east on Sixth street, and, as I approached Park View avenue, I was going about 20 miles an hour, and I know that I was going about 20 miles because a car passed me that was going 25. * * * As I approached Park View I threw out my clutch to slow down, and there were two cars standing abreast of each other, as I remember it, and I approached these cars in the track so that I had a perfectly free way to pass, and just as I got past Park View avenue my steering wheel was taken right out of my hands, and I ran into the curb and knocked over Mrs. Fletcher. * * *"

From what we have stated it is patent that there was evidence from which the trial court could draw the conclusion that the defendant R. J. Rumsey and the defendant Charles Lloyd were guilty of no negligence whatsoever, and that the defendant W. F. Lloyd, in the act of passing the automobile of Charles Lloyd, committed the act so negligently that he collided with the front end of the Marmon car and knocked the Marmon car over against Mr. Tyler's car, and at the same time dashed forward obliquely to the curb. That theory finds further support in the physical facts testified to by the witnesses. Mr. R. D. Lloyd was riding with his father, Mr. W. F. Lloyd. Immediately after the impact he looked down and saw that the back part of the fender over the right front wheel on his father's car was ripped up and the running board was injured as though the car had had a collision with a telephone pole.

He also testified that he looked back at the Marmon car and the left side of the bumper was on the street ripped off. Mr. Rumsey testified that his left-hand fender was bent in toward the center of the car, but straight up as if you raised it up, and that the bumper in front was bent forward. It was bent out and round like it had been pulled around. The wheels were turned in; not scratched or broken. The fender was bent up probably a couple of inches. It will be noted that the foregoing physical facts square with the theory of the respondents. It will also be noted that they are not in harmony with the theory that the Marmon car hit the car driven by Mr. W. F. Lloyd.

Conceding that there is evidence in the case to support a different theory, nevertheless it must be granted that there was an abundance of evidence to support the findings made by the trial court in favor of the respondents.

The judgment is affirmed.

We concur: LANGDON, P. J.;
NOURSE, J.

75 Cal. App. 247

**OLD HOMESTEAD BAKERY, Inc., v.
MARSH. (Civ. 2939.)**

(District Court of Appeal, Third District, California. Nov. 18, 1925. Hearing Denied by Supreme Court Jan. 14, 1926.)

1. Statutes $\S$ 225 $\frac{1}{4}$ —Statutes imposing fees on electric motor vehicles and fuel tax are in "pari materia," to be construed together.

In determining whether Legislature in taxing motor vehicles has discriminated against electric-propelled motor vehicles, St. 1923, p. 517, $\S$ 77 (b), providing for a registration fee for electric motor vehicles, and St. 1923, p. 571, imposing a gas tax, are to be read together as "in pari materia," especially since they were passed at same session of the Legislature.

2. Statutes $\S$ 225—Revenue statutes particularly to be construed in pari materia.

Rule that statutes in pari materia should be construed together is particularly applicable to statutes relating to revenue and taxation on theory that all such statutes constitute one law.

3. Statutes $\S$ 225—Rule construing statute in pari materia one of interpretation and construction.

The office of the rule that statutes in pari materia should be construed together is that of interpretation and construction.

4. Statutes $\S$ 217, 225—Statute containing words of uncertain meaning to be construed with other statutes to determine legislative intent.

Where statute uses words of uncertain meaning, other statutes on same subject, or history of the legislation thereon, should be

considered, if by so doing intent of the Legislature may be learned.

5. Statutes $\S$ 225—Statutes to be construed in pari materia to avoid unconstitutionality of statute standing alone.

Where statute contains no uncertain words, but, taken alone, would offend certain constitutional restrictions, then, if there be any other statutes in pari materia therewith, the several statutes should be construed together.

6. Automobiles $\S$ 29—Gas tax held in lieu of registration fees.

St. 1923, p. 571, imposing tax on gas used in gas-propelled motor vehicles, was intended to be in lieu of registration fees operators of such vehicles were theretofore required to pay.

7. Automobiles $\S$ 28—Statutes imposing registration fee on electric vehicles held not to discriminate against them.

St. 1923, p. 517, $\S$ 77 (b), imposing registration fee for electric motor vehicles when construed with St. 1923, p. 571, imposing tax on gas used in gas-propelled motor vehicles does not discriminate against electric motor vehicles.

8. Constitutional law $\S$ 47—Courts cannot go behind legislative acts on their face constitutional.

The courts cannot go behind legislative enactments which on their face are constitutional and by resort to evidence attempt to ascertain whether Legislature remained within constitutional restrictions.

9. Automobiles $\S$ 28—Constitutional law $\S$ 206(4), 241, 297—Statutes $\S$ 74(1)—Statutes imposing registration fee on electric vehicles held constitutional.

Additional registration fee or privilege tax, imposed by St. 1923, p. 517, $\S$ 77 (b), on electric motor vehicles used in transporting passengers for hire or property, in view of gas tax imposed by St. 1923, p. 571, is founded on a classification which does not conflict with Const. art. 1, $\S$ 11, providing that general laws shall have uniform operation, nor with Const. U. S. Amend. 14, prohibiting abridgment of privileges and immunities, deprivation of property without due process of law, or denial of equal protection of law.

10. Statutes $\S$ 68, 72—Law is general and uniform within Constitution, if operating uniformly on all persons similarly situated.

A law is general and uniform within Const. art. 1, $\S$ 11, if it operates uniformly on all persons standing in same relation to law in respect to the privileges and immunities conferred or acts prohibited.

11. Constitutional law $\S$ 208(1)—To make law free from discrimination there must be a classification founded on natural, intrinsic, or constitutional distinctions.

To render a law not applicable to all the people free from fatal discrimination in favor or against certain members thereof, there must be a classification founded upon some natural, intrinsic, or constitutional distinctions.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Mandamus by the Old Homestead Bakery, Inc., to compel W. H. Marsh, as Chief of Division of Motor Vehicles of the Department of Finance of the State of California, to issue a certificate of registration of electric motor vehicle. From a judgment dismissing the proceeding, petitioner appeals. Affirmed.

Harding & Monroe, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Robert T. McKisick, Deputy Atty. Gen., for respondent.

HART, J. It appears from the petition, filed originally in the court below, that the petitioner, a corporation, with its principal place of business in the city and county of San Francisco, is engaged in the business of baking bread and certain kinds of confections, and that, in the delivery of its products to its customers, in said city and county, uses the motor vehicles propelled by electricity; that, on the 6th day of February, 1924, petitioner filed, in due legal form, an application for the registration of a certain motor vehicle so propelled, of which it was the legal owner, and which was designed to be used for the purposes above stated; that, accompanying said application, was "the certificate of a public weigher of the state of California, showing the weight of said vehicle, when unladen, to be 6,280 pounds." The petition proceeds:

"That since the date of the payment of the 1923 license tax on said electric motor vehicle, the unladen weight thereof had been increased by improvements made thereon from 5,940 pounds to 6,280 pounds, and that said respondent demanded an additional weight fee of \$6.25 for the year 1923.

"That at the time of the presentation of said application to said respondent, this petitioner did tender to him, as such, in lawful money of the United States, the sum of \$39.25, being and including:

"(1) The sum of \$6.25 as and for the additional weight tax claimed for the year 1923, and (2) the sum of \$3 required to be paid under subdivision (a) of section 77 of said act, and (3) the sum of \$30 required to be paid as a weight tax under subdivision (c) of section 77 of said act, and this petitioner did thereupon request and demand that said respondent, out of said sum of \$39.25 so tendered, accept and receive the sum of \$33 as payment in full as and for the legal registration fees for said vehicle, for the year or 12 months expiring on the 31st day of January, 1925, and did request and demand that he register said vehicle and assign to it a number, and issue to this petitioner the certificates of registration and ownership provided for in section 41 of said act, and to furnish it with two number plates for said vehicle as provided by section 42 of said act.

"That said respondent did, at said time, refuse, and ever since has refused, to accept said sum of \$33 so tendered to him as aforesaid, and did refuse, and ever since has refused, to accept said application and to register said ve-

hicle and to assign to it a number, and to issue to petitioner the certificates provided for in section 41 of said act, and to furnish it with said number plates, except upon the payment of the additional sum or fee of \$50 mentioned in subdivision (b) of said section 77 of said act as an additional registration fee 'to be paid for the registration of every electric motor vehicle designed and used for the transportation of passengers for hire, or for the transportation of property.'"

The prayer of the petition is for a writ of mandate directed to the respondent to compel him, upon the tender to him of the said sum of \$39.25, to "accept, out of said sum, the sum of \$33 as payment in full as and for the legal registration fee for said vehicle for the year or 12 months ending January 31, 1925," etc.

The respondent interposed a demurrer to the petition on the general ground, and the same was sustained and the proceedings for the writ dismissed. From the judgment entered upon said order the petitioner appeals upon the judgment roll alone.

The purpose of this proceeding is to obtain a judicial determination of the question whether the provision of the state Motor Vehicle Act authorizing the imposition of a registration fee of \$50 for the registration of electric motor vehicles intended for use and used for the transportation of passengers for hire or the transportation of property is or is not, when measured by certain mandates of the state and federal Constitutions, a valid enactment. The position here of the petitioner is that it is in violation of the state Constitution, in that it imposes upon such motor vehicles a fee "in excess of that imposed upon any other automotive vehicles designed and used for the transportation of passengers for hire, or for the transportation of property," and is therefore discriminatory; that it is "based upon an unreasonable and arbitrary classification."

The provision to which the objections above stated are here interposed is in subdivision (b) of section 77 of the act of the Legislature of 1923 (Stats. 1923, p. 517 et seq.), the object of which, generally stated, is to regulate the use and operation of vehicles upon the public highways, and to provide for the registration and identification of motor vehicles, etc., and for the payment of registration fees therefor. Said subdivision reads:

"(b) A registration fee of ten dollars shall be paid for the registration of every electric passenger motor vehicle and a registration fee of fifty dollars shall be paid for the registration of every electric motor vehicle designed and used for the transportation of passengers for hire or for the transportation of property. Such fees shall be in addition to the fees specified in subdivision (a) of this section."

The preceding subdivision (a) provides for the payment of a registration fee of \$3 for

the registration of every motor vehicle, trailer or semitrailer, except for such as are by the act expressly exempted from the operation of said subdivision.

The act of 1923 was intended to supersede the statute of 1913 (Stats. 1913, p. 639), which provided, in elaborate detail, rules and regulations governing the use and operation of motor vehicles over and upon the public highways of the state. Under said act registration fees for all motor vehicles, regardless of the kind of power by which they were operated, were rated upon the basis of the horsepower of the vehicle, and therefore, the amount of such fee which was required to be paid was according to the horsepower of the vehicle. That act, with some amendments thereto by subsequent Legislatures, remained the law until the passage of the act of 1923 above mentioned. Among the several changes made in the act of 1913 was that by the Legislature of 1915 (Stats. 1915, pp. 397, 401), whereby motor vehicles operated by electricity were, as to registration fees, removed from the general class of motor vehicles and set off in a class by themselves, or, in other words, the electric motor vehicles were taken from the horse power basis for the charging of registration fees and the owners thereof required to pay for each such vehicle a flat registration fee of \$5. The gas vehicles were still retained by said act in their original class for registration fee rating purposes; that is to say, they were still subject to the horse power system of rating the registration fees.

Of course, the purpose of the legislation exacting license taxes for motor vehicles operated over the public highways is to raise funds with which such highways may be improved and kept in repair in such manner as is suitable to the mode of transportation peculiar to motor vehicles. The theory of such a tax, particularly under present-day conditions as to the character of the highways required and the great expense in constructing and maintaining them, is, manifestly, that it is only just and proper that those who use the public highways, either for business purposes or for pleasure should bear the expense of keeping in repair those already improved and to contribute to the construction of new roads. And, unquestionably, it was and is the duty of the Legislature, in the framing of a system for the raising of revenue for that purpose, to adopt a basis therefor which would have the effect of equalizing, as nearly as may be practicable, the burden thus imposed upon motor vehicles or the owners and operators thereof, considering, of course, the particular use to which such vehicles are put, their weight, and such other elements as might properly enter into the determination of the probable effect, as to the matter of "wear and tear," the use of each of the various classes of motor vehicles would have

upon the roads. The Legislature of 1913, and subsequent Legislatures until the Legislature of 1923, conceived, as we have seen, that the horsepower standard of rating registration fees would constitute a system which would bring about a just distribution among all classes of motor vehicles of the burden of raising the revenue necessary for road improvement and repair purposes. It may be that that system worked well for a just equalization of the burden imposed upon owners of motor vehicles to contribute to the improvement and maintenance of the public roads of the state. As to this, however, we express no definite opinion, nor is it necessary to do so here. Assuming, though, that the system established by the Legislature of 1913 at least equitably distributed the burden referred to, there was still another element in the establishment of a scheme for raising revenue for road purposes by a registration fee system, which it was necessary to take into account; namely: The raising of a sufficient aggregate annual sum for that purpose to meet the exigent requirements of modern highway improvement and maintenance. It is known, as a matter of current knowledge, that within the past few years automotive highway traffic has increased in volume in prodigious and, it may not inappropriately be added, in alarming proportions. The expense of maintaining the public highways from the greatly increased use and consequent wear and tear to which thus the highways now are and have been subjected has of necessity proportionately been increased, and, most naturally, if, under the horse power system of fixing registration fees, the greatly enhanced cost of improving and keeping in proper repair the highways could not be met, it would be requisite to contrive and establish some other scheme, founded upon a just and an intelligent basis, by which it could be done, and, at the same time, adjust the matter of the imposition of registration and other license fees or taxes in such manner or upon such a basis as would produce substantial equality among all owners or operators of motor vehicles, according to a proper classification thereof, in bearing the burden necessarily coincident with the work of improving and maintaining the public highways, or, in other words, to establish the registration and other fees imposed upon owners or operators of motor vehicles according to a plan which would prevent discrimination as against such vehicles of the same class or of any class. And it may well be assumed that the plan adopted into the act of 1913 for the raising of revenue for highway purposes by prescribing graduated registration fees to be paid by owners of gas-propelled motor vehicles and a flat fee for electric motor vehicles was finally found to be entirely inadequate to the raising of such revenue in an amount each year which would satisfy the

increased and the still growing financial exactions of highway improvement and upkeep, since it is true that the Legislature of 1923 passed an act establishing an entirely new system for the raising of revenue for said purpose, so far as gas and other fuel cars are concerned, by requiring, practically, the owners or operators of all such cars to pay to the state, in addition to nominal registration fees, 2 cents per gallon for all gas consumed in the operation thereof. Stats. 1923, p. 571. It is true that the license tax of 2 cents per gallon on all fuel gas sold and distributed by those engaged in the business of selling the same for motor vehicle purposes is not a direct license tax upon those owning or using such vehicles; yet that the act operates indirectly to impose upon the owners or operators of such vehicles a tax of 2 cents on every gallon of gas that they purchase for use in propelling motor vehicles is, from the very nature and logic of the situation, indisputably true. This proposition irresistibly follows from the fact that taxes assessed against the goods and wares of the vendor thereof and by him paid are always included in so-called "overhead expenses," and, of course, constitute an element in the fixing of the market value of the goods, or, at all events, is an element of the cost of the goods to the consumer, and that the tax upon such gas provided by the act was intended by the Legislature to be substituted for and in lieu of the license tax on motor vehicles propelled by means of gas, and graded according to the horse power standard, as provided by the act of 1913, is plainly shown by the provisions or the language thereof. The first section of the act defines the meaning of a number of the terms used in the statute, such as "motor vehicle," "motor vehicle fuel," "service station," "distributor," etc.

The second section provides that every distributor, etc., of fuel gas, so engaged when the act goes into effect, and any person, etc., intending thereafter to become such distributor, etc., shall within a specified time register as such distributor with the state board of equalization, whereupon said board shall issue to such distributor a license, etc. Section 3 fixes the tax of 2 cents per gallon of fuel gas sold to every owner or operator of fuel gas motor vehicles, and provides that the payment thereof shall be to the state controller in quarterly installments. Section 6 provides that, within a certain period of time specified therein, every distributor of gas fuel shall file with the state board of equalization, within 20 days after the end of each quarter, a verified statement, in a certain prescribed form, showing, among other things, the total number of gallons of motor vehicle fuel, etc., sold and distributed within the state by such distributor. Failure by any distributor to file such statement entails, by virtue of the provisions of section 8, a certain penalty, which,

with the tax, must be collected by the state controller, and, if the tax and penalty be not paid to that officer, then, upon his request, the Attorney General must institute and prosecute an action against the delinquent distributor to recover the taxes and all accrued penalties and interest.

The eleventh section provides that any person, firm, corporation, etc., who shall buy motor vehicle fuel for purposes other than in motor vehicles operated or intended to be operated upon public highways, and also those buying such gas to be used and used exclusively in motor vehicles employed in the transportation of rural free delivery mails, shall be reimbursed by the state in the amount of the tax on fuel gas as provided by said act, upon presenting to the state controller, in the form prescribed, a claim for the total amount so paid, all applications for such reimbursement to be filed with the controller within six months from the date of the purchase of such motor vehicle fuel.

Section 12 vests the state board of equalization with the right to make such examinations of the records of distributors as it may deem necessary for the carrying out of the provisions of the act. Section 13 provides that all license taxes collected by the state controller in pursuance of the provisions of said act shall be by that officer deposited in the state treasury and credited to the "motor vehicle fund," which the act expressly creates, and further provides that one-half of the net amount of all the moneys so received shall be paid to the counties of the state in certain designated proportions, and the same placed in "a special road improvement fund," and to be expended by the counties receiving them "exclusively in the construction and maintenance of roads, bridges, and culverts in each such county." The moneys remaining after the payment of the amount above indicated to the counties are appropriated by the act (section 12) to the "state highway maintenance fund," to be used exclusively in the maintenance, repair, reconstruction, etc., of state highways, and roads and highways in state parks. At the same session of the Legislature at which the act above considered was passed the act containing the provision (section 77) which constitutes the basis of the petitioner's grievance, as set forth in general language in its petition, was passed. Both acts were approved on the same day, to wit, on the 30th day of May, 1923. The act last referred to, as did the act of 1913, specifically, or with the required particularity, deals with motor vehicle traffic upon the public highways, prescribing rules regulating the use and operation of motor vehicles over and upon such highways and fixing penalties for the violation thereof. It does not, however, as in the case of motor vehicles propelled by electricity, provide for a flat registration fee of \$50 for gas fuel motor vehicles used for the transportation of passengers or property, and

thus the cause of the controversy here arises, and to which it is now timely to give consideration.

[1] The Attorney General, representing the respondent, insists that, to determine whether the Legislature, in providing for the raising of revenue for highway improvement purposes by imposing upon owners or other persons operating motor vehicles over and upon the highways of the state certain license fees or taxes, has or has not discriminated in favor of gas-propelled as against electric-propelled motor vehicles, the two statutes of 1923—the one dealing with automotive highway traffic and other matters pertaining to the use of motor vehicles, and the other levying a fuel gas tax of 2 cents per gallon, to be paid by all persons operating such vehicles propelled by gas—must be read and considered together as being in *pari materia*. This position is vigorously assailed by counsel for the petitioner. They assert that the doctrine of in *pari materia*, being a mere rule of construction, may appropriately be invoked only where there are two or more statutes dealing with cognate or interrelated subjects, and one contains words of such dubious or doubtful meaning as to make it uncertain what the Legislature intended to say by the use of such words; that in such case such statute may be read and considered with such other statute or statutes to ascertain the true meaning of such words or the intent of the Legislature in so using them. In other words, and in brief, the position of petitioner's counsel is that the application of the rule referred to is limited to the ascertainment of the meaning of ambiguous words in a particular statute of several dealing with the same general subject, and is not to be resorted to for the purpose of obtaining light upon the question whether it was the legislative intent that the several statutes should together constitute a single plan or scheme for the accomplishment of a particular object. To the contention thus stated we are unable to agree. We can think of no good reason which may stand as in support of it. To the contrary, we accept as expounding the sounder interpretation of the doctrine the following statement thereof in 36 Cyc. p. 1147:

"Statutes in *pari materia* are those which relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the *uniform and consistent purpose of the Legislature* (italics ours), or to discover how the policy of the Legislature with reference to the subject-matter has been changed or modified from time to time. With this purpose in view therefore it is proper to consider, not only acts passed at the same session of the Legislature, but also

acts passed at prior and subsequent sessions, and even those which have been repealed."

See, also, *State ex rel. American Piano Co. v. Superior Court*, 105 Wash. 676, 679, 178 P. 827, 828; *Paltro v. Aetna Casualty & Surety Co.*, 119 Wash. 101, 204 P. 1044, 1046; *Ford v. Harbor Commissioners*, 81 Cal. 19, 29, 22 P. 278; *Irelan v. Colgan*, 96 Cal. 413, 414, 415, 31 P. 294; *German Sav. & Loan Society v. Ramish*, 138 Cal. 120, 128, 69 P. 89, 70 P. 1067; 31 Corpus Juris, p. 358, and cases named in the footnotes.

Furthermore, "the rule that statutes in *pari materia* should be construed together applies with peculiar force to statutes passed at the same session of the Legislature; it is to be presumed that such acts are imbued with the same spirit and actuated by the same policy, and they are to be construed together as if parts of the same act. They should be so construed, if possible, as to harmonize, and force and effect should be given to the provisions of each." 36 Cyc. p. 1151.

[2] And particularly in the construction of statutes relating to revenue and taxation is the rule applicable and invariably invoked upon the theory that all such statutes constitute one law. *People v. Cleveland, C. C. & St. L. Ry. Co.*, 306 Ill. 459, 138 N. E. 196; *Commonwealth v. P. Lorillard Co.*, 129 Va. 74, 105 S. E. 683; *State v. Covington*, 35 S. C. 245, 14 S. E. 499.

[3-5] The case of *Gleason v. Spray*, 81 Cal. 217, 22 P. 551, 15 Am. St. Rep. 47, cited by petitioner as supporting his view of the scope of the rule of in *pari materia* as a canon of statutory construction, while stating that, in construing a certain section of the Civil Code which contained certain words whose meaning, as so used, was obscure, said section, to ascertain the meaning of the ambiguous words, should be considered with other sections of the Code relating to the same subject, does not hold that the rule of construction thus invoked is confined in its application merely to the ascertainment of the meaning of ambiguous words used in a statute. Nor do the cases of *Stevenson v. Colgan*, 91 Cal. 649, 27 P. 1089, 14 L. R. A. 459, 25 Am. St. Rep. 230; *Conlin v. Supervisors*, 99 Cal. 17, 33 P. 753, 21 L. R. A. 474, 37 Am. St. Rep. 17; and *Los Angeles Co. F. C. Dist. v. Hamilton*, 177 Cal. 119, 169 P. 1028, also cited by petitioner. Of course, the office of the rule is that of interpretation and of construction. If, in order properly to construe a statute, words used therein are of such dubious or uncertain meaning that the real legislative intent of the act cannot be determined, when it is considered by itself or alone, then, of course, other statutes or acts upon the same subject, or the history of the legislation thereon, may and should be considered if, by that course, the meaning of the words as intended by the Legislature may be learned, and, if so learned, thus open the way for a construction

of the statute in accord with the intent at the bottom thereof. On the other hand, where a legislative act contains no uncertain or misleading words, but, taken alone, although the subject-matter thereof be within legislative cognizance, it would, nevertheless, offend certain restrictions or inhibitions of the state or federal Constitution, then, in that case, if there be any other statute or statutes in *pari materia* with such act, the several acts or statutes should be construed together as if they constitute but one law, if in so doing they harmonize in the achievement of the central purpose of their enactment and at the same time remain within the commands or inhibitions of the state and federal Constitutions.

[6-8] It is perfectly clear, as has been before stated, that the provisions themselves of the act of 1923 imposing a tax of 2 cents on every gallon of fuel gas, to be used in gas-propelled motor vehicles, show that the Legislature, *ex industria*, intended that that plan of imposing a privilege tax on those operating or causing to be operated such motor vehicles upon the highways of the state should be in lieu of the registration fee such persons were theretofore required to pay. We therefore hold that the two acts of 1923 under consideration, in so far as they provide, respectively, for a registration fee for electric motor vehicles and the excise or privilege tax on gas for gas-propelled motor vehicles were intended to constitute a single plan or scheme for compelling persons operating, or causing to be operated, motor vehicles upon the public highways of the state to pay a fee or a tax, according to the character of such vehicles as to the method of their propulsion, and that the two acts in that particular are in *pari materia*; that, in effect, they constitute one law. So considering the two acts, we can perceive no reason for holding that there is any discrimination in the matter of the privilege fee or tax which the operators of the two classes of motor vehicles are, respectively, required to pay. We cannot so declare from the face of the statutes. It may be that, in particular instances, the amount paid by the operators of gas-propelled motor vehicles used for the transportation of passengers or property in some years is and will be less than the flat fee required to be paid by operators of freight or passenger electric motor vehicles. On the other hand, it may be (and we doubt not that this is true) that in many instances the amount paid as the tax on fuel gas purchased and used by persons operating or causing to be operated gas-propelled passenger or freight motor vehicles is annually far in excess of the sum of \$50, the amount of the registration fee exacted from those operating like electric motor vehicles. The problem is not one of easy solution. It is, however, a problem the solution of which is peculiarly and exclusively one of legislative cognizance, and an approximately

fair and equitable adjustment of the whole matter is, perhaps, all that may or should reasonably be expected. The presumption is that the Legislature, in establishing the existing plan, fully investigated the facts upon which it acted in fixing a flat fee in the one case and a fuel gas tax in the other, and in placing the fee for electric motor vehicles used for freight or passenger transportation at \$50, and the statutes themselves constitute a finding that the system established by those acts will bring, and has brought, about as near an equitable adjustment, as between the operators of the two classes of motor vehicles so used, of the amounts they should respectively pay for the privilege of using the highways as is practicable. *Cooley's Const. Limitations*, 187; *Stevenson v. Colgan*, 91 Cal. 649, 653, 27 P. 1089, 14 L. R. A. 459, 25 Am. St. Rep. 230. Of course, the courts cannot go behind legislative enactments which, upon their face, are in complete harmony with the Constitution, and, by a resort to evidence, attempt to ascertain whether the Legislature, in passing them, did or did not observe or remain within the restrictions which the Constitution has placed upon its power as a co-ordinate branch of the government, or has or has not properly performed the duty which is not only enjoined upon it by the Constitution but which its members by their oaths bound themselves properly to perform. *Stevenson v. Colgan*, *supra*.

The effect of the two statutes as to the fee or tax to be paid is necessarily to segregate the gas-propelled motor vehicles and the electric motor trucks used for the transportation of passengers for hire or of property into two classes. Counsel for petitioner in their opening brief concede the validity of the classification by subdivision (b) of section 77 of electric motor vehicles into those designed for the transportation of passengers for hire or for the transportation of property and those designed and used for other purposes as a basis for differentiating in the amount of the tax or fee to be exacted from the owners or operators of each of the classes of such motor vehicles, and further declare that they have no objection to make to the "weight tax" exacted by subdivision (c) of said section 77. But, as seen, they do contend that the imposition by subdivision (b) of an additional registration fee of \$50 for electric motor vehicles used for the transportation of passengers for hire or of property is not within "a classification based on a difference which bears a just and proper relation to the object to be attained; namely, the 'laying of a tax charge in the nature of compensation for the damage done to the roads of the state by the driving of these machines over them, and properly based upon the amount of destruction caused by them,'" citing *In re Schuler*, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706.

[9] This brings up the question whether the

fixing of the privilege tax upon persons operating motor vehicles for the transportation of passengers for hire or of property according to the essential difference in the instrumentalities by which the two kinds of such vehicles so used are operated or propelled is founded upon a classification which has the effect of removing the statutes in question, in so far as they provide for such tax in the manner explained, from the interdiction of the following provision of the state Constitution: "All laws of a general nature shall have a uniform operation." Article 1, § 11.

The distinction between gas fuel motor trucks or stages and electric motor trucks or stages is in the difference in the means by which the two kinds are operated. Indeed, the distinction in that particular becomes the more marked and palpable when it is considered that a privilege or excise tax based upon the quantity of fuel gas used in motor vehicles so propelled may be imposed upon persons operating or causing to be operated such motor vehicles upon the public highways of the state, while it is obviously impossible to impose such tax upon those likewise operating or causing to be operated electric motor vehicles or trucks; and it is that difference between the two classes of motor vehicles which of necessity gives rise to the distinction between those persons operating, or causing to be operated, gas fuel motor vehicles used for property or freight transportation and those operating or causing to be operated electric motor vehicles used for the same purpose, and, in the very nature of things, the two sets of persons thus described are segregated into distinct classes, namely: (1) Those operating gas fuel motor vehicles for the transportation of passengers for hire or property; (2) those operating electric motor vehicles for the same purpose.

[10, 11] It is established in this state that, within the contemplation of section 11 of article 1 of the Constitution, a law is general and uniform in its operation if it operates uniformly upon "all persons standing in the same relation to the law, in respect to the privileges and immunities conferred by it, or the acts which it prohibits." *City of Pasadena v. Stimson*, 91 Cal. 238, 251, 27 P. 604, 607; *Ex parte Smith and Keating*, 38 Cal. 710; *Brooks v. Hyde*, 37 Cal. 366. True, to render a law general which cannot be made applicable to the entire body of the people free from fatal discriminatory provisions in favor of and, in a corresponding degree, against certain members thereof, there must be a classification of the people founded upon some "natural or intrinsic or constitutional distinction." *City of Pasadena v. Stimson*, supra. In other words, a law cannot be general and uniform in its operation, within the meaning and intent of the constitutional provision above referred to "if it confers particular privileges or imposes peculiar disabilities or burdensome conditions, in the exercise

of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." *Id.*

Nothing could be clearer than that the automatic segregation by the acts in question of the persons operating fuel gas motor vehicles employed in the transportation of passengers for hire or the transportation of property and electric motor vehicles likewise used for the purpose of fixing a tax charge peculiarly appropriate to the character of such motor vehicles with respect to the means by which they are propelled, into different classes, involves a classification founded upon an intrinsic distinction arising from the essential difference in the agencies by which such motor vehicles are operated. The classification is as well grounded as is the classification made by one of the acts herein concerned as between electric motor vehicles used in the business of transporting passengers for hire or of property and electric motor vehicles used for other purposes, of which classification counsel for petitioner, as seen, voluntarily vouchsafe their approval. Indeed, the distinction upon which the classification herein is based is no less intrinsic or natural than that which exists or would exist as between those persons conducting a trucking or a freight or passenger business by means of motor vehicles fed with fuel gas or by electricity and those operating trucks or passenger stages solely by the aid of horses or mules. All persons belonging to either of the classes thus established stand in precisely the same relation to the law with respect to the burdens it imposes. There is, in other words, no discrimination as between any of the persons belonging to either class. All in each class stand upon an absolute equality in so far as are concerned the duties enjoined or the burdens imposed by the law.

Concluding the discussion, it is pertinent to observe that other states have adopted such a plan of classification for the imposition of a privilege tax upon those using the public highways by means of motor vehicles as the acts in question have established in California, and that, although attacked in the higher courts of such states upon every conceivable constitutional ground, the plan has been upheld. Among the sister states referred to are Ohio, Massachusetts, Pennsylvania, and Maryland. In the case of *Graves v. Jones et al.*, 2 O. C. A. (Ohio) 383, decided in February, 1914, the court, dealing with a statute which in principle makes such a classification as is involved in the acts in question here, used the following language, which is cogently pertinent in all respects to the case in hand:

"The uniformity clause of the Constitution does not prevent reasonable classification of the subjects of legislation. Motor vehicles are a just subject of classification in respect to the use of public highways as distinguished from

horse-drawn vehicles. * * * This classification deals more especially with the necessity of police regulation. The burden of highway maintenance as between motor vehicles and horse-drawn vehicles is as clearly pronounced. * * * From the evidence we are advised that the basis of horse power rating adopted by the act is well recognized and has been employed by leading manufacturers, and while in the recent development of engine-making there may be some inaccuracy, still we think this basis is sufficiently definite to justify legislative adoption. The standard adopted is a formula. There is no delegation of power. The formula existing at the time of the enactment continues until changed by the Legislature. There is also sufficient reason for the flat-rate charges upon electrics. The electrics in general use are comparatively slow moving and of low horse power. While it may be true that electrics of high speed have been constructed, yet it is equally true that they are not in general use. Should they become so, it will be ample time for the Legislature to act."

From what has been said herein it is clear that that portion of the Fourteenth Amendment to the federal Constitution prohibiting the making or enforcement of any law which shall abridge the privileges or immunities of citizens of the United States or which shall deprive any person of life, liberty, or property without due process of law, or denies to any person within its jurisdiction the equal protection of the laws, is not offended by the legislation in question.

For the foregoing reasons, the judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

75 Cal. App. 335

DOUGLAS v. PENSION BOARD OF CITY OF SACRAMENTO et al. (Civ. 3028.)

(District Court of Appeal, Third District, California. Nov. 24, 1925.)

1. Municipal corporations ⇨220(9)—Pension system should be administered to produce intended results.

No public officer or employee is entitled to pension as of right, but, when system for retirement pensions is adopted, it should be so administered as to bring about efficacious results intended.

2. Municipal corporations ⇨220(9)—Pension, based on "salary paid," determined by compensation during last year.

Under Sacramento City Charter, §§ 167-169, 171, basing pension on "salary paid," pension of employee regularly employed on per diem basis should be determined by compensation provided during last year of service for one working full time.

Application by John Douglas for writ of mandate, prayed to be directed to the Pension Board of City of Sacramento and others,

to compel the granting of a pension to petitioner. William Douglas, administrator of the estate of John Douglas, deceased petitioner, was substituted for petitioner. Writ granted.

Henry & Bedeau, of Sacramento, for petitioner.

R. L. Shinn, of Sacramento, for respondents.

HART, J. Subsequent to the institution of this proceeding the petitioner passed out of life, and William Douglas, the duly appointed administrator of his estate, by stipulation of the respective counsel, has been substituted for and in the place of the deceased as petitioner herein.

The proceeding involves an original application for a writ of mandate to compel the respondents the pension board, and the members thereof, of the city of Sacramento, to allow and grant to petitioner an annual pension of \$646.34 as a retired employee of said city by virtue of certain provisions of the charter thereof. By said charter the city of Sacramento has established a system for the pensioning, upon specified terms and conditions, the employees thereof. Section 167 of said charter creates a pension board, consisting of the city manager and the members of the civil service board of said city. Section 168 provides:

"All employees of the City of Sacramento who have served the City continuously for twenty years in *any capacity* (italics ours), except as an elective officer or city manager shall be eligible to relief and pension."

Section 169 provides that all city employees shall be retired upon reaching the age of 70 years; that the board may retire and relieve from service any member of the police or fire department who has passed the age of 55 years, and any other employee of the city who has passed the age of 60 years, and who on examination by two regularly licensed physicians, selected by the board to conduct such examination, is found to be unfit for the performance of his duty, "shall receive an annual pension equal to one-half of the salary paid him one year prior to his retirement." Reference to other sections under the chapter relating to the pensioning of officers and employees of the city, except section 171, may be omitted herefrom as having no special concern with the problem submitted here for solution. The section last named, as petitioner contends, furnishes the source of his right to the amount of the pension to which he claims to be entitled as a retired employee of said city. It provides:

"Any city employee, who is eligible to relief and pension as defined by section 168 and who has become disabled, upon filing with the pension board a verified petition, setting forth the facts constituting such disability, and the

cause thereof, accompanied by a certificate signed by the head of his department, and by two regularly licensed physicians in the employ of the city, designated by the board for that purpose, recommending his retirement upon a pension, on account of such disability, may be retired upon an annual pension *equal to one-half of the salary paid him one year prior to his retirement*, said pension to cease at his death. In case his disability shall cease, his pension shall cease, and he shall be restored to the service in the rank he occupied at the time of his retirement."

From the petition for the relief herein prayed for it appears that for more than 20 years immediately prior to the 20th day of August, 1921, the petitioner was continuously employed by the city of Sacramento in the street department thereof; that, after such continuous service of 20 years, and on said 20th day of August, 1921, the petitioner, on account of disability, was retired from such service; that, at the time he was so retired, and for more than 1 year immediately prior to his retirement, petitioner was paid as compensation for the service so performed by him for said city the sum of \$4.13 per day, or the annual compensation of \$1,292.69; that during the year next preceding the 20th day of August, 1921, on account of sickness, petitioner was unable to work for a period of approximately 3 months thereof, and that by reason thereof he actually received for the service so performed for the city the sum of \$960.48; that respondents computed and determined the amount of annual pension to be paid to petitioner on the basis of the money actually received during or for said year, to wit, the sum of \$960.48; that petitioner has often demanded of respondents that they allow him an annual pension of \$646.34, which is equal to one-half of his annual salary or compensation (\$1,292.69) during or for said year; and that they issue warrants therefor accordingly, but respondents "refused and still refuse to do so, claiming and contending that the petitioner is entitled only to an annual pension equal to one-half of the money he actually received during said year."

The respondents demurred to the petition on the general ground.

As the petition states, the respondents contend that the italicized language of section 171, to wit: "equal to one-half of the salary paid him one year prior to his retirement," means, and was intended to mean, that the basis of computation of the annual pension of an employee retiring after 20 years of service because of disability is the amount of money which has actually been paid to him by the city for the year prior to the date of his retirement. Per contra, the petitioner insists that the compensation is to be based upon the annual salary or the total amount he would have been entitled to receive had he put in every working day in the performance of the service assigned to him.

The language referred to is capable of dif-

ferent constructions, dependent, however, upon the connection in which it may be used. In certain conceivable connections it might properly be held to bear, or to have been intended to bear, the meaning ascribed to it by the city attorney, representing respondents. In other connections it might with equal propriety be construed to have been intended to carry the meaning which the petitioner claims for it. Thus it is clear that the question in such a situation would be, What meaning did the Legislature, if used in a statute, or of the parties, if used in a contract, or, as here, of the framers of the charter, if used in the organic law of a municipality, intend that the language should bear? And that intention must be ascertained by a consideration of the language in connection with the entire context of the measure or instrument, the consequences following a construction either way, and the object which it was designed that the instrument or measure was to attain. In other words, in such a case the question is one of intention, to be determined upon the considerations indicated, and that is the question before us which by a like process must be determined.

The effect of laws providing for the payment of retirement pensions to public officers or employees is to increase the compensations of such officers and employees, and they are so intended. This proposition has particular force as to public officers who perform services as such subsequent to the passage of the law granting such pensions. *Whitehead v. Davie*, 189 Cal. 715, 717, 209 P. 1008; *Hammitt v. Gaynor* (Sup.) 144 N. Y. S. 123; *People v. Abbott*, 274 Ill. 380, 113 N. E. 696, Ann. Cas. 1918D, 450; *State v. Love*, 89 Neb. 149, 131 N. W. 196, 34 L. R. A. (N. S.) 607, Ann. Cas. 1912C, 542. The considerations upon which a government adopts, as a part of its administrative policy, a system for the pensioning of those who have continuously, for a specified period of years, served the government in the performance of public civil duties, both as officers and employees, are, in a large measure, these: (1) To encourage those public officers or employees who have by experience or otherwise demonstrated peculiar fitness for the performance of the public services to which they have been assigned to continue in the service of the government and at all times faithfully discharge the duties involved in such service. The hope held out for future additional reward or compensation for their public services to that which they receive concurrently with the period during which they are actually and actively engaged in performing such services is conducive to uniform faithfulness to and efficiency in discharging the duties which their offices or employments have exacted. (2) To safeguard or insure such officers or employees against a possible condition of penury and want, when, after giving the best part of their lives both in

point of time of service and ability to the service of the public, they are no longer able to perform, to the degree required, labor of any character or kind. A more just and humane consideration of the class or classes of persons for whom such a provision is made by a government can hardly be conceived. Indeed, the justness of a pension system for the benefit of those who, after long service, must be retired from old age or disability is now so far recognized that it has even become the uniform custom with private corporations to maintain a reasonably framed and well-regulated system of retirement pensions for the benefit of those of their employees who have been in their service continuously for a specified number of years, or to a time when by reason of their advanced age or physical disability they are no longer able, with the efficiency required, to perform the particular duties demanded by such service.

[1] While, of course, no public officer or employee is entitled as of right to be granted a pension, still, when a government has adopted a retirement pension system, it should be so administered as to bring about the efficacious results which it is intended to produce. It should not be so construed and administered as to confer its benefits upon those not actually entitled thereto, nor so that those so entitled should be denied their just rights thereunder.

[2] By the provisions of the charter of the city of Sacramento establishing a retirement pension system it was intended, of course, that every officer or employee of said city who has performed services for the city for the specified number of years, based either upon the age limit or disability, shall, upon his retirement, receive the compensation or pension specified in the instrument, and that intention should be carried out in all proper cases, and never set at naught in any particular instance, except it is plainly apparent that the conditions upon which pensions are to be granted do not exist.

That the petitioner's intestate was a "city employee," and "eligible to relief and pension, as defined by section 168" of the city charter, is admitted here, and it will be observed that, where the compensation of the city employee is fixed as by day's wages, as in the case of petitioner's intestate, section 171, for the purpose of computing and fixing his retirement pension, treats the compensation of such employee, in the annual aggregate thereof, as a yearly salary or compensation. This "salary" or compensation we are persuaded from the considerations to which we have above adverted, and others yet to be suggested, was intended by the framers of the charter, and by the people of the city of Sacramento in approving or ratifying the instrument, to constitute the criterion whereby the retirement pension of any employee of the city, whether his compensation is estab-

lished upon a per diem basis or upon that of a yearly or monthly salary, is to be computed.

The language of section 171 of the charter, viz. "one-half of the salary paid him one year prior to his retirement," is, it is true, not as clear as it could have been made by the exercise of a little care. In fact, it might, with some show of reason, when considered alone, be held that it was intended that the basis for the computation of the pension in the case of any employee should be the aggregate sum he had been paid for the nineteenth year of his service. But we are of the opinion that, by the use of said language, it was the intention to say that every such employee, upon his retirement at the end of the twentieth year of continuous employment in the service of the city, should receive a pension in an amount equal to one-half of what his compensation would total in the last of the twentieth year of such employment, counting every working day in the year, and this whether he has or has not actually performed the service required in his employment every working day of such year. To be more explicit: The words "salary paid to him" in our opinion mean what the compensation which has been provided for the position or office or employment, whose duties he is required to perform, would amount to, computed upon the same basis as is a fixed or determinate yearly salary, limited, however, to the number of working days in the year. To give said language any other interpretation, or, it is perhaps better to say, to ascribe to it the meaning claimed for it by the respondents, would be to violate the spirit and frustrate, to the extent to which the section might thus be applied, the very design or the central purpose of the usual retirement pension schemes for civil public officers or employees, as above explained, since the effect of such an interpretation, if sanctioned, would, in many instances, inevitably lead to very unjust consequences. So far as anything to the contrary is disclosed by the record before us, the petitioner, as may, indeed, be the case as to any employee of the city, in every year of the 19 consecutive years immediately preceding the twentieth year of his employment in the service of the city put in every working day in the performance of the duties of his assignment, and yet, if the theory of respondents as to the meaning of section 171 of the charter is to be accepted, the result would be that, notwithstanding those 19 years of full and faithful service, the petitioner, having, during the twentieth year of such service, and while engaged in performing the duties thereof, suffered a disability which necessarily forced him to be absent from his employment for several weeks or several months, would be entitled, as for his retirement pension, to no greater an allowance than what one-half

of the aggregate sum which had actually been paid him for services actually performed during said year would amount to. But it is said that, on the other hand, the law before us, if construed as the petitioner understands its meaning and intent, would, in conceivable cases, work unjustly as against the city, an instance of which would be where an employee, in each of the 19 years immediately preceding the twentieth year of his service, had not actually rendered services every working day, or for the full year. Such a situation is apt to arise during the course of long service by any person in any field of activity, and that consideration is to be assumed to be within the contemplation of any well-framed pension system for those employed to discharge civil duties for a government. In other words, in creating a pension system, a government or a private corporation do so with the expectation or anticipation that those for whose benefit such system has been established will, at some time during the long period of service which, under the system, entitles them to be retired on a pension, be unable to perform the duties of their employment, and, where special provision is not contained in the law establishing the system to the effect that all working days upon which those employees whose compensation is fixed and paid upon a per diem basis have not actually performed services shall be excluded from consideration in computing their retirement pension, it is then to be assumed that it was the intention to include such days as among those constituting the basis for such computation. There is no such provision in the charter of the city of Sacramento. Hence the fixing of the amount of the pension to which the petitioner's intestate is entitled upon the basis of all the working days of the twentieth year of his employment is only following the mandates of the law. There can be no unjustness or injustice in following the law either in letter or spirit. And the views thus expressed are supported by the consideration that the petitioner's intestate was, in all the years prior to the date at which he became eligible to retire upon a pension from disability, regularly employed for continuous service, and that the city, at all times while he

was in its employment, where he was not actually performing the services required by his contract of employment as well as when engaged in performing those services, used or had control of his time. By this we intend to say that, so long as he was not discharged from the service of the city, or his absence from his employment was temporary only, he was, during such absence, as much an employee of the city as when actually he was engaged in performing services for the city, and it was upon the basis of his employment as so viewed that he is entitled to have his retirement pension fixed and allowed. Of course, we are not here holding that an employee of the city is entitled to be paid compensation by way of wages for those days during which he has performed no services. We can perceive no reason why he should. This declaration, though, is not inconsistent with the theory upon which we hold the retirement pension of such an employee should be fixed and allowed. The two propositions relate to different considerations. And it must be understood that, in the present discussion, we have in mind those employees only who are regularly employed for continuous service through the year, but who, from physical disability or other adventitious contingencies which may arise in the course of any employment, are not able to perform the services required of them every working day of the year, and not those employees, if any such there be, whose employments may be of such a nature that the performance of the services involved therein would be required for a brief period or at intervals only in each year, as to the eligibility of which class to pension benefits under the charter of Sacramento we have no opinion now to express.

Our conclusion is that the relief herein asked should be granted. Accordingly, the demurrer to the petition is overruled, and it is ordered that a writ of mandate be issued out of this court directed to respondents, commanding them to issue to the petitioner a warrant for the amount stated in the petition as the amount due him for the retirement pension of his intestate.

We concur: FINCH, P. J.; PLUMMER, J.

2. Appeal and error $\hookrightarrow$ 1071(6) — Defendant not prejudiced by trial court's failure to make a finding which would have been against him under the evidence.

In suit for goods sold and delivered, trial court's failure to find that defendant failed to disclose fact he was acting as receiver in official capacity held not prejudicial to defendant, where, under the evidence, finding relative thereto would clearly have been against him.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by Mead Clark against Clarence E. Baen and Ruby E. Whitney, as administratrix of the estate of George O. Whitney, deceased. Action dismissed as to defendant administratrix. From a judgment for plaintiff, defendant Clarence E. Baen appeals. Affirmed.

Marcel E. Cerf and C. H. Sooy, both of San Francisco, for appellant.

Geary & Geary and W. F. Geary, all of Santa Rosa, for defendant Whitney.

Fred W. McConnell, of Healdsburg, for respondent.

FINCH, P. J. The complaint alleges that the defendants are indebted to the plaintiff in the sum of \$435.50 for "lumber lath sold and delivered" to them by plaintiff. The action was dismissed as to the defendant administratrix. The defendant Baen filed an answer denying the allegations of the complaint and alleging, as an affirmative defense, that the International Brokerage Company, a Delaware corporation, doing business as California Grape Distributors, was adjudged a bankrupt by the federal court at Chicago, and that a receiver was there appointed to take charge of the bankrupt's estate; that the federal court at San Francisco appointed defendant ancillary receiver of the bankrupt's estate in California; that the bankrupt, prior to said adjudication, had carried on the business of "dehydration and drying of fruits and vegetables and of packing and shipping the same" at Santa Rosa, Cal.; that "at the time of the appointment of said defendant as ancillary receiver * * * the said bankrupt estate had remaining assets consisting of leasehold property and improvements on leasehold property consisting of drying and packing machinery, drying sheds, a warehouse, and other improvements attached to the leasehold and the business connected therewith"; that, under and by virtue of orders of the court, "said defendant as ancillary receiver was duly authorized to carry on business of the said named bankrupt in Santa Rosa and in California"; that the defendant did "as ancillary receiver, and not otherwise, carry on and conduct * * * the business of the said bankrupt in the city of Santa Rosa," and employed "George O. Whit-

75 Cal. App. 389

CLARK v. BAEN et al. (Civ. 2937.)

(District Court of Appeal, Third District, California. Dec. 1, 1925. Hearing Denied by Supreme Court Jan. 28, 1926.)

1. Bankruptcy $\hookrightarrow$ 114(1) — Defendant, failing to disclose he was acting in official capacity as receiver, and assisting to conceal identity of principal, personally liable.

Where plaintiff seller, at time of sale and delivery to defendant's agent, did not know that defendant was acting as receiver or in other than individual capacity, and defendant failed to disclose such fact, and helped to conceal identity of his principal by permitting agent to conduct firm's business under misleading name, defendant could not deny his liability to plaintiff, misled thereby, on ground that he was acting for undisclosed principal, but was personally liable for goods.

ney in and about the conduct of the business of said bankrupt at Santa Rosa"; and that the merchandise described in the complaint was "sold and delivered to said bankrupt estate upon the order of said George O. Whitney."

The court found that the allegations of the complaint are true; that the defendant was appointed ancillary receiver as alleged in the answer; that the business of the bankrupt was as therein alleged; that the defendant was duly authorized to "continue the business of the International Brokerage Company for the balance of the drying season for the year 1921, at the plant of said International Brokerage Company at Santa Rosa"; that the defendant employed Whitney as alleged; that "during said time the said defendant Baen also conducted the business of buying, selling, and shipping grapes at said city of Santa Rosa, and shipping said grapes to eastern markets, under the name and designation of Santa Rosa Dehydrating Company, and in and about which said last business the said defendant Baen also employed the said Whitney as agent and manager; that during the times herein mentioned, and between September 30, 1921, and October 19, 1921, the said defendant Baen, by and through said manager and agent, George O. Whitney, did purchase from the said plaintiff herein, at said Santa Rosa, in the said county of Sonoma, lumber lath for use in shipping green grapes purchased by the said defendant Baen under the name of Santa Rosa Dehydrating Company, and which said lumber lath were of the reasonable value of \$435.50, and for which the said defendant Baen, by and through said agent and manager, agreed to pay to the said plaintiff herein the said sum of \$435.50; no part of which has ever been paid." Judgment was entered in favor of plaintiff against defendant Baen as prayed for in the complaint. Baen has appealed from the judgment. He contends that the evidence does not support the findings to the effect that he purchased the materials in question in his individual capacity and is personally liable for the value thereof.

Whitney was in charge of the International Brokerage Company's business at Santa Rosa during the year 1920, and the dehydrating plant was built that year. The company did not operate under the name Santa Rosa Dehydrating Company. Its principal business there "was the dehydrating process." "That is what it (the plant) was built for." "It was advertised as a dehydrating plant." "Fresh grapes were shipped during the year 1920," to what extent does not appear. It used "lumber lath" in shipping such grapes, but the same was not purchased from plaintiff. The materials involved in this action were used in the shipment of fresh grapes during the year 1921. The plaintiff testified that they were ordered by Whitney and de-

livered at the dehydrating plant; that six deliveries were made; that his bookkeeper charged the sales in his account books to the Santa Rosa Dehydrating Plant; that, "after there had been one or two loads went out, and I found the account here in my book before I knew they had gotten any, * * * I saw Mr. Whitney, and I says, 'Whose is this dehydrating plant?' I know I asked him who it was, and he said it consisted of Mr. Clarence E. Baen of San Francisco, he was the head man, he was the one that would send me the check, * * * He said Mr. Baen would pay that." Plaintiff then wrote in pencil, after the name Santa Rosa Dehydrating Plant in the account, "Clarence E. Baen, Whitney Manager." Plaintiff further testified:

"The International Brokerage Company, I knew they had gone into bankruptcy; that is, I heard they had, but I didn't know anything about the dehydrating plant, and I did not know who the owners were or anything about it at all. * * * When we sold this lumber I knew nothing about" Baen's receivership.

The defendant Baen testified:

"My instructions to Mr. Whitney were * * * not to run up any bills or create any obligation that he did not have the money to pay for." The International Brokerage Company "left a great many debts, a great many obligations to grape growers and to everybody around this country. * * *

"Q. Why did they call it the Santa Rosa Dehydrating Plant (during the receivership)? A. * * * I really don't know. Because the International Brokerage Company name was too long, for one thing, and Whitney took that line up and called it the Santa Rosa Dehydrating Plant because the International Brokerage Company name was too long, he said, and because it had a pretty rotten reputation.

"Q. Did you suggest he do that? A. No. I told him to take it down; that he had no right to do that; that he was manager for me of the International Brokerage Company, and he said, 'That's only the name of the plant, that is not the name of the company.'

"Q. It was run as the Santa Rosa Dehydrating Plant, wasn't it? A. Yes, sir."

Baen further testified that he operated the plant from July to October or November, 1921; that he incurred debts to the amount of about \$15,000 in excess of the moneys in his possession as receiver; that he resides in San Francisco; that during the operation of the plant by him he made possibly a dozen visits to Santa Rosa, "different week-ends, Saturday afternoons and Sundays"; that during that time he purchased and shipped, as receiver, 125 or 130 carloads of fresh grapes, at an expenditure of \$180,000 or \$200,000; that Whitney was not the agent of defendant personally, but only as receiver; and that the materials purchased were used only in the shipment of grapes by the defendant as such receiver.

[1] It is not necessary to consider whether the receiver exceeded his authority by engaging in the business of buying and shipping fresh grapes, or whether that business is included in the business of "dehydration and drying of fruits and vegetables and of packing and shipping the same," or whether the plaintiff, having no interest in the bankrupt's estate, can raise the question of want of authority. The uncontradicted evidence shows that at the time the materials were sold and delivered the plaintiff did not know that Baen was acting as receiver or in other than his individual capacity. Baen, knowing that the bankrupt corporation had a "rotten reputation" at Santa Rosa, was instrumental in misleading plaintiff by permitting Whitney to conduct the business under a name which would naturally tend to hide the identity of the real purchaser, if the bankrupt estate was such. In harmony with the adoption of a misleading name, when plaintiff inquired as to the identity of the Santa Rosa Dehydrating Company, Whitney not only failed to give the desired information, but he made statements which further misled the plaintiff. Baen was the agent of the bankrupt estate. By permitting Whitney to conduct the business thereof under a misleading name, Baen helped to conceal the identity of his principal. Under such circumstances the defendant cannot be heard to deny liability to one who has been misled, on the ground that he was acting for an undisclosed principal.

"The rule is well established that, where one deals with another believing him to be a principal, and subsequently learns that he was dealing with an agent of an undisclosed principal, he may recover either from the person with whom he dealt or from the undisclosed principal. A man has a right to the character, credit, and substance of the person with whom he contracts; if, therefore, he enters into a contract with an agent, who does not give his principal's name, the presumption is that he is invited to give credit to the agent, still more, if the agent does not disclose his principal's existence. If a person would excuse himself from responsibility on the ground of agency, he must show that he disclosed his principal at the time of making the contract, and that he acted on his behalf, so as to enable the party with whom he deals to have recourse to the principal in case the agent had authority to bind him. Consequently, an agent who contracts without disclosing his principal, is personally liable, even where he discloses the fact of the agency, but not the name of his principal." 1 Cal. Jur. 860; *Bradford v. Woodworth*, 108 Cal. 684, 41 P. 797; *Murphy v. Helmrich*, 66 Cal. 69, 4 P. 953.

[2] If it be conceded that the defendant conducted the business of buying and shipping fresh grapes as receiver, he nevertheless made himself personally liable to plaintiff by failing to disclose the fact that he was such receiver and was acting in his official capacity. The evidence more strongly supports the judg-

ment in this case than that produced in *Bradford v. Woodworth*, supra, where the judgment against the agent personally was affirmed. It is true that the trial court in that case found that the agent did not disclose the fact that he made the purchases there in question on behalf of his principal, but, since a finding upon that issue in this case must necessarily, under the evidence, have been against the defendant, he has suffered no prejudice by the failure to so find. An examination of the whole case not only fails to show a miscarriage of justice, but shows affirmatively that no other judgment could properly have been entered.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

75 Cal. App. 353

FILARSKI v. COVEY et al. (Civ. 2986.)

(District Court of Appeal, Third District, California. Nov. 27, 1925.)

1. Sheriffs and constables §100—Sheriff liable for acts of deputies only when performed in line of official duties.

A sheriff is liable for acts of his deputies only when being performed in line of official duties and under color of office.

2. Sheriffs and constables §100—Sheriff has no duty to call judges or magistrates to come to court and deputy calling magistrate was not acting in line of duty, so as to render sheriff liable for negligent injuries.

A sheriff has no official duty to call judges or magistrates to come to court, and deputy calling magistrate to court, in order that he might bring a prisoner before him for examination under Pol. Code, § 4157, was not acting in line of his duty, so as to render sheriff liable for deputy's negligent injuries to another

3. Sheriffs and constables §157(3)—Surety on sheriff's bond is not liable for any acts not in line of performance of official act.

Under Civ. Code, § 2836, liability of surety on sheriff's bond is limited to express terms of contract, and if act upon which liability is predicated is outside of official duties and not in line of performance of some official act, surety is not liable.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Louis Filarski against C. H. Covey and others. Judgment for defendants, and plaintiff appeals. Affirmed.

K. Van Zante, of Hanford, for appellant.
J. L. C. Irwin, of Hanford, for respondents.

PLUMMER, J. This action was brought by the plaintiff against the defendant C. H. Covey, as deputy sheriff, W. J. Hime, as sheriff of the county of Kings, state of California, and Maryland Casualty Company, a cor-

poration, as surety on the official bond of W. J. Hime, as sheriff, for the purpose of recovering damages in the sum of \$10,000 for the death of a minor son of the plaintiff, alleged to have been caused by the negligence of C. H. Covey as deputy sheriff. The trial court sustained the demurrer of the defendants Hime and Maryland Casualty Company to plaintiff's amended complaint without leave to amend, and sustained the demurrer of the defendant C. H. Covey to said complaint, with leave to plaintiff to amend within ten days, which plaintiff declined to do. Judgment was entered in favor of the defendants, and from this judgment the plaintiff appeals.

The second amended complaint, after setting forth certain preliminary matters alleged, in paragraph VI and VIII thereof, as follows:

VI. "That on the 8th day of October, 1923, defendant C. H. Covey, while acting in his official capacity as deputy sheriff, had in his possession a certain automobile which was then under his care, management, and direction, and which he was driving north on the public highway at a place about three miles south of the southeast corner of the city limits of the city of Hanford in said county of Kings, to wit, at the intersection of said public highway and a private road running east therefrom."

VIII. "That on the said 8th day of October, 1923, defendant W. J. Hime, as sheriff of said county of Kings, had in his custody in the county jail of said county of Kings a person whom he had arrested for committing a public offense, who was then and there awaiting his preliminary hearing before, and to be admitted to bail by, a magistrate. That on said day defendant C. H. Covey, while acting in the line of his official duties, went out to call such magistrate, and after having called such magistrate he (defendant C. H. Covey) proceeded to return to take said person so held in custody before said magistrate for examination, to wit, to give him a preliminary hearing and to admit him to bail, and while thus returning as aforesaid said defendant C. H. Covey so wrongfully, carelessly, and negligently, and without due regard for the safety and convenience of others upon said public highway, managed and drove said automobile that the same then and there came into violent collision with said bicycle managed and ridden on by said Joe Filarski. That by reason of said collision said Joe Filarski was thrown upon the ground and rendered unconscious, and his skull and the bones of both his arms were fractured. And the injuries then and there inflicted upon said Joe Filarski, by reason of said collision caused his death on the 9th day of October, 1923."

The grounds of demurrer were that said second amended complaint does not state facts sufficient to constitute a cause of action; that said complaint is uncertain in that it cannot be determined therefrom what official act said C. H. Covey was performing, or attempting to perform, at the time of the alleged accident; that it cannot be ascertained from said second amended complaint whether it was sought to hold the Maryland

Casualty Company liable on its bond for wrongful acts committed by said Hime in his official capacity as sheriff or in the negligent performance of his official duties; that said amended complaint is uncertain in that it cannot be determined whether it is sought to allege the wrongful acts committed by Covey in his official capacity or in his individual capacity. Other grounds of demurrer are specified, but these are sufficient to present the questions to be determined on this appeal.

No question is presented upon the allegations that C. H. Covey was a duly appointed deputy sheriff, appointed by the defendant W. H. Hime, the sheriff of Kings county.

As said in 1 A. L. R. 236, in an extended note:

"The general rule has long been settled that sheriffs and other officers performing similar duties are liable civilly but not criminally for the acts and omissions of their deputies when acting officially or under color of the office"—citing a large number of cases.

Among the duties placed upon sheriffs by section 4157 of the Political Code is to "arrest and take before the nearest magistrate for examination all persons who attempt to commit, or who have committed a public offense."

[1-3] While the rule is as above stated, that a sheriff is liable for the acts of his deputies when acting in an official capacity, because the acts are really his acts, it is also the law that the sheriff is not liable for the acts of his deputies unless the acts being performed are in the line of his official duties and under color of office. We do not think it necessary to a determination of this case to review the authorities cited by respective counsel, as an examination of the pleadings clearly establishes the correctness of the ruling of the trial court. Paragraph VI of the second amended complaint shows that the defendant Covey was driving an automobile, of which he had possession (whose automobile is not alleged), and was moving northward on a public highway at a place about three miles south of the southeast corner of the city limits of the town of Hanford, in the county of Kings. This paragraph contains no statement of facts showing that the defendant Covey was acting in an official capacity. It does contain the words, "while acting in his official capacity as deputy sheriff," which, of course, not being coupled with any statement of facts, is a mere conclusion of law. This paragraph, however, does locate the place of the defendant Covey at the time the alleged injury was inflicted. In paragraph VIII it is set forth that the defendant Hime, as sheriff of the county of Kings, had in his custody in the county jail of said Kings county a person who had been arrested for committing a public offense, who was then and there awaiting his preliminary

hearing before and to be admitted to bail by a magistrate; "that on said day defendant C. H. Covey, while acting in the line of his official duties, went out to call such magistrate, and after calling such magistrate he (defendant C. H. Covey) proceeded to return to take said person so held in custody before said magistrate for examination, etc., and while thus returning as aforesaid said defendant C. H. Covey so wrongfully, carelessly, and negligently, and without due regard for the safety and convenience of others upon said public highway, managed and drove said automobile that the same then and there came into violent collision with said bicycle managed and ridden on by said Joe Filarski, etc."

This paragraph shows clearly that the defendant Covey was not taking the arrested person before any magistrate. Why the defendant Covey had gone about three miles from the town of Hanford to call a magistrate does not appear. It is argued by counsel that the magistrate had his office in the town of Hanford, but was then living some three miles out in the country. This, of course, cannot be considered, because it does not appear in the pleadings, further than the fact that the defendant Covey had gone that distance out in the country to call a magistrate. We do not think it necessary to cite any authorities to the point that it is no part of the official duties of a sheriff to call either judges or magistrates to come to court. To attend court is the official duty of the judge, justice, or magistrate, from which it follows that, while the defendant Covey had in mind the subsequent performing of an act which would be in the line of his official duty, to wit, the taking from the county jail to the office of the magistrate the person held in custody, he had not at the time of the injury entered upon any such official service. The complaint does not show facts from which it can be concluded that the sheriff had directed the defendant Covey to take out an automobile belonging to the sheriff, or to any other person, and call the magistrate to come into town and discharge his official duties. Hence there is nothing to sustain even the inferences of agency. The allegation of the complaint, "that, while acting in the line of his official duties, defendant Covey went out to call such magistrate," contains no statement of facts upon which such an allegation could be predicated, and is merely the setting forth of a conclusion; but in the setting forth of that conclusion it does allege the performance of an act not in line of his official duty, and hence, so far as it is set forth, controverts the allegation of acting in the line of official duty. While the sheriff upon his official bond would be liable for the wrongful acts of his deputy performed in the line of his official duties, he is not liable upon such bonds for the personal dealings and

acts of a deputy otherwise performed. The defendant Covey in this case was not serving any process, had no process in his possession for service, was not taking any prisoner before any magistrate, was not performing any act under color of his office, but was simply, as alleged in the complaint, out in the country to call a magistrate. As to the surety, section 2836 of the Civil Code limits the liability to the express terms of the contract, and if the act upon which the liability is predicated is outside of the official duties and not in the line of the performance of some official act, the surety is not liable. We do not deem it necessary to cite authorities relating to the liability or nonliability of sheriffs for the acts of their deputies, in view of the fact that a reading of the allegations of the complaint, as we have set forth herein, establishes the correctness of the ruling of the trial court.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

75 Cal. App. 439

PEOPLE v. DASEY et al. (Cr. 1267.)

(District Court of Appeal, Second District, Division 1, California. Dec. 7, 1925.)

1. Indictment and information $\S$ 132(6)—Motion requiring election properly overruled where each charge supported by evidence.

Where two defendants were indicted for two crimes of rape against same person on same day, one count as principal and another as accomplice, a motion after state had presented its case requiring state to elect trial count was properly refused, under Pen. Code, $\S$ 954; there being evidence tending to support each charge.

2. Rape $\S$ 51(1)—Evidence held to sustain conviction.

Evidence held to sustain conviction of each of two defendants both as principal and as accomplice.

3. Rape $\S$ 54(1)—Corroboration of testimony of complaining witness held unnecessary.

In prosecution for rape, where complaining witness' testimony was uncorroborated, but such witness was 20 years old, had no previous acquaintance with accused, a good reputation, and justified her failure to tell mother of crime on same evening, it was held that no corroboration was necessary.

4. Criminal law $\S$ 829(3)—Refusal to give accused's instruction as to resistance of prosecutrix held no error.

In prosecution for rape, where requested instruction by accused as to degree of resistance required of prosecutrix was refused, but court charged another as to resistance, held, such refusal was not reversible error.

5. Criminal law §1169(1)—Hearsay evidence by police officer as to automobile number held not prejudicial.

In prosecution for rape, where police officer testified as to automobile number on information from prosecutrix, it was held, where accused admitted crime was committed in automobile, that, although testimony was hearsay, its admission did not prejudice accused.

6. Rape §59(3)—Cautionary instructions as to uncorroborated testimony of prosecutrix held not compulsory.

In prosecution for rape, where prosecutrix was not a child, but her testimony was uncorroborated, and court gave cautionary instruction as to scrutiny of her testimony, it was held no error to refuse cautionary instruction of accused, where no statute made such instruction compulsory.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

James M. Dasey and John M. Dasey were convicted of rape, and they appeal. Affirmed.

Frank Allender, A. S. De Santis, and Irvin C. Taplin, all of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., Erwin W. Widney, Deputy Atty. Gen., and Hamish B. Eddie, of Los Angeles, for the People.

CURTIS, J. [1] The indictment against appellants is in two counts. Each count charges appellants with the crime of rape committed against the same person and on the same day. It was the contention of the prosecution that each of said appellants had sexual intercourse with one Josephine Price by force and violence, and that while one of said appellants accomplished said act the other aided and abetted in its commission by holding and restraining said complaining witness and thus overcoming her resistance. That is, the prosecution contended that each of said appellants was guilty of two crimes of rape against the same person and on the same day, and that in the commission of one of said crimes the appellant James M. Dasey was the principal and appellant John M. Dasey was the accomplice, and in the commission of the other of said crimes the appellant John M. Dasey was the principal and the appellant James M. Dasey was the accomplice. The evidence admitted on behalf of the prosecution tended to show the commission of each of said crimes. There was therefore no merit in the motion of appellants made after the prosecution had closed its evidence in chief requiring the people to elect one of the two charges contained in the indictment as the one upon which the appellants would be prosecuted. As the appellants were charged with two separate and distinct crimes, and there was evidence tending to support both of said charges, there could be no right whatever on appellants' part to require the people to limit the prosecution to only one of said crimes.

Under section 954 of the Penal Code the indictment may charge two or more different offenses of the same class of crimes under separate counts, and the prosecution is not required to elect between the different offenses or counts set forth in the indictment, but the defendant may be convicted of any number of the offenses charged.

[2, 3] There was ample evidence to support the verdict finding each of the appellants guilty of each of the crimes of which he was charged. The weight of this evidence was for the jury, and, the jury having found against appellants, this court will not disturb their verdict. It is true that the Supreme and appellate courts of this state have in some instances, in cases where the charge was of the same character as those against appellants, reversed judgments of conviction when there apparently was a substantial conflict in the evidence. This was done in the case of *People v. Hamilton*, 46 Cal. 540, 543, following *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506. The same ruling was made in *People v. Ardaga*, 51 Cal. 371. See, also, *People v. Cavanaugh*, 30 Cal. App. 432, 158 P. 1053, *People v. Castro*, 60 Cal. 118, and *Lind v. Closs*, 88 Cal. 6, 25 P. 972. Whatever may have furnished the necessity in some of the above cases for the courts to have departed from the well-established rule and practice of refusing to pass upon the weight of the evidence, we see no occasion in this action under the facts as disclosed by the record to justify this court in setting aside the verdict of the jury and reversing the judgment on the ground of the insufficiency of the evidence. The reason assigned by the courts in the above cases for reviewing the evidence and considering its weight was that the story of the complaining witness was so improbable as to warrant the belief that the verdict was more the result of prejudice and popular excitement than the calm and dispassionate consideration upon the facts. Such a reason is not to be found in the present action. The complaining witness was a mature young woman of between 19 and 20 years of age. Her reputation was above reproach. She told a straightforward story of being abducted by the appellants at a late hour of night and taken to a secluded spot and there forcibly ravished by them. She had no previous acquaintance with either of the appellants, and testified that she had never seen either prior to the attack being made upon her. It is true that there was no direct corroboration of any of these acts, but no corroboration was necessary. The only respects in which appellants claim that her testimony was improbable were those wherein she testified that she made no outcry when a milkman passed within a few inches of the automobile in which she and her assailants were seated, and at about the time when the

assaults were being made upon her, and her further statement that she failed to complain to her mother on return to her home on the night of the assault. She explained her failure to make any outcry at the time the milkman drove near the automobile by the fact that the appellants were at the time choking her and holding their hands over her mouth so that it was impossible for her to speak. She gave as the reason for not complaining to her mother that the latter was in delicate health, and she feared the effect upon her mother's health of her being aroused at that late hour of the night and informed of the serious plight of her daughter. Her testimony shows that the next morning she sent word to the police department and gave to the officers a complete account of the outrage committed against her and all information regarding the affair, which led to the arrest of the appellants. On this subject we would call attention to the case of *People v. Fraysier*, 36 Cal. App. 579, 172 P. 1126, where the prosecuting witness, a girl of 12 years of age, testified that the defendant, evidently a grown man, committed an assault upon her and immediately thereafter she went home; she said nothing to her mother about the occurrence, but straightway went out to play with her companions and forgot the matter; she thought nothing more about it until the arresting officer called upon her one day at school and questioned her in regard to the affair. There was no corroboration of her testimony, yet the court said at page 581 (172 P. 1126):

"We cannot say from a review of the entire record that the evidence of the prosecution was inherently improbable. The most that can be said is that its truth was open to suspicion. If believed by the jury, it was sufficient to support their verdict and the judgment."

We find nothing so improbable in the story of the prosecutrix in this action that we feel called upon to hold that her testimony was not sufficient to support the verdict.

[4] The court struck out from an instruction proposed by appellants the following:

"Therefore, if you believe from the evidence in this case that the said Josephine Price, while in the automobile mentioned in evidence, while located on the streets mentioned in evidence, at times yielded to the solicitations of the defendants, or either of them, and did not at all times resist to her utmost, but subsequently consented to the acts of intercourse charged in the indictment, then and in that event you should find the defendants not guilty."

It is claimed by appellants that they were seriously prejudiced by the court's refusal to give the foregoing portion of the proposed instruction. Conceding that the portion of the instruction which the court struck out correctly stated the law as to the extent and degree of resistance required of the prosecu-

trix in a case of this character, there was no error on the part of the court in refusing to give it. The court gave other instructions upon this phase of the case, one of which was as follows:

"The law requires that the prosecution must satisfy your minds that the prosecutrix resisted at all times to the full extent of her ability, and that her resistance was overcome by means of force and violence. And if you find from the evidence in this case that the prosecutrix, Josephine Price, did not at all times resist to the full extent of her ability, and that her resistance was not overcome by means of force or violence, your verdict should be not guilty."

We think the rights of appellants were all properly safeguarded by the court in the instructions given.

Appellants took exception to various statements of the district attorney made during the latter's argument to the jury. In each instance the court sustained appellants' objection to such statements and admonished the jury to disregard them. In view of the nature of these statements, and the admonition given by the court in relation thereto, we are of the opinion that no injury was sustained by appellants on account of such remarks.

[5] No error was committed by the court in permitting the police officer to testify to the number borne by the automobile which it was claimed was used by appellants on the night of the assaults. It may be conceded that the only knowledge that the police officer had as to this number was gained by him from the prosecutrix, although this does not clearly appear from the evidence. Therefore his statement as to the number was hearsay. The only purpose of this evidence was to identify the appellants as the occupants of the car on the night of the assaults and, therefore, as the assailants of the prosecutrix. Each of the appellants admitted that they were with the prosecutrix on said night and were with her in said car, and each further testified that he had sexual intercourse with her while in said car. The testimony of the police officer, therefore, as to the number of the car given to him by the prosecutrix, could not have resulted in any injury whatever to the appellants.

[6] The appellants requested the court to instruct the jury that:

"While it is true that a conviction may be had upon the testimony of the prosecuting witness alone, if it be sufficient to be accepted by the jury as truth, for this reason it is the duty of the jury in such a case to carefully scan the testimony of the prosecuting witness and to view the same with caution."

Our attention has not been called to any authority holding that it was error in cases of this kind to refuse to give a cautionary instruction such as that proposed by appellants.

The subject is considered in California Jurisprudence as follows:

"Although there is no statute especially requiring it, the court may instruct the jury to view the testimony of the prosecutrix with caution where she is a child of tender years and her testimony is uncorroborated, since in this class of cases the accused is almost defenseless and ample opportunity is afforded for the free play of malice and private vengeance. On the other hand, the refusal of such an instruction is not error where the prosecutrix is not a child of tender years where her testimony is corroborated." 22 Cal. Jur. p. 408.

While the court refused to so instruct the jury as requested by appellants, it did give the following instruction:

"The court further instructs the jury that while it is the law that the testimony of the prosecutrix should be carefully scanned, still this does not mean that such evidence is never sufficient to convict."

This instruction is in almost the precise language as that given in *People v. Liggett*, 18 Cal. App. 367, 372, 123 P. 225. It does not greatly differ from the instruction given by the trial court in the case of *People v. Currie*, 16 Cal. App. 731, 736, 117 P. 941, 943, concerning which the appellate court said:

"We think the court went far enough in its cautionary signal to the jury to awaken in their minds the importance of carefully scrutinizing the testimony of the prosecuting witness."

The only material respect in which the instruction given in the *Currie* Case differs from that given in the present action is that in the former case the court charged the jury directly that the law required them "to examine the testimony of the prosecutrix with caution," while in the present action the court instructed the jury that the testimony of the prosecuting witness "should be carefully scanned," but not in as direct language as that used in the *Currie* Case. On each occasion, however, the attention of the jury was called by the court to the law imposing upon them the duty of carefully scrutinizing such testimony when uncorroborated before convicting the defendants upon it. In the absence of any requirement, arising either from statutory enactment or judicial declaration, making it compulsory upon the court to give any cautionary instruction whatever in cases of this character, it was not error for the court to refuse to give the above instruction requested by appellants. In view of the instruction upon this same subject which the court did give to the jury, we think appellants have no just cause to complain as to the court's instruction.

We find no reversible error in the record, and are of the opinion that the judgment and

order denying appellants' motion for a new trial should be affirmed; and it is so ordered.

We concur: CONREY, P. J.; HAHN, Justice pro tem.

75 Cal. App. 286

RIVERSIDE PORTLAND CEMENT CO. v. ANCHOR LAUNDRY CO. (SCHAFFER, Intervener). (Civ. 5234.)

(District Court of Appeal, First District, Division 2, California. Nov. 23, 1925. Hearing Denied by Supreme Court Jan. 21, 1926.)

1. Corporations ⇨133—Authority to sign name of corporation as indorser on notes held immaterial as respects rights of parties to suit to compel book transfer of attached stock of another corporation.

Whether signing of corporation's name as indorser on notes sued on was authorized held immaterial as respects rights of attachment defendant in such suit, and assignee of attached stock of another corporation, as parties to suit to compel transfer thereof on books.

2. Appeal and error ⇨1011(1)—Trial court's fact findings binding.

The appellate court is bound by trial court's fact findings on evidence conflicting at most.

3. Corporations ⇨123(3)—Instrument directing delivery of stock assigned held sufficient constructive delivery.

Instrument assigning corporate stock as security for indebtedness to assignee, and directing bank holding it as security for notes to deliver it to assignee on payment of such notes, constituted sufficient constructive delivery.

4. Corporations ⇨123(12)—Valid lien on corporate stock not forfeited by good faith assertion of ownership and request for transfer on books.

Lien of assignee on corporate stock was not forfeited by asserting claim of ownership and asking transfer on books, where it was not shown that assignee did not act in good faith or was not within its rights.

5. Corporations ⇨123(1)—Instrument assigning pledged stock as security for indebtedness held not void as providing for forfeiture of stock and restraining right of redemption.

Instrument assigning as security for indebtedness to assignee all title and interest in certain shares of stock then held by bank as security for notes executed by assignor, and providing that assignee on paying off notes should accept stock in full settlement of all claims against assignor and dismiss attachment suit against him, held not void, as providing for forfeiture of stock and restraining right of redemption.

Appeal from Superior Court, Los Angeles County; Frederick C. Valentine, Judge.

Action by the Riverside Portland Cement Company against the Anchor Laundry Com-

any, wherein M. E. Schaffer intervened and filed a cross-complaint. From a judgment against the intervener, he appeals. Affirmed.

G. C. O'Connell, of Los Angeles, for appellant.

O'Melveny, Millikin, Tuller & Macniel and G. C. De Garmo, all of Los Angeles, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to compel it to transfer on its books certain shares of stock. The defendant appeared and answered the plaintiff's complaint. Later M. E. Schaffer appeared as intervener and filed a pleading by him called a cross-complaint, in which he set forth a claim of title to the same stock, and asked relief against the original plaintiff and original defendant accordingly. Schaffer's pleading was answered by the original parties filing separate answers. A trial was had before the court sitting without a jury. The trial court entered an order of nonsuit against the plaintiff, and no appeal has been taken from that order. The trial court made findings in favor of the original plaintiff and against the intervener, and ordered a judgment that the intervener take nothing and that the plaintiff and intervener each pay their own costs. From that judgment the intervener has appealed, and has brought up a bill of exceptions.

Prior to the 25th day of July, 1919, the plaintiff had been attempting to collect certain promissory notes which were past due. Accordingly it had caused to be commenced an action in the superior court of the state of California in and for the county of Los Angeles, which action was entitled James H. Woods v. M. E. Schaffer, E. J. Knight Company, a Corporation, and S-C Contracting Company, a Corporation. The plaintiff in that action took out a writ of attachment against M. E. Schaffer and caused the same to be levied on certain real property belonging to Schaffer, and also to be levied upon 200 shares of capital stock of the Anchor Laundry Company which was owned by him but was pledged to Hellman Commercial Trust and Savings Bank as security for the payment of two other promissory notes. Said last-mentioned action had not been brought to trial and was still pending on July 25, 1919. On that date the plaintiff and M. E. Schaffer entered into a contract in words and figures as follows, to wit:

"Los Angeles, California, July 25, 1919.

"For value received, I hereby sell, assign and transfer to the Riverside Portland Cement Company, a corporation, of Los Angeles, California, all of my right, title and interest in and to 200 shares of stock of the Anchor Laundry Company, a corporation, of Los Angeles, California, evidenced by certificates No. 1 for 40 shares, No. 2 for 40 shares, No. 3 for 40 shares,

No. 4 for 40 shares, No. 23 for 39 shares and No. 24 for one share, which said stock is now held by the Hellman Commercial Trust & Savings Bank as security for a promissory note for \$12,000 executed by M. E. Schaffer, and another note for \$6,400 executed by the said M. E. Schaffer, both in favor of the Hellman Commercial Trust & Savings Bank.

"This assignment is executed as security for any indebtedness owing by the undersigned to said Riverside Portland Cement Company and involved in the action of Jas. H. Woods v. M. E. Schaffer et al., No. B-65944, superior court of Los Angeles county, and is given in lieu of the attachment issued in said action on said stock and on certain real property in the city of Los Angeles, known and described as No. 950 South St. Andrews place; and it is understood that upon the execution of this assignment the said attachment shall be released upon said stock and upon said real property levied upon under said writ of attachment.

"The undersigned hereby represents that the notes referred to and described in the above-entitled action, and the two notes above referred to executed by the undersigned to the Hellman Commercial Trust & Savings Bank, constitute the only indebtedness owing by the undersigned at the present time, and said attachment is to be released upon such representation and understanding.

"The undersigned further agrees to use his best endeavors to secure renewals and extensions of said notes above described payable to the Hellman Commercial Trust & Savings Bank, and of the indebtedness thereby evidenced, for a period of one year from date hereof, and to that end agrees to sign such new notes as may be required by said bank for that purpose. At the end of said one-year period, or sooner, at the option of the Riverside Portland Cement Company, the said company may pay off said notes due said Hellman Commercial Trust & Savings Bank, and in that case it is to accept and take over said stock above described in full settlement of all claims and demands against said M. E. Schaffer, under said notes last mentioned, either individually or as indorser on the notes described in said action No. B-65944, or as a stockholder and director in the E. J. Knight Company, a corporation, of Los Angeles, California; and said action No. B-65944 shall thereupon be dismissed.

"And for the purpose of carrying into effect the provisions of the preceding paragraph, the said Hellman Commercial Trust & Savings Bank is authorized and directed to deliver to the order of said Riverside Portland Cement Company the stock above described, upon payment of said two notes above referred to, payable to said bank, and said Riverside Portland Cement Company is hereby given full power and authority to surrender said stock to the Anchor Laundry Company and to have the same reissued in the name or to the order of said Riverside Portland Cement Company.

"Riverside Portland Cement Company,

"John Treanor, Manager.

"M. E. Schaffer."

On the 25th day of July, 1920, the plaintiff paid the Hellman Commercial Trust & Savings Bank the amount owing to that bank on the two promissory notes, and received from the bank the certificates of stock which are

the subject-matter of this suit. At the same time the plaintiff caused to be dismissed the action entitled *Woods v. Schaffer et al.*

[1] As showing a want of title in the plaintiff, and as showing title in himself, the appellant contends that there was no authority shown authorizing E. J. Knight to sign the name of the E. J. Knight Company as indorsements on the notes sued on by the plaintiff in *Woods v. Schaffer*. The trial court found the facts against the appellant. However, the subject was entirely immaterial so far as the rights of the parties in the instant case are concerned.

[2] The appellant also sought to show that he had signed the same notes through certain misrepresentations and fraudulent practices made by the agents of the plaintiff. The trial court made findings on those allegations, and all of the findings are against the appellant. The most that can be said is that the evidence is conflicting, but we are hardly prepared to state that there is any conflict in the evidence. Be that as it may, the case presents an instance in which a Court of Appeal is bound by the findings made by the trial court.

[3] The foregoing considerations bring us to a construction of the instrument dated July 25, 1919. By granting to the Anchor Company a motion of nonsuit, the trial court in effect held that said instrument did not constitute an absolute transfer from Schaffer to the Riverside Company of the shares of stock when, on July 25, 1920, that company paid off the Hellman Bank and dismissed the action entitled *Woods v. Schaffer et al.* Such determination was in legal effect to hold that the Riverside company, after paying off the bank's claim, held the certificates of stock as additional security to secure the notes which it held signed by the intervener. However, the appellant contends that no pledge was created in favor of the Riverside Company because on July 25, 1919, the stock was not manually delivered by the intervener into the hands of the Riverside Company. The instrument dated July 25, 1919, and in particular the last paragraph thereof, was, in legal effect, an order for the delivery of the stock, and as such constituted a sufficient constructive delivery. *Yokohama S. Bk. v. Trans-Oceanic Co.*, 54 Cal. App. 533, 202 P. 346.

[4] Conceding that the Riverside Company at one time had a valid lien, the appellant then asserts that the lien was forfeited when the Riverside Company thereafter asserted a claim of ownership and asked the Anchor Laundry Company to transfer the stock to the Riverside Company, and upon its refusal to do so thereafter commenced an action to compel the Anchor Company to make the transfer. The claim is without merit. There is nothing in the record to show that the acts of the Riverside Company were not made in

good faith, or, to put it in another way, there is nothing to show that the Riverside Company was not within its rights in making the application which it made. However, when the trial court granted its order of nonsuit, the Riverside Company accepted the ruling, and since that date has not asserted any claim other than that it holds the stock to secure the notes which were signed by the intervener.

[5] Again, the intervener complains that the document dated July 25, 1919, provides for a forfeiture of the stock subject to the lien, and is in restraint of the right of redemption, and is therefore void. A most casual reading of the instrument shows that it contains no forfeiture and contains no restraint on the right of redemption.

Other points made by the appellant are not of sufficient importance to prolong this opinion.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J

75 Cal. App. 187

FEDEROFF v. BIRKS BROS. et al.
(Civ. 2837.)

(District Court of Appeal, Third District, California. Nov. 13, 1925.)

1. Appeal and error §843(2)—Whether statement that truck would haul tractor over certain road was representation of fact or expression of opinion held immaterial.

Whether seller's statement that truck would haul tractor over certain road was representation of fact or only expression of opinion held immaterial, in absence of evidence that any attempt was made to haul it over such road or similar ground.

2. Appeal and error §843(2)—Whether false representations were made by seller or waived, and certain testimony erroneously excluded, held immaterial.

Whether false representations were made or waived, and whether court erred in excluding testimony in explanation of letter asking extension of time for payment, held immaterial, in absence of testimony that buyers relied on, or were deceived by, seller's statements, or that seller knew, or had reason to know, that they were false.

3. Sales §53(3)—Directed verdict held proper.

In absence of testimony as to matters essential to make out case of fraud and misrepresentation, directed verdict in action on purchase-money note was proper, though there was some conflict in testimony.

4. Bills and notes §534—Direction to jury to fix attorney's fees at reasonable sum, not exceeding amount provided for in note, held not error.

Where complaint asked for attorney's fees, provided in note, and defendants did not con-

test amount, court did not err in directing jury to allow reasonable sum, not exceeding agreed amount, though there was no testimony as to reasonable value of attorney's services.

5. Bills and notes $\hookrightarrow$ 534—Fifty dollars for services of plaintiff's attorney in action on note held not excessive.

Fifty dollars for services of plaintiff's attorney, in action on note providing for payment of 15 per cent. of amount due, which was \$950, as attorney's fees held not excessive, where two days were consumed in trial.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by W. R. Federoff against Birks Bros., a copartnership, and the members thereof individually, in which defendants filed cross-complaint against H. B. Whitten. From a judgment for plaintiff and cross-defendant, defendants appeal. Affirmed.

See, also, 242 P. 885.

Arthur C. Huston and Arthur C. Huston, Jr., both of Woodland, for appellants.

John R. Connelly, of Sacramento, and Arthur Coats, of Yuba City, for respondents.

PLUMMER, J. Action to recover balance of \$950 alleged to be due upon a promissory note executed and delivered for the sum of \$1,620, by the Birks Bros., to the defendant H. B. Whitten, and assigned by him to the plaintiff, W. R. Federoff. The note was given on account of the purchase price of a 2½-ton United States truck sold upon contract. The defendants interpose the defense of fraud and misrepresentation. The action was tried before a jury, and, at the conclusion of the defendants' testimony upon the defense of fraud and misrepresentation, the court directed the jury to bring in a verdict in favor of the plaintiff and cross-defendant and against the appellant in the sum of \$950, and also directed the jury to fix the amount of the attorneys' fees. The jury brought in a verdict as directed, and fixed the attorneys' fees at the sum of \$50. From this judgment the defendants Birks have appealed. The appellants in their answer set up a number of specifications of fraud and misrepresentation, but at the trial attempted only to prove two of the items thereof, to wit, that the plaintiff's assignor represented the truck to be in good running condition; and also that the truck would carry a tractor weighing about 7,500 pounds. The truck involved in this transaction was a secondhand machine, and had been used about six weeks. The evidence shows that, in response to an advertisement inserted in a Sacramento paper by the respondent Whitten that he had a secondhand truck for sale, the appellants called upon said Whitten at his office in the city of Sacramento, examined the truck, and entered into negotiations with him, culminating in the purchase thereof. During the course of the con-

versation leading up to the purchase it is claimed by the appellants that the respondent Whitten made certain false and fraudulent representations both as to the capacity of the 2½-ton truck to carry a tractor weighing 7,500 pounds and also as to the condition of the truck. The testimony of John T. Birks, who appears to have conducted the negotiations on the part of the appellants, on direct examination, concerning the carrying capacity of the truck, is set out in the transcript as follows:

"A. I told him what make of a tractor it was, and told him just what it weighed.

"Q. What was it? A. It weighed on the road 7,600 pounds with a load.

"Q. And did you tell him with a load? A. It was about 7,500 with a load.

"Q. What was said about the road between your place and Santa Rosa? A. I told him the kind of a road that we had to travel over, and he was acquainted with it, and he said he would guarantee to haul that tractor over that road."

The same witness, upon direct examination as to the condition of the truck, testified as follows:

"A. He said it was in good condition and guaranteed it to be in good condition and would do that work for which we wanted it."

Upon cross-examination this witness testified as follows:

"A. He guaranteed it to haul that tractor and told me—I told him what it weighed, and he guaranteed it to haul that tractor, and I told him of the other work we wanted to do with it, and he said it would do that work."

It further appears from the testimony that one of the purposes for which the appellants wanted the truck was to haul the tractor over the road mentioned between two farms. As to the condition of the truck, the witness testified as follows:

"Q. Now in what particulars was the truck not in good running condition when you took it across the bridge into Yolo county? A. you say why wasn't it in good running order?

"Q. Why wasn't it in good condition—in what way? A. I couldn't say there was anything the matter with it when we got across there.

"Q. In what particulars was it not in good running condition when you took it across the bridge? A. I supposed it was in good running condition.

"Q. Well, was it? A. It seemed to be when we took it across.

"Q. You think it was? A. It seemed to be.

"Q. You testify now, or your testimony now is, that it was in good running order when you took it across that bridge? A. Well, as far as I could see it at that time.

"Q. I am asking you at that time in your opinion was it in good running condition? A. It seemed to be as far as I could tell.

"Q. And you believed it was? A. It seemed to be.

"Q. Then you think at the time you first took it into your possession that the truck was

in good running order? A. Well, it seemed to be. Of course it gave me trouble on the way home.

"Q. But you think when it was delivered to you it was in good running condition? A. It seemed to be.

"Q. And you believed it was? A. Well, I believed it was. It seemed to me that way."

The witness further testified that he had difficulty with the truck on the way home, and that it stopped on him several times and that once when it stopped he had the assistance of some one to remedy the defect, and then he proceeded on with the truck. The testimony simply shows that the driver of the truck had some trouble with it in reaching home, but the testimony does not disclose what the defects, if any there were, in the machinery of the truck, or what, if any, there was of poor condition in the truck that caused the driver thereof to have the difficulty mentioned.

The truck was purchased some time during the month of November, 1921. The attempt to haul the tractor with the truck was not made until some time late in the spring of 1922. The testimony in this particular is as follows:

"A. Well, we loaded the tractor on and tried to haul it.

"Q. And where did you load the tractor on? A. At the home ranch near Meridian.

"Q. And how long was that after you purchased the truck? A. Well, I don't remember just how long it was. It was some time that spring after we purchased the truck.

"Q. And what experience did you have in that connection? A. We loaded it on, and spent nearly an entire day trying to make it pull and get it out of the corral.

"Q. That was at your river ranch in this county? A. Yes, sir.

"Q. On level ground? A. Yes, sir.

"Q. Tell us what you did? A. We loaded the tractor on it one day, and we were going to take it out there the next day, and we tried to drive it, and it would go a short distance and stop.

"Q. By stopping you mean the engine would stop? A. Yes, sir; the engine would stop.

"Q. And how far did you get in your effort to haul the tractor to the work? A. I never got it out of the corral or barnyard.

"Q. Who was there with you? A. Myself and brother.

"Q. How long did you work with the truck to take it out? A. All day.

"Q. Did you succeed in hauling this tractor at all? A. No."

The action in this case was not begun until some two years after the transaction mentioned, and during that period of time the testimony shows that the appellants spent something like \$300 in having repairs made upon the truck. It further appears that the appellant John R. Birks had a conversation with Whitten about the truck some months after its purchase, in which conversation the respondent Whitten advised the appellants to

take the truck to some good mechanic and have him go over the same. The record shows no testimony of any mechanicians. It also appears that some conversation was had between one of the appellants and the respondent Whitten after the institution of this action in which the appellant stated that the truck was "no good" and Whitten replied "that a fellow would naturally say that because he was suing him for the pay of the truck."

[1] The testimony fails to show the condition of the ground in the corral where the appellants attempted to haul the 7,500-pound tractor upon the 2½-ton truck. Whether the ground was soft and yielding or hard and unyielding does not appear. There is not a word of testimony as to whether the ground in the corral was similar to the road over which the appellants stated that the respondent Whitten guaranteed that the truck would haul the tractor. The testimony does not show that any attempt was ever made by the appellants to haul the tractor over the road in question, or to haul the tractor by the truck over any ground where the conditions would be similar. The testimony of the alleged representations in this particular is, as we have said, in the following answer:

"I told him the kind of a road that we had to travel over, and he was acquainted with it, and he said he would guarantee it to haul that tractor over that road."

[2] It is strongly insisted by the respondents that this is neither a false nor fraudulent representation; that it is, at most, only the expression of an opinion. It is only the conclusion of the witness. What the respondent may have said in relation to the capacity of the truck does not appear, but, taken as a representation and as the expression of a fact, there appears nothing in the testimony to show that the truck would not do exactly what the respondent Whitten said it would do, which, of course, disposes of this question, whatever conclusion may be reached based upon the statement of the witness couched in the language which we have set forth. It may be further stated that there is no testimony called to our attention or discoverable in the transcript showing that the appellants relied upon any statements made by the respondent Whitten, or were deceived in any manner thereby. In this particular, our attention is called to the testimony of the witness J. R. Birks as to the capacity of a 2½-ton truck to carry a load weighing 7,500 pounds:

"Q. Have you ever hauled your tractor on a 2½-ton truck before? A. Other people have hauled it.

"Q. Other people have hauled it? A. Yes, sir.

"Q. And you believed at the time you purchased the truck that a 2½-ton tractor, or that a 2½-ton truck would haul a load like that, did you? A. 2½-ton truck?"

"Q. Yes, a 2½-ton truck would haul a load like that? A. Yes, sir; when I saw it done.

"Q. You knew that of your own knowledge? A. Yes, sir; I saw it done twice on a 2½-ton truck. Two times.

"Q. If a person represented to you that a truck was a 2½-ton truck you would conclude of your own knowledge that it would haul a tractor of that size? A. Yes; he guaranteed it to do it."

The witness further testified on redirect examination that he had seen a similar tractor hauled on a 2½-ton truck, and, in addition, a 15-gallon can of oil and a box of tools, etc.

While it does not appear to have been taken into consideration, in directing a verdict to be rendered for the plaintiff, the testimony shows that at a former trial of this action the truck in question was loaded with 75 sacks of cement and driven along the streets in Yuba City, but the weight of the cement sacks is not shown. The testimony shows that the contract for the purchase of the truck was taken by the appellants to their home, and four or five days after its receipt was sent back to the respondent Whitten for correction, was sent to them again by the respondent Whitten, and after some weeks finally signed by all of the appellants and returned to the respondent Whitten. During all of this period of time the contract was in the possession of the appellants. The question being considered during this period of time was that of fixing the date or dates of payment of the unpaid portion of the purchase price of the truck. After the final execution of the contract and during the period of time that elapsed between the date thereof and the institution of this action, the defendants paid thereon the sum of \$700. It is further insisted by the respondent that any alleged fraudulent representations made by the respondent Whitten were waived by the conduct of the appellants in asking for and receiving additional time in which to pay for the truck. The record shows that on or about the 23d day of May, 1922, the appellants wrote to the respondent Whitten as follows:

"Meridian, May 23—22.

"H. B. Whitten—Dear Sir: Your letter received and in reply will say that we will have to have an extension of time as there is nothing coming in now just before harvest. After harvest we will be able to meet it. Will try to get down to Sacramento before that time to arrange the matter.

"Yours truly, Birks Bros., Meridian, Cal."

On the part of the appellants it is claimed that the court erred in refusing to allow the appellants to offer an explanation of this letter that at the time of the execution of the contract it was verbally agreed that the appellants might have a full year's time within which to make the payments for the truck. While no action was begun to enforce pay-

ment of the contract until long after the period mentioned in the appellants' letter, bearing date of May 23, 1922, the record does not show any formal extension of time executed or granted for the payment of the balance due upon the contract. The record further shows that at the time of the trial, or shortly preceding the date thereof, the plaintiff sought permission of the defendants to demonstrate that the truck in question would haul the tractor over the road mentioned by the respondent Whitten in the conversation had during the negotiations for the purchase and sale of the truck, and that this permission was refused.

From the fact that the record fails to disclose any testimony showing that the appellants relied upon any alleged false representations made by the respondent Whitten, we think we do not need to comment upon the testimony alleged to constitute false representations, or to pass upon the question whether there was a waiver of the alleged false representations, or whether the court erred in refusing to permit oral testimony as to an agreement for a one-year period to make payment for the truck as an explanation of the letter referred to, as these matters are not necessary for a determination of this case. We may state, however, that, in addition to the lack of testimony which we have just mentioned, there is nothing in the record tending to show that Mr. Whitten knew any of the alleged statements to be false, or had any reason to know the same, assuming that they were, in fact, false. There was no evidence that respondent Whitten was in the truck business other than he had this second-hand truck for sale and was in the automobile business.

[3] In view of the lack of testimony to support appellants' allegations of fraud and misrepresentation, we deem it unnecessary to refer to more than one case in support of the ruling of the trial court in directing the jury to bring in a verdict for the plaintiff. In *Jacobson v. Northwestern Pac. R. R. Co.*, 175 Cal. 468, 166 P. 3, it is said:

"A directed verdict is proper, unless there be substantial evidence tending to prove in favor of plaintiff all the controverted facts necessary to establish his case. In other words, a directed verdict is proper whenever, upon the whole evidence, the judge would be compelled to set a contrary verdict aside as unsupported by the evidence. To warrant a court in directing a verdict, it is not necessary that there should be an absence of conflict in the evidence, but, to deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one."

It is not a question of a conflict of evidence in this case, assuming that there might be some conflict in the evidence set out in the transcript or that different inferences might be drawn from the testimony to which our attention has been directed and which we

have set forth, but it is a question of a lack of testimony upon matters essential and necessary to be proved in order to make out a case based upon fraud and misrepresentation. There being such lack in this case, a directed verdict for the respondents was proper.

[4] The appellants finally insist that the court erred in directing the jury to fix the amount of the attorney's fees to be allowed the plaintiff. No testimony was introduced concerning the reasonable value of the services performed by the attorney for the plaintiff. The note sued upon contains the following clause:

"And I (we) agree in the event this note be placed in the hands of an attorney for collection, to pay 15 per cent. of the amount due hereon as attorney's fees."

This note is set out in *hæc verba* in the complaint, and the prayer of the complaint asks for "an attorney's fee of 15 per cent. of the amount due," etc. In the answer filed by the appellants the matter of the attorney's fee is unmentioned. The court, in submitting the matter to the jury, stated that the amount due, calculated at 15 per cent., was the sum of \$174.90, and that the jury might fix the attorney's fee at such reasonable sum as the jury might deem proper, not exceeding \$174.90. The jury fixed the amount at \$50. While it is true that the amount of the attorney's fees to be allowed might have been contested by the appellants, no attempt was made so to do. It is beyond question that in the note executed by the appellants they contracted to pay an attorney's fee in the sum of 15 per cent. on the amount due. The contract reads a certain sum, and not a reasonable fee, which may not exceed a certain fixed sum, as is the case in many instances. In the case of *Alexander v. McDow*, 108 Cal. 25, 41 P. 24, the facts are to all intents and purposes exactly the same as the case at bar. The note set out in the complaint fixed definitely the attorney's fee to be paid. The prayer of the complaint asked for that fee which was fixed at 10 per cent. in the note on the amount found to be due. Default was made by the defendant, and the clerk entered up the amount of the attorney's fee and this action was contested on appeal. No testimony, of course, was introduced either pro or con. The note in that case read: "10 per cent. of total amount due for attorney's fees," etc. Upon this character of a complaint, with no question raised as to the attorney's fee by answer filed therein, the court in the *Alexander Case* held as follows:

"We think, also, that there is sufficient in the complaint to support the allowance of attorneys' fees. The note, which is set forth in full, provides for them, and the prayer of the complaint asks for them, and the action is brought by an attorney at law. The sum asked as attorneys' fees is susceptible of exact determination by simple mathematical calculation.

It is fairly deducible from the complaint, therefore, that plaintiff asks an allowance of a specific sum as being reasonable and due for attorneys' fees under the contract. It is true that this demand is in the nature of special damages, the allowance of which might have been contested by defendant. *Prescott v. Grady*, 91 Cal. 518 [27 P. 755]. But his default admits the truth of the matters pleaded, and must, therefore, be construed to admit that the amount claimed is both reasonable and due. Thus no evidence was required to be taken for the purpose of fixing that amount."

[5] In 8 C. J. 1101, it is said:

"The amount of fees fixed by the instrument sued on is at least *prima facie* the sum recoverable, subject to be reduced, it is generally held, where such sum is unreasonable and excessive. It is generally held that a provision for a fixed per cent. as attorney's fees is a contract of indemnity, and not for liquidated damages, so that the maker is liable to the holder only for the amount of attorney's fees actually contracted for, or, in the absence of a special contract for fees, for the reasonable value of the services rendered; but there is authority for the contrary, holding that the sum or per cent. fixed is liquidated damages."

Cases are also there cited to the effect that the plaintiff is *prima facie* entitled to recover the per cent. stipulated for as attorney's fees, and need not in the first instance show that he has contracted to pay his attorney such per cent. or that it is a reasonable sum. In the case at bar, just as in the case of *Alexander v. McDow*, the complaint is signed by an attorney at law, and, further, there can be no question that the sum of \$50 allowed by the jury is far below what any court would ordinarily fix as a reasonable attorney's fee. The record shows that two days were consumed in the trial.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

75 Cal. App. 345

FEDEROFF v. BIRKS BROS. et al.
(Civ. 2845.)

(District Court of Appeal, Third District, California. Nov. 25, 1925.)

1. Costs $\Leftrightarrow$ 10—Expense of demonstrations held improperly allowed.

Where plaintiff, at second trial of action, offered to pay all expenses of demonstration, which court ordered on such condition, and no demonstration was made on third trial, expenses of demonstration at each trial were improperly allowed plaintiff as costs.

2. Courts $\Leftrightarrow$ 90(1)—Decision in original opinion of question not referred to in opinion on rehearing in bank not court's decision.

Decision in original opinion of question not referred to in opinion on rehearing in bank is not court's decision.

3. Witnesses **§29**—Legal distances between county seats and Sacramento not controlling in determining whether witness lives so far from place of trial as not to be entitled to mileage fees.

Legal distances from county seats to Sacramento, as fixed by Pol. Code, §§ 150-208, are not controlling in determining whether witness lives more than 50 miles from place of trial, and hence is not entitled to mileage fees under Code Civ. Proc. § 1989, and Pol. Code, § 4300g.

4. Statutes **§230, 231**—Parts not altered by amendment or incorporated in Code considered as having been law from time of enactment.

Where statute is amended or incorporated in Code, parts not altered are considered as having been law from time of enactment.

5. Statutes **§184**—Original purpose and object considered in arriving at legislative intent.

To arrive at legislative intent, original purpose and object of legislation must be considered.

6. Statutes **§184**—No room for construction of statute, where Legislature distinctly states design.

Ordinarily, when lawmaking power distinctly states its design in enactment of particular statute, no room is left for construction.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by W. R. Federoff against Birks Bros., a copartnership, and the members thereof as individuals, in which defendants filed cross-complaint against H. B. Whitten. Judgment for plaintiff. From an order taxing costs, defendants appeal. Modified, and affirmed, as modified.

See, also, 242 P. 881.

Arthur C. Huston and Arthur C. Huston, Jr., both of Woodland, for appellants.

John R. Connelly, of Sacramento, and Arthur Coats, of Yuba City, for respondent.

FINCH, P. J. [1] This is an appeal from an order taxing costs. Plaintiff recovered judgment in the action, and in due time thereafter served and filed a memorandum of his costs and disbursements. Appellant filed a motion to have the costs taxed by the court, objecting therein to certain items claimed by plaintiff. The court overruled the objections, and taxed costs in the amount stated in the memorandum. The action was tried three times. Two items allowed as costs were for the expenses of demonstrating a truck, \$10.35 at the second trial, and \$9.50 at the third. Relative to such demonstrations, the bill of exceptions contains the following:

"That as to the item charged for the expenses of demonstrating the truck on the second trial, it was shown that at such trial the following stipulations and order were made by the court:

"After argument as to offer to demonstrate truck. The Court: If you had offered to bear the expense of the repairs to this truck, it would be different, but I am not going to saddle the expense of that on—

"Mr. Connelly: That is understood; we will pay all expense.

"The Court: That wasn't understood.

"Mr. Connelly: We include that in the offer; we will pay the expenses of it.

"The Court: I haven't any reasonable assurance it can be done between now and meeting time in the morning.

"Mr. Connelly: If it cannot be done by that time we are willing to waive it; we are willing to pay all expenses. (Argument.)

"The Court: I will make the order that the plaintiff at his expense may pay for the repairs and have it loaded if he can have it done by 10 o'clock tomorrow morning.

"That as to the item charged for the expenses of demonstrating the truck on the third trial of said action it was shown that there was no demonstration of said truck during the trial."

It thus clearly appears that at the second trial the plaintiff offered to pay all expenses of the demonstration, and that the court ordered the demonstration made on condition that plaintiff pay the expenses thereof. At the third trial no demonstration was made. It must be held, therefore, that those two items were improperly allowed.

[2, 3] Certain items were allowed as mileage fees paid to residents of Sacramento who were witnesses at the trial. Section 1989 of the Code of Civil Procedure provides:

"A witness is not obliged to attend as a witness before any court, judge, justice, or any other officer, out of the county in which he resides, unless the distance be less than fifty miles from his place of residence to the place of trial."

Section 4300g of the Political Code provides for witness fees as follows:

"For each day's actual attendance, when legally required to attend upon the superior court, per day, two dollars in civil cases. * * * Mileage actually traveled, one way only, per mile, ten cents."

Evidence produced at the hearing of the motion shows that the actual distance from Sacramento to Yuba City, the county seat of Sutter county, is 45 miles. Appellants contend that, notwithstanding such actual distance, title 3, part 2, sections 150 to 208, of the Political Code, is controlling. Section 200 fixes the legal distance from Sacramento to Yuba City at 58 miles. Appellants argue that such witnesses were not obliged to attend, and that, therefore, they were not entitled to any allowance for mileage.

Section 150 reads: "The legal distances in this state are fixed as follows."

Then follow sections 150 to 207, fixing the respective distances from the several county seats of the state to Sacramento. Section

208 reads: "When mileage is allowed by law to any person, the distance must be computed as herein fixed." Appellants rely upon *Hegard v. California Ins. Co.*, 2 Cal. Unrep. 663, 11 P. 594, where it is said:

"The sections of the Political Code, *supra*, established the legal distances therein set out without any qualification, and hence they are established for any and all purposes."

The opinion cited is not the decision of the court, however, as a rehearing was granted, and the decision of the court in bank is reported in 72 Cal. 535, 14 P. 180, 359. No reference appears therein to the question of legal distances. If the legal distances fixed by the Political Code were adopted "for any and all purposes," some surprising results would follow. The distances to Sacramento from Yuba City and Marysville, respectively, are 58 and 52 miles. Mathematically, therefore, the shortest possible distance between Yuba City and Marysville is 6 miles. Actually, however, they are separated only by the width of Feather river. If such legal distances are controlling in a case such as this, then a resident of Sacramento, when subpoenaed by the superior court of Sutter county, would not be "obliged to attend as a witness"; but one so served who resides 4 miles south of Sacramento, and therefore 4 miles farther from the county seat of Sutter county, would be obliged to attend, he being within the actual limit of 50 miles fixed by section 1989 of the Code of Civil Procedure, and the legal distance from his residence to Yuba City not having been established by legislative enactment. Section 208 of the Political Code does not relate to the mileage fees which a witness may collect, because he is entitled to such fees for only the "mileage actually traveled."

The history of the legislation covering the subject-matters embraced in title 3 indicates that the distances therein fixed were intended to be applied only in computing mileage fees allowed by law to officers and others traveling between the city of Sacramento and the several county seats in the state. It was so held in *Neely v. Naglee*, 23 Cal. 152. In 1854 an act was passed entitled "An act defining the legal distances from each county seat in the state of California to the state capitol at Sacramento, the state lunatic asylum at Stockton, and the state prison at San Quentin." Stats. 1854, p. 78. Section 1 of the act read as follows:

"The distances established by this act shall be, and the same are hereby declared to be the legal distances for which mileage shall be allowed to the state capital at Sacramento: First: For county treasurers in settling their accounts. Second: For conveying the insane to the asylum at Stockton. Third: To sheriffs for transporting prisoners to the state prison at San Quentin."

[4-6] In 1858 an act in substantially the same terms as to title and purposes was passed, and the former act was expressly repealed. Stats. 1858, p. 256. In 1872 the provisions of the latter act and the amendments thereto were incorporated into the Political Code as title 3, part 2, sections 150 to 201. Section 201 was in the identical language of the present section 208; the provisions thereof never having been changed. Viewed in the light of the prior legislation on the subject, that provision shows the purpose and intent of the Legislature as fully as did section 1, *supra*, of the act of 1854.

"The incorporation of the statute in the Code cannot be said to have a greater effect upon its meaning than an amendment thereof would have had. Where a statute is amended, the parts which are not altered are to be considered as having been the law from the time when they were enacted." *San Joaquin, etc., Irr. Co. v. Stevinson*, 164 Cal. 221, 234, 128 P. 924, 929.

"To arrive at the legislative intent the original purpose and object of the legislation must be considered." *Mackey v. Mott*, 25 Cal. App. 110, 115, 142 P. 1082, 1084.

"Ordinarily it is the rule that, when the law-making power distinctly states its design in the enactment of a particular statute, no room is left for construction." *Coulter v. Pool*, 187 Cal. 181, 185, 201 P. 120, 122.

"The statute, like all statutes, must be read in view of the evident purpose of the Legislature in its enactment." *Dillingham v. Welch*, 179 Cal. 656, 658, 178 P. 512, 514.

The order is modified by striking out the items of \$10.35 and \$9.50 for demonstrations of the truck, and as so modified the order is affirmed, appellants to recover costs of appeal.

We concur: HART, J.; PLUMMER, J.

75 Cal. App. 323

PAIVA et ux. v. CALIFORNIA DOOR CO.
(Civ. 2989.)

(District Court of Appeal, Third District, California. Nov. 24, 1925. Rehearing Denied Dec. 24, 1925. Hearing Denied by Supreme Court Jan. 21, 1926.)

1. Appeal and error $\S$ 927(3)—Evidence construed favorably for plaintiff, on appeal from judgment of nonsuit.

On appeal from judgment of nonsuit, all evidence in favor of plaintiff must be taken as true, and all contradictory evidence disregarded.

2. Evidence $\S$ 595—Statutes do not require that facts on which an inference may be founded must be proved by direct evidence.

Code Civ. Proc. $\S\S$ 1958, 1960, defining "inference," do not require that facts upon which an inference may be founded must be proved by direct evidence, as facts established by circumstantial evidence are "proved" and "legally proved" within those sections.

3. Negligence $\hookrightarrow$ 136(17)—Negligence in leaving fire unguarded held for jury.

Whether defendant was negligent in leaving burning stumps unguarded during dry season, near lands covered by trees, brush, leaves, and grass, when fire had been started without a permit from state forester as required by Forestry Act, *held* for jury.

4. Statutes $\hookrightarrow$ 64(2)—Unconstitutionality of provision as to liability for fire held not to affect other provisions of Forestry Act.

If provision of Forestry Act, § 18, as amended by St. 1919, p. 234, imposing liability for accidental and unavoidable fire, is unconstitutional, remainder of act is not affected, as such provision might be eliminated without affecting other provisions.

5. Constitutional law $\hookrightarrow$ 311—Negligence $\hookrightarrow$ 121(1)—Statute declaring escape of fire *prima facie* proof of negligence valid.

Legislature *held* authorized to provide, as in Forestry Act, § 14, that proof that defendant allowed fire to escape from his own land to that of another shall be *prima facie* proof of negligence.

6. Statutes $\hookrightarrow$ 110½(1)—Language of Forestry Act held limited by its title to fires in forests and places endangering forests.

Forestry Act *held* limited by its title to regulation of fires within public or private forests, or in places so situated in relation thereto as to endanger same.

7. Statutes $\hookrightarrow$ 110½(1)—Provisions of Forestry Act invalid, if applying to fires in places other than mentioned in title.

In view of title of Forestry Act, limiting its application to regulation of fires within public or private forests or in places so situated in relation thereto as to endanger same, such provisions as are broad enough to apply to fires in other places are invalid.

8. Statutes $\hookrightarrow$ 64(10)—Provisions of statute, not wholly germane to title, are not void in toto.

Provisions of statute, some of which are not germane to the title, are not void in toto, but are to be construed as applying only to subject-matter embraced in title of act.

9. Statutes $\hookrightarrow$ 110½(1)—Statute regulating fires is constitutional.

Forestry Act, § 16, as amended by St. 1923, p. 690, prohibiting fires between certain dates without permit from state forester or his agent, when construed, in view of its title, as applying only to forests and places so situated as to endanger them, is constitutional.

10. Negligence $\hookrightarrow$ 18—Permitting fire to escape actionable under Code, irrespective of validity of Forestry Act.

One negligently permitting fire, kindled on his land, to escape to another's *held* liable, irrespective of validity of Forestry Act, in view of Civ. Code, § 3346a, and Pol. Code, § 3344.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by Antonio Paiva and wife against the California Door Company, a corporation. From a judgment of nonsuit, plaintiffs appeal. Reversed.

P. G. West and J. M. Inman, both of Sacramento, for appellants.

R. Fitzgerald, of San Francisco, and Charles A. Swisler, of Sacramento, for respondent.

FINCH, P. J. [1] Plaintiff sued to recover damages alleged to have been caused by fire "negligently kindled" by defendant on its land, and by it "negligently, willfully, and carelessly" permitted to spread to and upon plaintiff's land and "burn and destroy a large amount of plaintiff's standing timber, pasturage, fence posts, and wire." At the close of plaintiff's evidence, on motion of defendant, judgment of nonsuit was entered on the ground that the plaintiff had failed to prove a sufficient case to support a judgment in his favor. This appeal is from the judgment. Since, on a motion for a nonsuit, all the evidence in favor of the plaintiff must be taken as true and all contradictory evidence disregarded, it will be sufficient to state the evidence most favorable to plaintiff's case which tends to support the allegations of the complaint.

Running in a direction approximately west-southwest through defendant's timber land, there is a ravine which crosses the west boundary line about 60 or 70 feet south of the place where the fire in question was discovered. For a week or more prior to the day of the fire the employees of defendant were engaged in clearing its land lying adjacent to the west boundary line thereof, both on the north and the south sides of the ravine, and burning brush and limbs of trees thereon. The evidence justifies respondent's statement that the ravine "had been cleared of all brush, as also had the land of respondent lying to the north of the ravine, and some clearing had also been done south of the ravine." An employee of defendant testified that its land across the line from the place where the fire started "was all burned off slick that I could see." Except for the standing timber, it "was all clear." The defendant had cleared a fire line, or fire trail, along the west boundary from 9 to 18 inches in width.

During the latter part of the week preceding the fire, some of defendant's employees were engaged in burning brush south of the ravine. Witnesses observed fire burning on defendant's property in the bottom of the ravine near the west boundary line in the forenoon of Saturday, September 15, 1923. The employees, in accordance with their usual custom, quit work for the week at 3 o'clock in the afternoon of that day. Between 7 and 8 o'clock Saturday night a fire broke out on

defendant's land south of the ravine near the place where the men had been burning brush. "It was just in a little brush and manzanita, * * * a small patch of stuff; it started up in that. * * * There had been little piles of brush burned around there in places * * * where they had been burned a few days before." Three men fought this fire. It burned for "an hour or hour and a half." On Sunday night, at about 10 o'clock, another fire was discovered near the same place. It burned over a larger area than that of Saturday night, and 15 or 20 men were called out to fight it, some of them remaining on duty there until nearly 7 o'clock Monday morning, when only a few stumps were burning. These burning stumps were covered with earth before the men left them.

On Monday, September 17th, a dry wind was blowing from the northeast. "It was more nearly east than northeast." "It blew in a circle. It would come this way in a circle and then go the other way, * * * from all directions; that is the way it blew." It was a "pretty high wind, about 40 miles an hour." A witness testified that from defendant's property towards the place where the fire started, there were "some leaves flying and some ashes where some fire was before. * * * On that place where the wind blew the ashes, there wasn't any fire for 6 days." Two of defendant's employees were felling trees in the morning of that day at a point 80 or 90 feet northerly from the place where the fire started and 25 or 30 feet east of defendant's west boundary line. They had an unobstructed view of the defendant's land lying to the south of them, and of the place where the fire started, but on that morning they did not see any other person in that vicinity or any fire on defendant's land. At about a quarter past 7 o'clock they noticed a fire in "pine needles and manzanita leaves * * * underneath a manzanita bush" about 8 feet west of defendant's boundary line, and, as stated, about 60 or 70 feet north of the ravine. The fire was then about 14 inches high, and covered "a space of 4 or 5 feet." They immediately ran to the fire and endeavored to extinguish it, and other employees went to their assistance within a few minutes thereafter. In spite of the combined efforts of these men, the fire spread rapidly, and swept westerly and southwesterly over several thousand acres of land, including that of plaintiff.

Appellant contends that the defendant negligently left smoldering fires in two stumps north of the ravine and near the west boundary line of its land, and that the evidence warrants the inference that fire was communicated from one of these stumps to the inflammable pine needles and leaves covering the land where the fire was discovered. There is no direct evidence that either of these stumps was burning on Monday morn-

ing. If they were burning at that time, in the absence of any other evidence as to the origin of the fire, it might be inferred reasonably that the high wind carried sparks or pieces of burning material from one of the stumps to the place where the fire started. The evidence tending to show that there was fire in these respective stumps will be stated separately.

Euell Gray, an assistant fish and game commissioner, visited the premises in the afternoon of September 20th. He testified as follows:

"Q. Do you know where the * * * big fire started? A. Yes. Q. That was pointed out to you? A. Yes. Q. Well, with reference to that point where did you see any fire burning? A. There was a pitch stump at that point that was very close to the fire line * * * that was still burning. * * * It was a pitch pine stump. * * * It was practically right there. It showed that some effort had been made at that point to corral the fire, * * * and it had apparently gotten away because of the closeness of timber and leaves, etc. * * * It was right there at the point of the fire line. They had scraped the leaves and debris away. * * * It had burned practically through the heart of the stump. It had apparently gone through the stump and had burned underneath, under the ground. The fire was still in the roots of the stump. Q. Was it sticking above the ground? A. Yes. * * * This pitch stump was right in the fire line they had put along the edge of their boundary. * * * It seemed to us at that time that it had started from that pitch pine stump. * * * It showed that from the amount of work that had been done, scraping the leaves in and trying to corral it at that place. * * * You could see where they had put some dirt on the stump. * * * They had apparently tried to cover this stump with dirt and had brought the fire line between the stump and the manzanita bush or the brush on the westerly side. * * * At the time we examined it, it looked as though the fire had apparently gone from this stump. You could see where it crossed the fire line and had got in where there was lots of leaves and pine needles. * * * You could see where the needles had burned from the stump across into the manzanita bush where they first tried to corral the fire."

Cross-examination by counsel for defendant:

"Q. How far would you say this stump was from * * * where the fire is supposed to have started? A. * * * I would say that it was not more than 7 or 8 feet. * * * Q. * * * Would you say that it was possible for embers from burning bushes and branches of that (manzanita) tree to have fallen and ignited the needles on the ground and in that way connected with the stump? A. That is highly improbable on account of the wind and the distance too. Had the wind been blowing in an opposite direction, I would say the fire might have come back. Q. You have had considerable experience with fires, have you not? A. Quite a little, yes. Q. In every fire that starts it eats back towards the way the wind is

blowing for some distance, does it not? A. But not in this case. It had burned to this particular point, and there was nothing for it to eat back on. Q. But there was a point where it could eat into it from the other side, was there, from the side you saw the ashes? A. Well, that portion had been burned. The brush had all been burned. Q. In fact it had all been cleared for some time before that, didn't it have that appearance? A. It did at this time, yes."

Another witness testified:

"The fire trail was just west of the stump. There was a thin sprinkling of pine needles in the fire trail that had been burned following directly from the stump to where the thick needles and debris was under the manzanita bush. Q. Were there any evidences as to how this stump had been made—in other words, had it been cut off, or was it an old stump, or what? A. It was all charred over the top and burned down to a small size; I could not say."

An employee of defendant, who "had charge of burning brush," testified that there were no "fires made or kindled" on defendant's land on the 17th of September. It does not appear whether any fires were kindled on defendant's property on the 18th or the 19th.

The testimony relative to the other burning stump is more closely connected in point of time with the fire of the 17th. J. P. Yost, employed by the state board of forestry as a district fire ranger, testified as follows relative to an examination which he made of defendant's premises on the day after the fire:

"I went up Tuesday morning, and went into the bottom of the ravine there on the line they have been calling the fire line. * * * I started east along there, and after I got up the ravine about 75 feet I went straight north to get out of the ravine, and I put my hand up on a round place. It was a stump covered up, and I found it was hot there, and I went to jump up and I landed on a bed of coals, and I found that the stump had burned part way through. * * * There was a bed of hot coals one side of the stump. A jagged end stuck up maybe a foot. The root gave way underneath where it had been burned maybe a foot down in the ground. After I found that I went up and looked over all the property. * * * On the southeast point of the clear ground * * * there was three different stumps burning. * * * Q. With reference to the place where you stepped into the hole, where was that with reference to the California Door Company's line? A. About 75 or 100 feet up the ravine. Q. Where was it with reference to this point which you say you had pointed out to you as the place where the fire started. A. It was east, maybe a little bit southeast—south of a point straight east, maybe 10 or 15 feet south of it."

From the extent to which this stump had been burned, it is evident that it must have commenced to burn at a time prior to September 18th. Since no fires were kindled on defendant's premises on the 17th, it logically follows that it must have been burning on

the morning of that day and prior thereto. Taking it then as a justifiable inference that the stump was burning on Monday morning, and giving consideration to the further proved fact that a strong wind was blowing past the stump in the general direction of the place where the fire started, it would not be unreasonable, in the absence of other explanation, to infer that the fire was caused by sparks from the burning stump. *Viera v. Atchison, etc., Ry. Co.*, 10 Cal. App. 267, 101 P. 690; *Bowles v. Hickson*, 22 Cal. App. 264, 133 P. 1149; *St. Paul F., etc., Co. v. Southern Pac. Co.*, 30 Cal. App. 140, 157 P. 247; *Reuter v. San Pedro, etc., R. R. Co.*, 37 Cal. App. 277, 174 P. 927; *McGillivray v. Hampton*, 39 Cal. App. 726, 179 P. 733; *Dibble v. San Joaquin L. & P. Corp.*, 47 Cal. App. 112, 190 P. 198.

[2] Respondent contends that the foregoing reasoning is faulty, in that "an inference cannot be based on another inference." The second inference is not based upon the first inference alone, but upon the inferred fact that the stump was burning, and the further fact, proved by direct evidence, that a strong wind was blowing from the stump towards the origin of the fire. The statement that an inference cannot be based upon another inference appears itself to be based upon an unsubstantial foundation.

"An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect." *Code Civ. Proc.* § 1958.

"An inference must be founded on a fact legally proved." *Code Civ. Proc.* § 1960.

Facts established by circumstantial evidence are "proved" and "legally proved," and the foregoing sections do not provide that the facts upon which an inference may be founded must be proved by direct evidence. To hold that an inference cannot be based upon facts inferred from testimonial evidence would be to confine circumstantial evidence within narrow limits. In *Wigmore on Evidence*, § 41, it is said:

"It was once suggested that an 'inference upon an inference' will not be permitted, i. e., that a fact desired to be used circumstantially must itself be established by testimonial evidence; and this suggestion has been repeated by a few courts, and sometimes actually enforced. There is no such rule; nor can be. If there were, hardly a single trial could be adequately prosecuted. * * * In * * * innumerable daily instances we build up inference upon inference, and yet no court ever thought of forbidding it. * * * The judicial utterances that sanction the fallacious and impracticable limitation, originally put forward without authority, must be taken as valid only for the particular evidentiary facts therein ruled upon."

[3] It is not intended, of course, to express any opinion as to the weight of the evidence produced at the trial, but, viewing the evi-

dence in the light most favorable to the plaintiff, as is required on a motion for a nonsuit, sufficient appears to prove a prima facie case in favor of plaintiff. It cannot be said as a matter of law that it is not negligence to leave burning stumps unguarded during the dry season in close proximity to lands covered with trees, brush, leaves, and grass. It is reasonably to be anticipated that a wind may carry sparks from the burning stump to the inflammable materials on the adjacent lands.

The fires which had been burning upon defendant's land were set without a permit from the state forester or any of his agents, required by the Forestry Act. Stats. 1905, p. 235. That act provides:

"Sec. 14. Every person, who willfully, maliciously or negligently sets on fire or causes or procures to be set on fire any woods, brush, prairies, grass, grain or stubble on any lands not his own, or allows the fire to escape from his own land, whereby any property of another is injured or destroyed, * * * shall be guilty of a misdemeanor. * * * Setting such fires or allowing them to escape shall be prima facie proof of willfulness, malice or neglect under this section, provided, that nothing herein contained shall apply to a person who, in good faith, sets a back-fire to check a fire already burning."

"Sec. 16. *Restriction of Use of Fire in Dry Season.* It shall be unlawful between May fifteenth and October thirty-first, for any person or persons to burn brush, stumps, logs, fallen timber, fallows, slash, or grass brush or forest covered land or any other inflammable material or to blast with dynamite, powder or other explosives, or set off fireworks of any kind in forest, fallows, grass or brush covered land, either their own or the property of another, unless done under a written permit from the state forester or his duly authorized agent, and in strict accordance with the terms of the permit; these restrictions not to apply to the ordinary use of fire or blasts in logging in the redwood region (*sequoia sempervirens*). Provided, however, that no written permission shall be necessary to burn inflammable material in small heaps or piles, where the fire is set on a public road, in dooryard premises, corrals, gardens, or plowed fields, at a distance not less than one hundred feet from any woodland, timber, or brush covered land or field containing dry grass or other inflammable material. Any violation of this section is punishable by a fine of not less than fifty dollars or more than five hundred dollars or imprisonment for not less than thirty days nor more than six months in the county jail of the county in which the crime is committed, or both such fine and imprisonment." Stats. 1923, p. 690.

"Sec. 18. *Civil Liability for Forest Fires.* In addition to the penalties provided in sections fourteen, fifteen, sixteen and seventeen of this act, the United States, state, county, or private owners, whose property is injured or destroyed by such fires may recover in a civil action, double the amount of damages suffered if the fires occurred through willfulness, malice or negligence; but if such fires were caused or escaped accidentally or unavoidably, civil ac-

tion shall lie only for the actual damage sustained as determined by the value of the property injured or destroyed, and the detriment to the land and vegetation thereof. The presumption of willfulness, malice or neglect shall be overcome; provided, that the precautions set forth are observed; or, provided, fires are set during the 'dry season' with written permission of and under the direction of the district firewarden. Persons or corporations causing fires by violations of this act shall be liable to the United States, state, county, or private owners in action for debt to the full amount of all expenses incurred by the United States, state, county or private owners in fighting such fires." Stats. 1919, p. 234.

[4, 5] Respondent contends that section 18 "provides for a civil liability in cases where a fire is caused or escapes accidentally or unavoidably," and that such provision is therefore unconstitutional, in that it would deprive a person of property without due process of law. It may be conceded that, in a case such as this, it is beyond the power of the Legislature to impose a liability for an accidental and unavoidable fire, which accidentally and unavoidably escapes, if there be no negligence in causing the fire or in allowing it to escape. The provision referred to, however, may be eliminated without affecting the other provisions of the statute. It is within the power of the Legislature to provide, as it has provided in section 14, that proof that a defendant allowed fire to escape from his own land to that of another shall be prima facie proof of negligence. *People v. Cockrill*, 62 Cal. App. 22, 216 P. 78.

Respondent further contends that, for like reasons, section 16 is unconstitutional, citing *In re McCapes*, 157 Cal. 26, 106 P. 229. In that case subdivision 3 of section 384 of the Penal Code, as it then stood (Stats. 1907, p. 996), was declared unconstitutional. It made it a misdemeanor for any person to build a fire upon his own land "for the purpose of burning brush, stumps, logs, rubbish, fallen timber, fallows, grass or any other thing whatsoever" without a written permit from a "state or district firewarden." The court said:

"It prevents the setting of any fire without permission from a fire warden, though the fire be set with scrupulous care, and by no possibility could work the destruction of property."

The court further said:

"It is to be noted that the act is designed to prevent the destruction of property, and particularly of forests, by the careless setting of fires. In its purview and purpose, therefore, the act is within the police power of the state. No one at this day can be unaware of the great havoc wrought by forest fires, and, indeed, in states such as this, which undergo long periods of drouth, of the loss which results from fires sweeping over the farming lands and destroying the crops. The purpose of the law being for the general good of the state, to prevent

the destruction of property by fires carelessly set and allowed to escape control, not only brings the act strictly within the police power, but the purpose must commend the act to every court. Nevertheless, in the accomplishment of that purpose, it is quite plain that the legislature has transgressed all reasonable bounds."

[6-9] The purpose of the Forestry Act, as expressed in the title thereof, is "to provide for the regulation of fires on, and the protection and management of, public and private forest lands within the state of California." The language of the act, however broad and general its terms, is restrained and qualified by this title to fires within public or private forests or in places so situated in relation thereto as to endanger the same. Lewis' Sutherland on Statutory Construction (2d Ed.) § 135. In so far as the provisions of the act are broad enough to apply to fires in other places, such provisions are invalid, because not germane to the title. Such provisions are not to be held void in toto, however, but they are to be construed as applying only to the subject-matter embraced in the title of the act. Lewis' Sutherland on Statutory Construction (2d Ed.) § 298; Estate of Melone, 141 Cal. 331, 74 P. 991. The application of the provisions of the Forestry Act is expressly limited by the proviso contained in section 16 thereof, a limitation not contained in section 384 of the Penal Code at the time of the decision in the McCapes Case. Viewing the statute in the light of these limitations, it cannot be said that "the Legislature has transgressed all reasonable bounds."

[10] If the act in question were invalid for the reasons stated by respondent, it would still be liable if it negligently permitted the fire to escape. Section 3346a of the Civil Code and section 3344 of the Political Code, in identical language, provide:

"Every person negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own land, is liable in treble damages to the party injured."

The judgment is reversed.

We concur: HART, J; PLUMMER, J.

75 Cal. App. 274

WALLACE v. REGENTS OF UNIVERSITY OF CALIFORNIA et al. (Civ. 5393.)

(District Court of Appeal, First District, Division 1, California. Nov. 20, 1925. Hearing Denied by Supreme Court. Jan. 18, 1926.)

1. Colleges and universities ⇨ **2—Legislature may limit or abrogate right of university to require vaccination before admission of students.**

Legislature, under police power, may limit or abrogate right of University of California, under Const. art. 9, § 9, in absence of lawful

statutory limitation, to require vaccination before admission of student.

2. Colleges and universities ⇨ **2—Statute prohibiting regulation of vaccination by school authorities held void, so far as affecting constitutional right of university.**

St. 1921, p. 550, prohibiting adoption of rule or regulation as to vaccination for smallpox, by school or local health authorities, and repealing St. 1911, p. 295, which repealed St. 1889, p. 32, held void, as general law, not itself regulating subject, in so far as prohibiting or limiting power of University of California, under Const. art. 9, § 9, to pass health laws.

Application of Ralph C. Wallace, by W. S. Wallace, his guardian ad litem, for writ of mandate to the Regents of the University of California and such University. Writ denied.

Hearing denied by Supreme Court; Cashin, Justice pro tem., not participating.

Donovan & Lyman, of Oakland, for petitioner.

John U. Calkins, Jr., and Warren Olney, Jr., both of San Francisco, for respondents.

Douglas L. Edmonds, of Los Angeles, amicus curiae, for Public School Protective League.

TYLER, P. J. Application for a peremptory writ of mandate compelling respondents to admit petitioner to enter himself as a student at large in respondent corporation.

The facts may be briefly stated as follows:

Petitioner applied to be entered in the University of California as a student at large for the term beginning on or about August 14, 1925, and to receive regular tuition therein. He had complied with all the requirements prescribed by respondents to entitle him to so enter save and except that he refused to submit to vaccination against smallpox, or offer proof of previous vaccination, for which reason his application was denied. In their answer to the petition respondents admit that every person in attendance as a student at respondent institution was and is now required, by a rule or regulation imposed or adopted by the Regents, to provide satisfactory evidence to the authorities in charge of the University that he has been successfully vaccinated against smallpox within seven years prior to his application for admission. It is then alleged in substance that the reason for refusal of petitioner's request was due to the fact that he had not complied with the rule in question. Petitioner claims that the Regents have no authority to exact such a requirement, and that the regulation is invalid and is contrary to existing general law.

The sole question thus presented is whether or not the regulation of the university is one which it has power to enact. Prelimi-

narly, it may be well to briefly refer to the various acts of the Legislature on the subject and the adjudications with reference to such legislation. Prior to the year 1889 there was no law governing the situation. The Legislature of that year passed an act (Stats. 1889, p. 32), requiring the vaccination of every child attending the public schools. The constitutionality of this act was assailed, but its validity was upheld by the appellate courts as being a proper exercise of the police power. *Abeel v. Clark*, 84 Cal. 226, 24 P. 383; *French v. Davidson*, 143 Cal. 658, 77 P. 663; *State Board of Health v. Board of Trustees*, 13 Cal. App. 514, 110 P. 137.

In 1911 the statute of 1889 was amended so as to provide that any unvaccinated child or person might be admitted to the public schools upon the filing, by the parent or guardian of such child, of a statement in writing to the effect that such parent or guardian was conscientiously opposed to the practice of vaccination and would not consent thereto. Stats. 1911, p. 295.

This act further provided that whenever the state board of health should, after a thorough investigation, find that smallpox existed in any school district or city, all children or persons who had not been successfully vaccinated within seven years then last past should be excluded forthwith and continuously from admission to or attendance upon the benefits of or service in connection with any and all schools, colleges, universities, academies, and other educational institutions situated in such school district, city, town, or city and county until such children were successfully vaccinated or until such time as such smallpox should cease to exist.

While this act was in full force and effect application was made as here by a minor through his guardian to be enrolled at the University. The rule requiring vaccination was then in force. The applicant presented his statement showing that his parents were conscientiously opposed to vaccination. He was refused admission, and brought a proceeding in mandamus to compel such admission. It was his contention that, having complied with all the requirements as set forth in the statute of 1911 prescribing the conditions with respect to vaccination to be complied with for admission as a student, he was entitled to enrollment. He was denied the relief prayed for. *Williams v. Wheeler*, 23 Cal. App. 619, 138 P. 937. It was there held that the provision of the Act of 1911 (Stats. 1911, p. 295), exempting persons who were conscientiously opposed to the practice of vaccination from the operation of the law, otherwise general in its terms, requiring vaccination of persons seeking admission to educational institutions, was not in the nature of a health regulation, and not being so, it was not such a proviso as comes within the

general police powers with which the Legislature is invested. It was accordingly further held that it could not be availed of by those seeking enrollment in the University of California to nullify the effect of the rule of the Regents of the University that every person in attendance as a student, or applying for enrollment as such, shall produce evidence satisfactory to the authorities thereof that he has been successfully vaccinated within seven years prior to such attendance or application, or else be vaccinated.

It was also held that by section 9 of article 9 of the state Constitution the University of California was raised to the dignity of a constitutional department or function of the state government, with the investment of power and discretion in the management of its affairs, including the power to make all reasonable rules and regulations as might tend to prevent the introduction and spread of contagious disorders amongst the student body, and that a rule requiring vaccination as a prerequisite to the admission of a student was, in the absence of legislation lawfully limiting the exercise of that power, a reasonable one. In 1921 the Legislature repealed the 1911 statute. Stats. 1921, p. 550. Section 1 of the new act reads as follows:

"The control of smallpox shall be under the direction of the state board of health, and no rule or regulation on the subject of vaccination shall be adopted by school or local health authorities."

Section 2 of the act repealed the only act of the Legislature then in effect dealing with the subject of vaccination.

It is petitioner's contention that by reason of this change in the law it was the intention of the Legislature to take away from all schools and local health authorities the power to make rules or regulations on the subject of vaccination, in consequence of which the University authorities have no power to deny petitioner the privilege he seeks by reason of a rule they have no power to exact or maintain.

Respondents, on the other hand, insist that the word "school," as employed in the act, is not used in its generic sense, but, rather, is limited to institutions of lesser academic requirements than colleges or universities. They also claim that the phrase "local health authorities" has also a limited meaning, and refers to subordinate health boards and health districts of the state. The further claim is advanced that, even assuming that the Regents of the University may be said to come within the prohibition of the statute, the act, in so far as respondents are concerned, is unconstitutional and void.

[1] As we are of the opinion that they are correct in this contention, a decision upon the proper construction to be given to the word "school" or the phrase "local authorities" would answer no useful purpose. As

above pointed out, the Board of Regents of the University had, at the time the rule in question was promulgated, power to adopt and enforce regulations concerning health measures and to require vaccination as a prerequisite to the admission of a student to the University, as at that time there was an absence of legislation lawfully limiting the exercise of that power.

There is no question but that the Legislature may under its police power limit or abrogate this right, and in fact respondents do not claim otherwise, for they concede that the power vested under the Constitution in the Regents is not so broad as to destroy or limit the general power of the Legislature to enact laws for the general welfare of the public, including laws regulating the subject of vaccination, even though it might incidentally affect the University of California, as such a law would be paramount as against a rule of the Regents in conflict therewith. They do claim, however, that no such law exists, as neither the Legislature nor the board of health under its grant of power has attempted to pass any law or rule which in any manner contravenes the Regents' regulation in reference to the matter since the passage of the act of 1921.

[2] The present law does not itself attempt to regulate the subject, but it merely delegates to the board in question certain powers. Whatever rights this body may have under this grant of power is a matter with which we are not here concerned, nor it has made no attempt to exercise any power whatsoever. The legislative declaration that no rule or regulation shall be adopted by school or local health authorities is not a regulation, nor, in fact, is it a health law, but rather, under the circumstances, it is one in effect which forbids or prevents the adoption of a health measure, at least until such time as a rule or regulation on the subject has been adopted in conformity with the provisions of the act.

In so far as the act may be considered as a prohibition or limitation upon the constitutional power of the University to pass health laws, it is clearly void. The Legislature cannot, by this character of a general law, take away or impair the power so granted. In order to accomplish this result it must itself regulate the subject by appropriate legislation. A general law which does not itself regulate, but which merely provides, as here, that there shall be no local regulation, can have no proper application to local bodies deriving their powers under a constitutional grant, as such law amounts to no more than a legislative attempt to nullify such constitutional grant, and it is to that extent invalid.

This precise question has been considered and passed upon in the comparatively re-

cent case of *Ex parte Daniels*, 183 Cal. 636, 192 P. 442, 21 A. L. R. 1172. It is there held that an act of the Legislature, general in its terms, prohibiting local legislative bodies, acting under a constitutional grant, from enacting local, police, sanitary, or other regulations, while in a sense a general law, is a legislative attempt to nullify a constitutional grant to the local bodies politic, and therefore to that extent invalid. See, also, *In re Murphy*, 190 Cal. 286, 212 P. 30; *In re Mingo*, 190 Cal. 771, 214 P. 850.

In our opinion these authorities are decisive upon the question. Further consideration of the subject is therefore unnecessary.

The writ is denied.

We concur: KNIGHT, J.; CASHIN, J.

75 Cal. App. 418

BLAIN v. BURGE. (Civ. 5250.)

(District Court of Appeal, First District, Division 2, California. Dec. 3, 1925.)

1. Judgment $\S$ 942—Recitals in foreign judgment, essential to jurisdiction, presumed true, if not controverted.

In action on foreign judgment, recitals of that judgment, essential to jurisdiction, must be presumed to be true, unless controverted, and party attacking judgment has burden of proof.

2. Judgment $\S$ 822(1)—Foreign judgment of which presumptions of regularity and jurisdiction are not overcome has same effect as final judgment in state.

In view of Code Civ. Proc. $\S$ 1915, a foreign judgment, respecting which presumptions of regularity and jurisdiction are not overcome, has same effect as final judgment in state, and same rules relating to collateral attack are applicable.

3. Appeal and error $\S$ 1010(1)—Finding of trial court as to jurisdiction of foreign court to render judgment, supported by evidence, is conclusive.

In action to enforce foreign judgment, findings of trial court that foreign court had jurisdiction to render judgment, supported by ample evidence, is conclusive on appeal.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by J. S. Blain against R. T. Burge. Judgment for plaintiff, and defendant appeals. Affirmed.

C. W. Hall, of Los Angeles, for appellant. Moote & Patterson, of Los Angeles, for respondent.

NOURSE, J. Plaintiff sued on a judgment which had been rendered in his favor and against the same defendant in the state of Texas. Plaintiff also had judgment in this action, from which the defendant has ap-

pealed on a record prepared under section 953a, Code of Civil Procedure.

In his complaint in this action, the plaintiff pleaded that he recovered a judgment against the defendant for \$2,379.21, with interest at 6 per cent. a year in the district court of Jefferson county, Tex., and that said judgment was duly entered and recorded. The defendant denied these allegations for want of information or belief, and, as a special defense, alleged that on August 5, 1921, he was served with a citation issued out of the Fifty-Eighth district court of Jefferson county, Tex., citing him to appear and answer before the Sixtieth district court of the same county; that he employed counsel, who attended the session of the Sixtieth district court on the appearance date fixed in said citation; that on said date said counsel learned that said cause was not on the docket of said court, and that the same was not called for answer; that thereafter the default of this defendant was entered in said cause and judgment thereon was rendered against this defendant by said Sixtieth district court, which is the judgment here in controversy; that said judgment is void for want of jurisdiction, because the said cause had not been duly transferred to the Sixtieth district from the Fifty-Eighth district prior to the issuance of the citation to the defendant to appear in the former district.

The trial court found that the defendant was personally served with process to appear in the Sixtieth district court, and that said process was not issued out of the Fifty-Eighth district court as alleged in the answer. The jurisdiction of the Sixtieth district court to render the judgment in suit was found by the trial court, both as a matter of fact and as a conclusion of law.

The facts of the case, which are undisputed, are that the two courts exercise concurrent jurisdiction in the county of Jefferson and that the records of both courts are kept by the same clerk. The complaint was filed with this clerk, and the cause assigned to the Fifty-Eighth district. The judge presiding in that district immediately assigned the cause to the Sixtieth district, and the clerk thereupon issued the citation requiring the defendant to appear in that court. No appearance was made at any time, and because of defendant's default judgment was entered against him in full accord with the legal proceedings provided in such cases by the laws of Texas. No appeal or other attack had been made on this judgment in the Texas courts, and it had become final before the entry of the judgment in this state.

[1, 2] It is stated in argument that the Texas judgment contained all the recitals essential to jurisdiction, including a recital of due personal service of process. Such recitals must be presumed to be true, unless

controverted by other parts of the record or by independent proof. 15 Cal. Jur., § 248, p. 246; Estate of Pusey, 177 Cal. 367, 374, 170 P. 846. The burden of proof is on the party attacking the judgment (Collins v. Maude, 144 Cal. 289, 77 P. 945), and, if the presumptions of regularity and jurisdiction are not overcome, a foreign judgment has the same effect as a final judgment in this state (section 1915, Code Civ. Proc.).

[3] As there has been no direct attack upon the Texas judgment, it has become a final adjudication in that state. Therefore the rules of law above noted, covering collateral attack upon judgments in this state, are particularly applicable. The trial court in this state having found that the Texas court had jurisdiction to render the judgment, that finding is conclusive on this appeal; there being ample evidence to support it.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

75 Cal. App. 309

NATOLI v. DAVIS, Agent, etc. (Civ. 2927.)

(District Court of Appeal, Third District, California. Nov. 24, 1925.)

1. Limitation of actions ⇐125—Amended complaint, bringing in successor of presidential agent, named in original complaint as defendant, held commencement of new action, barred by federal Transportation Act.

Amended complaint, filed under Code Civ. Proc. §§ 472, 473, naming as defendant successor of presidential agent named in original complaint, did not operate as substitution of parties, but was commencement of new action by bringing in new party, against whom it was barred, because amended complaint was not filed within two years after passage of Transportation Act 1920, as required by section 206a (U. S. Comp. St. Ann. Supp. 1923, § 10071¼cc).

2. Courts ⇐97(5)—State court bound by federal Supreme Court's decision, in action against presidential agent.

As United States is attempted to be made responsible party, in action against presidential agent on cause arising while carriers were under government control, state Supreme Court is bound by decision of United States Supreme Court that amended complaint, naming as defendant successor of presidential agent named in original complaint, commenced new action, barred by Transportation Act 1920, § 206a (U. S. Comp. St. Ann. Supp. 1923, § 10071¼cc).

Appeal from Superior Court, San Joaquin County; Geo. F. Buck, Judge.

Action by D. Natoli against James C. Davis, as agent, etc. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Levinsky & Jones, of Stockton, for appellant.

Scott Rex, of Stockton, for respondent.

PLUMMER, J. Action by plaintiff to recover damages for injury to grapes in transit while the carriers on which the grapes were shipped were under government control. Plaintiff had judgment, and the defendant appeals.

The action was begun on the 1st day of November, 1921, naming as defendants Southern Pacific Company and John Barton Payne, as agent, under section 206 of the act of Congress of the United States, known as the Transportation Act (U. S. Comp. St. Ann. Supp. 1923, § 10071¼ cc). Summons was issued in said action on the 14th day of July, 1922, and on the 16th day of August, 1922, an amended complaint was filed herein, naming as defendants Southern Pacific Company and James C. Davis, as agent, under section 206 of the act of Congress of the United States, known as the Transportation Act, etc., and on the 13th day of October, 1922, a second amended complaint was filed herein, naming as defendant only James C. Davis, as agent as aforesaid. The shipment of grapes referred to herein took place in the fall of 1919. The defendant, James C. Davis, appeared and filed a demurrer to the second amended complaint, alleging, among other things, that said second amended complaint did not state a cause of action against said defendant, and also that the alleged cause of action set forth in said second amended complaint was barred by the provisions of section 339 of the Code of Civil Procedure of the state of California, and by subdivision (a) of section 206 of the Transportation Act of the United States of 1920. The defendant also moved the court to dismiss the action, among other things, upon the ground that at the time the action was brought against the said John Barton Payne, as agent, etc., he was no longer such agent; that on the 28th day of March, 1921, said John Barton Payne retired from office as agent under said Transportation Act, and on said last-named date said James C. Davis had been appointed as said agent, under section 206 of the Transportation Act, and that no proceedings were taken or had by the plaintiff in the above-entitled action for the substitution of said James C. Davis as a party defendant in the place and stead of John Barton Payne within one year after March 28, 1921, in accordance with the terms of that certain act entitled "An act to prevent the abatement of certain actions" passed by the Congress of the United States, and approved February 8, 1899 (U. S. Comp. St. § 1594). The demurrer interposed by the defendant was overruled, and his motion denied, and the cause proceeded to trial.

[1] Two questions only are presented for consideration upon this appeal: (1) The opening of the cause for the taking of further testimony by the court; and (2) the question of the statute of limitations. We think it necessary only to consider the latter question. The record shows that more than two years

had elapsed before the bringing in of the defendant, James C. Davis, as agent under the Transportation Act, and that at the time suit was instituted John Barton Payne was not the agent under said act and had not been for some period of time. The amended complaints were filed in this case under the provisions of sections 472 and 473, Code of Civil Procedure, before any answers were filed or appearances made by any of the defendants named in the several pleadings.

While the cases referred to by counsel speak of substitution of parties, under our procedure, what took place in this instance was not, in fact, a substitution of parties as that act is referred to and provided for in our Codes, but was a bringing in of new parties by the filing of the amended complaints and naming of them parties defendant therein. This distinction is set forth in *Kittle v. Bellegarde*, 86 Cal. 556, on page 563, 25 P. 55, 57, where the court says:

"An order of court substituting a party is different from an order of court allowing 'a party to amend any pleading * * * by adding or striking out the name of any party' by authority of section 473 of the Code of Civil Procedure. The substitution is made by the court; whereas the amendment is allowed to be made by the party. A substitution may be made, on suggestion and proof of the requisite facts, at the instance of either party, and might have been made on the suggestion and at the instance of the defendants in this case; whereas an amendment by adding or striking out the name of a party is only allowed at the instance of the party whose pleading is to be so amended. Again, the substitution of a party plaintiff necessitates no change in the defense; whereas the addition or striking out of a party by amendment may require or admit of a different defense."

In *Jeffers v. Cook*, 58 Cal. 147, the court refers to the section of the Code defining what constitutes the beginning of an action, to wit, "the filing of a complaint" (section 405, Code Civ. Proc.), and then goes on to speak of the effect of filing a supplemental, or amended complaint, bringing in new defendants. In that case the action was to foreclose a mortgage, where all the parties in interest were not made defendants in the original complaint. The court said:

"By moving, in the original action, to make the subsequent grantees of the mortgagor parties to the action, the plaintiff followed the course of procedure approved in *Goodenow v. Ewer*, 16 Cal. 465 [76 Am. Dec. 540]; *Boggs v. Fowler*, 16 Cal. 561 [76 Am. Dec. 561]; *Ketchum v. Crippen*, 37 Cal. 225; and *Aldrich v. Stephens*, 49 Cal. 677. But her motion was not made, and her supplemental complaint was not filed until nearly six years after the cause of action stated in the original complaint had accrued; and, according to the rule for moving within reasonable time, enunciated in *Goodenow v. Ewer*, supra, it would seem to have been too late to resort to a remedy against new parties in aid of a cause of action which, as to them,

was barred by the lapse of time within which, under the Code of Civil Procedure, an action could be brought against them upon the cause of action.

"But it is contended that the cause of action was not barred, because the original complaint in the action, having been filed against the mortgagor in statutory time, stopped the running of the statute of limitations. Section 350, Code Civ. Proc. That as a legal proposition is true as to the mortgagor, who was made the sole party defendant to the action at the time of filing the complaint. And it would, also, have been true as to those who were subsequently made parties defendants by the supplemental complaint, if they had been made parties before the statute had run in their favor. * * * The filing of the original complaint, therefore, stopped the running of the statute of limitations only as to him who was the party defendant at the time it was filed; it did not stop the running of the statute in favor of those who were not made defendants in the action at that time. The statute continued to run in their favor. * * * As to them, no action was commenced until the filing of the supplemental complaint in which they were named as defendants. * * * The supplemental complaint was a continuance of the original action as against the original defendant, but it was the commencement of a new action as to them. Until they were made parties to the bill, the action cannot be considered as having been commenced against them."

We do not find that this rule has been departed from in any subsequent California cases. The cases of *Walsh v. Decoto*, 49 Cal. App. 737, 194 P. 298, and also *Thompson v. So. Pac. Co.*, 180 Cal. 730, 183 P. 153, had to do with the correction of the names of the parties defendants, and were simply cases where a misnomer had occurred, and were not cases bringing in different parties defendant. Recognizing the principle that an action against a Director General of railroads, and his successor in office, as agent, designated by the President in suits against a railroad under government control, is, in substance and effect, a suit against the United States, several courts have held, where the distinction is not made between bringing in new parties and substituting parties, that the procedure adopted by the trial court in this action is correct. These cases also are founded upon local statutes permitting the procedure in the respective states there adopted and followed. In the case of *Bailey v. Hines*, 131 Va. 421, 109 S. E. 470, the action was brought against Walker D. Hines, Director General, and as successor in office as the agent provided for in section 206 of the Transportation Act. The defendant, Hines, named in said action, appeared, and pleaded in abatement that before the institution of the action he had resigned as such Director General of Railroads and agent, and that John Barton Payne had been appointed in his room and stead. The plaintiff thereupon asked leave to amend by substituting the name of John Barton Payne for that of Walker D. Hines, and moved the court to reject

the defendant's plea in abatement, and to dismiss his motion to quash, which request was declined, and also denied said motions. The plaintiff's objection to commencing a new action was that it would be barred by the statute of limitations. Upon this showing the Supreme Court of Virginia, citing the local Code provisions of that state, held that the plaintiff's motion should have been granted, and the motion to quash the proceedings should have been denied, and remanded the cause for further hearing. In *Arkansas Land & Lumber Co. v. Davis*, 155 Ark. 541, 244 S. W. 730, the Supreme Court of Arkansas had before it similar questions to those presented here, and it was held that—

Where "a person not federal Director General was in that capacity made defendant, and later plaintiff substituted the real incumbent, the time of bringing suit and not time of substitution determined the three years' limitation against plaintiff, since the substitution was, under *Crawford & Moses' Dig. § 1239*, an allowable amendment in form to correct defendant's name."

The action in that case was brought against John Barton Payne, as Director General of Railroads, within three years after the cause of action accrued, and later, when it was ascertained that Payne was not such director at the time suit was instituted, James C. Davis, who was such director at that time, was substituted as defendant. In the cases of *Hill v. Davis* (Tex. Civ. App.) 257 S. W. 340; *Mickle et al. v. Hines*, Director General of Railroads, et al. (Tex. Civ. App.) 263 S. W. 1078; and *Kilgore v. Hines* (Tex. Civ. App.) 265 S. W. 744, the Court of Civil Appeals, following the local statutes of that state, permitted substitution. The case of *Kilgore v. Hines* cites the cases of *Cohen v. Davis*, 247 Mass. 259, 142 N. E. 75; *Ætna Mills v. Director General of Railroads*, 242 Mass. 255, 136 N. E. 380, where substitution was allowed, even though more than two years had elapsed after the termination of federal control. These Massachusetts cases, as will hereafter appear, were subsequently overruled by the United States Supreme Court. In the case of *Ætna Mills v. Director General, etc.*, 242 Mass. 255, 136 N. E. 380, *supra*, the court, in discussing the Transportation Act, said:

"That statute impliedly imported into it the state practice with reference to substituting a new defendant by amendment"—citing cases.

"The construction of * * * section 206 of the Transportation Act for which the defendant contends, namely, that it permits the substitution of the agent designated by the President only in suits 'properly brought and pending at the termination of federal control,' seems to us unwarranted by the language of the entire act, and inconsistent with its comprehensive scope, contemplating as it does the settlement of matters arising out of federal control, in all the states. Admittedly the decisions which it cites are not decisive. In *Bryson v. Great Northern Railway*, 61 Mont. 351, 203 P. 529, the

plaintiff, after judgment had been rendered against the railroad company, sought to substitute the federal agent as defendant, and affirm the judgment as against him, without giving him a day in court. In *Tutsch v. Director General of Railroads* (Cal. Dist. Court of Appeal) 52 Cal. App. 650 [199 P. 861], the local statute of limitation had operated as a bar in favor of the Director General when the plaintiff sought to make him party defendant. A proposed amendment to substitute the federal agent as the sole defendant was denied as not authorized by the Maryland Code, in *Atkinson v. Philadelphia, Baltimore & Wash. Railroad*, 137 Md. 632 [113 A. 110], and as not permissible under the Alabama Code in *Currie v. Louisville & Nashville Railroad*, 206 Ala. 402 [90 So. 313, 19 A. L. R. 675]; *Neely v. Payne*, 126 Miss. 854 [89 So. 669], recognizes that actions under the Transportation Act should be brought against the federal agent and not against the carrier, but does not affect the question raised in the case at bar. * * *

"Finally the substitution of the defendant Davis was lawful and in accordance with the practice in this commonwealth. The cause of action remained the same, in fact. And G. L. c. 231, § 138, expressly states: 'The cause of action shall be considered to be the same for which the action was brought, if the court finds it to be the cause of action relied on by the plaintiff when the action was commenced, however the same may be misdescribed; and the allowance by the court of an amendment shall be conclusive evidence of the identity of the cause of action' [quoting cases]. Our practice act (G. L. c. 231, § 51) provides: 'The court may, at any time before final judgment, except as otherwise provided, allow amendments introducing a necessary party, discontinuing as to a party or changing the form of the action, and may allow any other amendment in matter of form or substance in any process, pleading, or proceeding, which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought, or enable the defendant to make a legal defense' [citing cases]."

It is to be observed that we have nothing of that kind in the Code provisions concerning the practice or the bringing in of parties in the state of California. Following the same rule, as laid down in the *Aetna Mills Case*, the Supreme Court of Massachusetts, in *L. L. Cohen & Co., Inc., v. Davis, Agent*, 247 Mass. 259, 142 N. E. 75, held, where one wrongfully brought an action against a railroad instead of against the government in control thereof, the representative of the government could be made a party by substitution and this substitution could take place more than two years after the termination of government control, where the action was commenced before the expiration of federal control, under Transportation Act of 1920.

Subdivision a of section 206 of the Transportation Act reads as follows:

"Causes of Action Arising Out of Federal Control—(a) Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use or oper-

ation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to federal control could have been brought against such carrier, may, after the termination of federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by state or federal statutes but not later than two years from the date of the passage of this act, be brought in any court which but for federal control would have had jurisdiction of the cause of action had it arisen against such carrier."

In the case of *Fischer v. Wabash Railway Co.*, 235 N. Y. 568, 139 N. E. 738, the Court of Appeals of the state of New York had certified to it five questions relating to matters which we are here considering. Four of the questions were answered; one was not. The trial court denied the motion for substitution. This order was affirmed. The affirmance of the order had the effect of holding by the court that substitution could not be made after the period of time mentioned in the statute and that the order of substitution would be, in effect, bringing in new parties and not simply correcting a misnomer of the party defendant.

In *Fahey v. Davis*, 224 Mich. 371, 195 N. W. 46 held: Under "Transportation Act 1920, § 206, terminating federal control of railroads March 1, 1920, and authorizing suits arising out of federal control, brought after the termination of federal control, to be brought against an agent designated by the President, within the prescribed period of limitations, and authorizing the substitution of such agent for the Director General, in suits pending at the termination of federal control, a suit for death in 1919, brought against a railroad company after the termination of federal control, was not pending at the time of such termination, and the substitution of the agent designated by the President was therefore unauthorized, and since the agent was not made a party till more than two years after the cause of action accrued, the action was barred," and also approved the language of the Supreme Court in *Currie v. Louisville & N. R. Co.*, 206 Ala. 402, 90 So. 313, supra, where it is said:

"This cause of action arose in April, 1919, during federal control of railroads. The railroads were returned to the owners by act of Congress on February 28, 1920; and under this act John Barton Payne was designated as the agent to be sued. This was done before this suit was filed. * * * This suit was filed against this defendant on April 14, 1920. The substitution of the designated agent for the defendant in all pending suits as authorized by the act is not applicable to this case. This was not a pending suit when the federal control terminated. It should have been filed against John

Barton Payne, Director General of Railroads. It was filed against the Louisville & Nashville Railroad Company. A granting of the motion to substitute John Barton Payne, the agent designated by the President, as the sole party defendant, would work an entire change of the party defendant, and therefore offend our amendment laws, and this substitution is not authorized under the federal act of Congress, as it was not a pending cause when the federal control terminated; hence there was no error in refusing the motion."

In *Davis v. Griffith*, 103 Okl. 137, 229 P. 499, the Supreme Court of Oklahoma had before it a situation identical with that presented in this case. It was there held that an action, based upon matters occurring during federal control of railroads against John Barton Payne, a former presidential agent, did not make the United States government a party defendant to such action; and an attempted substitution of James C. Davis, the duly appointed and acting presidential agent, for John Barton Payne, agent, resigned, did not confer jurisdiction over the United States government, and such jurisdiction could be acquired, only, by proper service of process; that the United States had a right to prescribe the exact manner in which it could be sued; and that a strict compliance with its terms was necessary, whether the same were considered reasonable or unreasonable. This case takes up and sets forth the history of the federal legislation relating to government control of railroads and shows that prior to the act of 1920 actions might be begun against the Director General without naming him, but that after the passage of the act of Congress, dated February 28, 1920, it was necessary to begin actions against the particular person named by the president to be sued, in order that a valid judgment might be obtained against the revolving fund, which had been created by Congress, out of which judgments for damages might be satisfied. It was there argued that the substitution in name of James C. Davis for John Barton Payne was simply correcting the description or name of the real defendant. This argument is there answered, and in the conclusion of the consideration of this case the court said:

"It is an elementary rule of law that the United States government cannot be sued without its consent, and, if it gives its consent, it has the right to prescribe the terms and conditions upon which it may be sued; and it can be sued, only, by compliance with such terms and conditions, whether reasonable or unreasonable."

And further:

"We conclude that the United States could be sued, only, by making the agent, named by the President under Transportation Act of 1920 for such purpose, party defendant, who in this instance was James C. Davis; and that the trial court acquired no jurisdiction by the attempted substitution of Davis for Payne, since such ju-

risdiction could be had, only, by service of process."

This holding is, in effect, that the bringing in of Davis was the institution of the action as to him and as against the United States, and, as this was not done within the period of time prescribed by the statute of limitations, the action was barred.

In *Vassau v. Northern Pac. Ry. Co.*, 69 Mont. 305, 221 P. 1069, the Supreme Court of Montana had before it for consideration the same questions which are presented here. It was there held that "a complaint in an action arising during federal control of railroads, brought against the railroad and a former presidential agent, designated under Transportation Act 1920, * * * did not make the United States a responsible defendant, and an order pursuant to which the pleadings were amended by designating the acting presidential agent was unauthorized, where the cause of action was then barred;" that the bringing in of the actual agent constituted the making of the United States a defendant, and, as this was not done until after the two-year period had elapsed, the amendment was too late. The argument was advanced in that case that the naming of John Barton Payne as Director General, etc., was sufficient to bring in the United States as a defendant. The court held, however, as we have stated, that such was not the case, and that a suit against a former agent was wholly ineffectual upon which to predicate an amendment bringing in the actual agent after the two-year period. In the *Vassau* Case the court refers to the case of *Bailey v. Hines*, supra, and also to the case of *Arkansas Land & Lumber Company v. Davis*, decided by the Supreme Court of Arkansas, and says:

"We think that in each instance undue prominence was given to local statutory provisions authorizing amendments of pleadings, and that the real question in controversy was either overlooked or passed with but slight notice. In the instant case, counsel for plaintiffs rely upon the decisions in those cases and upon our statute of amendments. * * * It is our opinion that the statute referred to has no application whatever to the question now before us."

The court then comments upon the absolute right of the government of the United States to prescribe the terms and conditions upon which it may be sued and the necessity of compliance therewith. The opinion further states:

That in the proceeding before it, which is identical with the cause at bar, "the complaint did not state a cause of action against either of the parties originally made defendants. The only means by which the responsible defendant, the United States, could be sued, was by making James C. Davis, presidential agent, defendant, and this was not done until February 4, 1922. Plaintiffs choose to sue the wrong party and must abide the consequences of their error.

Davidson v. Payne [C. C. A.] 289 F. 69. The effect of the order of February 4, 1922, was not merely to amend the pleading by correcting the name of the defendant, but to bring into the action for the first time the only responsible defendant, the United States."

In the case of *Tutsch v. Director General of Railroads*, 52 Cal. App. 650, 199 P. 861, this court, in the second division thereof, speaking through Justice Shaw, held:

"Where an action for personal injuries due to the negligence of a railroad company while the company was under government control was brought after the termination of such control against the Director General of the Railroads, instead of against the agent appointed by the President, and the plaintiff did not seek to make the agent a party defendant until after the expiration of one year from the accrual of the cause of action, the action as to such agent was barred by the statute of limitations and properly dismissed."

It was also held in that case that the agent acting for the United States government was not in a position to waive the bar of the statute. This case also refers to the rule which we have heretofore cited:

"The general rule is that unless an action is commenced against a party within the statutory period, or unless such party is by proper proceedings made a defendant by amendment prior to the expiration of such period, no judgment can be had against such defendant, unless the statute is waived."

The court also recognized the rule that in suing the United States government, the conditions embodied in the statute permitting such actions must be strictly complied with. It was there held that the application to amend the pleadings and bring in the person who was then the agent appointed under the Transportation Act of 1920, after the running of the statute, was properly denied.

We have referred to the various cases cited for the purpose of definitely setting forth the law in this state in relation to amendments bringing in new parties under the Code provisions of this state, as well as the Transportation Act of 1920, and also for the purpose of showing what cases set forth the law applicable to such as the one at bar, and the cases which have been, in effect, overruled by the United States Supreme Court. Whatever confusion may have arisen by the decisions in the several cases which we have cited, the law is now definitely settled in the case of *Davis v. L. L. Cohen & Co.*, 45 S. Ct. 633, 69 L. Ed. 1129, decided by the Supreme Court on June 8, 1925. This is the Massachusetts case to which we have heretofore referred, where the defendant, Davis, was permitted to be brought in by way of substitution, after the two-year period specified in subdivision (a) of section 206 of the Transportation Act had expired. The substitution was permitted under the statutes of the state

of Massachusetts, to which we have heretofore referred. It appears, as stated in the opinion of the Supreme Court of the United States, that the defendant, James C. Davis, was brought into the case in practically the same manner as he was brought into the case with which we are dealing. Davis interposed the objection that the time prescribed by the Transportation Act had expired, and any provisions of the Massachusetts laws purporting to authorize such a proceeding were repugnant therewith and void. The Supreme Court of Massachusetts allowed the amendment, and also held that their local laws relating to substitution, which provided, in effect, in the event of substitution, that the beginning of the cause of action related back to the filing of the original complaint in the action, and not from the time of substitution, or the bringing in of the agent as the defendant prevailed. The Supreme Court of the United States, to which this case was taken by writ of error, in their opinion, among other things, said:

"The Transportation Act, which passed in February, 1920, provided that the federal control should terminate on March 1, 1920. It further provided, in section 206(a), that suits and proceedings based on causes of action arising out of the possession, use, and operation of a railroad under federal control, of such character as prior thereto could have been brought against the railroad company, might, after the termination of federal control, be brought against an agent designated by the President for such purpose, 'but not later than two years from the date of the passage of this act.' It also provided, in section 206(d), that actions of the character above described, pending at the termination of federal control, should not abate by reason of such termination, but might be prosecuted to final judgment, substituting the agent designated by the President.

"At the termination of federal control there was no suit pending against the Director General to enforce the liability of the government. The amendment of the writ and declaration in the suit against the railroad company, in October, 1922, by substituting the designated agent as the defendant, was, in effect, the commencement of a new and independent proceeding to enforce this liability. Being commenced more than two years after the passage of the Transportation Act, it was repugnant to the provision of section 206(a) requiring such an action to be instituted not later than two years after the passage of the act. This was the only consent the government had given to being sued in such an action after the termination of federal control. Nor was this amendment authorized under section 206(d), which related solely to the substitution of the designated agent as the defendant in a suit which had been previously brought against the Director General to enforce the liability of the government; that is, merely authorized the substitution, in such a suit, of another federal agent for the one already before the court. It had no application to suits pending against a railroad company alone, in which there was no federal agent for whom the designated agent could be substituted, where the substitution of the designated agent for the railroad

company would work an entire change in the cause of action.

"These conclusions, we may add, are substantially the same as those of the state courts in *Fahey v. Davis*, 224 Mich. 371, 195 N. W. 46; *Fischer v. Wabash Railway*, 235 N. Y. 568, 139 N. E. 738; *Currie v. Louisville & N. Railroad*, 206 Ala. 402, 90 So. 313, 19 A. L. R. 675; *Davis v. Chrisp*, 159 Ark. 335, 252 S. W. 606, supra; and *Davis v. Industrial Commission*, 315 Ill. 341, 146 N. E. 569.

"It results that the provisions of the Massachusetts General Laws under which the plaintiff was allowed to amend the writ and declaration so as to substitute the designated agent as the defendant instead of the railroad company, as construed and applied in the present case, are void because of repugnancy to section 206 of the Transportation Act.

"The judgment of the superior court is reversed, and the cause remanded to that court for further proceedings not inconsistent with this opinion."

[2] The effect of this decision of the United States Supreme Court is to overrule all the cases relied upon by the plaintiff and respondent in this action, and as it is one in which the United States is, in substance and effect, attempted to be made the responsible party, this court is bound by the decision of the Supreme Court of the United States in the *Cohen Case*. It follows that the demurrer of the defendant, Davis, and his motion to quash were both well taken.

The judgment of the lower court is reversed, with directions to either grant the defendant's motion or sustain the defendant's demurrer without leave to amend.

We concur: FINCH, P. J.; HART, J.

75 Cal. App. 280

EBY et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.
(Civ. 5173.)

(District Court of Appeal, Second District, Division 1, California. Nov. 20, 1925. Rehearing Denied Dec. 14, 1925.)

1. Master and servant ☞375(2)—Injury to employee carrying tools while driving to work held not to arise out of and in course of employment.

Evidence that carrying of tools by employee to and from his home was merely incidental to his returning home and driving to work in his own car, as was his custom, or at most an accommodation to his employer, held to warrant finding that his injury and death in collision while driving to work with tools did not arise out of or in course of employment.

2. Master and servant ☞375(2)—Mission for employer, to be within course of employment, must be major factor in journey.

To prove that service was being rendered in course of employment of time of injury, re-

ceived while traveling to work, mission for employer must be the major factor in the journey or movement, and not merely incidental.

Proceedings under the Workmen's Compensation Act by Katherine Eby, for herself, and as guardian ad litem for Henry Van Denburgh and others, and by Mary Jenette Eby and others, minors, by their guardian ad item, Dora Eby, for compensation for the death of Roy T. Eby, opposed by J. L. Schimmer & Co., employer, and the International Indemnity Company, insurer. To review an order of the Industrial Accident Commission denying compensation, claimants bring certiorari. Affirmed.

Thomas A. Wood, of Los Angeles, for petitioners.

Warren H. Pillsbury, of San Francisco, for respondent Industrial Accident Commission.

W. I. Gilbert, of Los Angeles, for respondents J. L. Schimmer & Co. and International Indemnity Co.

HAHN, Justice pro tem. Petition for writ of review. Petitioners herein, being the wife and surviving children of one Roy T. Eby, were granted a writ of certiorari to enable this court to review the findings and award of the Industrial Accident Commission of California, made in the matter of a claim filed by them under the Compensation Act and arising out of the death of the said Roy T. Eby.

The facts as they appear from the record are undisputed and may be summarized as follows: Roy T. Eby was employed by respondent J. L. Schimmer & Co. as a night foreman; the Schimmer Company being engaged in cement work. Late in the afternoon of November 27, 1924, Eby, while driving from his home to his place of employment, in his own automobile used regularly for such purpose, met his death in a collision on the public highway. Previous to the accident—whether on that day or the previous day is not clear—Mr. Schimmer, his employer, had requested him to bring to the job certain small tools belonging to his employer, and which were to be found at the employer's garage. After the accident two hammers and a wrecking bar about three feet in length were found in the automobile of the deceased. Schimmer, his employer, was unable to identify these articles as being his property, or the tools which he had requested the deceased to bring to the job with him. It appears from the testimony of witnesses who were at the home of the deceased just prior to the time he left for his place of employment that he was seen gathering certain tools together and putting them in his automobile, and that he explained to his friends that he needed these tools on the job. There is nothing in the record to show whether

these tools belonged to the deceased or belonged to his employer. It does, however, appear that in the course of his employment he had the authority to purchase or to secure such tools as were needed by the workmen for certain types of work, and that his employer left to him the matter of purchasing the necessary tools or securing them otherwise. It further appears from the record that the deceased was in the habit of going to and from his work in his own automobile, which was the one he was driving at the time of the accident.

The Industrial Accident Commission, after the case had been submitted, made a finding that "the evidence does not establish that said injury and death arose out of or in the course of his employment." The conclusion of the commission was that the petitioners herein were not entitled to any allowance by reason of the death of the said deceased.

[1, 2] This finding and the judgment refusing an award are assailed by the petitioners as being in conflict with the evidence. With this contention we cannot agree. It is contended that the deceased at the time of the accident was carrying tools to his place of employment at the request of and for the benefit of his employer. The record, however, does not show that the tools which were found in the automobile belonged to his employer, or were the tools which his employer had requested him to get. Furthermore, the record shows that the tools which were in the automobile were apparently gathered up by the deceased upon his own premises. Whether or not these tools belonged to the deceased or to his employer, it clearly appears that the carrying of the tools was a mere incident, or at most, an accommodation to the employer. That the deceased, as a favor to his fellow employees, or even his employer, may have carried from the job to his home for safekeeping certain tools appears in the record. At most, such action on his part was merely incidental to his returning home and going to his work in his automobile. Where it is sought to prove that the service being rendered at the time of the injury was rendered in the course of the employment, by reason of the fact that the employee was performing a mission for the employer, the mission "must be the major factor in the journey or movement, and not merely incidental thereto." *London Guarantee, etc., Co. v. Ind. Acc. Com.*, 190 Cal. 587, 213 P. 977. But here it does not appear that the transportation, if any there was, of tools for use on the job was more than incidental to the main purpose of the journey, which purpose was that of an ordinary passage of the employee from his home to his place of employment.

In all of the cases cited and relied upon by the petitioners it appears that the injury

which formed the basis of the award was received during the hours of employment, or in the performance of some special duty imposed by the employer upon the employee. In the instant case it does not appear that the accident happened while the deceased was on any errand in the course of his employment. It happened while he was on his way, as was his usual custom, to his place of employment.

We do not understand it is contended by petitioners that, if the commission was justified in its finding of fact, namely, that the deceased met his death while on his way to his place of employment, and not while in the course of his employment, they would be entitled to recover. Under these circumstances there will be no occasion to discuss in detail the principles underlying the right of recovery, or to cite authorities declaring the law on the subject. The question is wholly one of whether or not the evidence supports the finding of the commission. As indicated in the foregoing discussion, we are of the opinion that the finding of the commission is supported by the evidence, and therefore the award of the commission is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

75 Cal. App. 395

MOORE v. BURTON et al. (Civ. 5292.)

(District Court of Appeal, First District, Division 1, California. Dec. 2, 1925. Rehearing Denied with Modification Dec. 31, 1925. Hearing Denied by Supreme Court Jan. 28, 1926.)

1. Levees and flood control ⚡36—Pleading fairly showing that injuries resulted directly from levee officers' negligent acts need not aver proximate cause.

Under St. 1919, p. 756, relative to levee officers' liability for injuries to persons or property, *held*, it was not necessary, under section 1, subds. 1, 2, thereof to aver directly that officers' negligence was direct and proximate cause of injury, but it is sufficient, if it fairly appears that injuries described resulted directly and proximately from matter complained of.

2. Levees and flood control ⚡36—Levee officers, whose negligence directly caused conditions from which injury resulted, *held* liable.

St. 1919, p. 756, limiting liability of officers of levee districts for injuries to persons or property from defects in public work by requiring certain facts to appear, *held* not to relieve from liability those officers, whose negligence was direct cause of condition from which injury to individuals directly resulted.

3. Levees and flood control ⚡36—Complaint, in action against levee officers, negligent in constructing dams, *held* sufficient under statute.

In action against officers of levee district to recover damages for negligently failing to repair

broken levee and erecting dams complaint held sufficient, under St. 1919, p. 756, where it alleged facts from which it fairly appeared that erection of dams at the place and in manner described was negligent, that act was done under direction of trustees, that a dangerous condition was thereby created, which was directly attributable to such negligence, and from which, as an immediate result, the injury followed.

4. Levees and flood control ⚡36—Statutory limitation of officers' liability to cases where injury sustained while public property or work was being carefully used not applicable, where work incapable of use by plaintiff.

St. 1919, p. 756, § 1, subd. 4, relative to levee officers' liability for injuries to persons or property, which requires that it shall appear injury was sustained while the public work or property was being carefully used, has no application, where property or work in question was not of character permitting its use by plaintiff.

5. Levees and flood control ⚡36—Statute placed burden on plaintiff to show due care to avoid injury.

St. 1919, p. 756, relative to liability of levee officers for damages to persons or property, section 1, subd. 4, of which provides it shall appear that damage or injury was sustained while public work or property was being carefully used, and that due care was being used to avoid danger due to such condition, held to place burden on plaintiff of showing affirmatively use of due care to avoid injury, both in cases where defective public work was being used by person injured and those wherein injuries complained of were unconnected with its use by such person.

6. Levees and flood control ⚡36—Plaintiff, required to show affirmatively absence of contributory negligence, need only allege in general terms that due care was exercised to avoid danger.

In action against officers of levee district, where St. 1919, p. 756, requires plaintiff, as condition to recovery, to affirmatively show absence of contributory negligence, held it is sufficient thereunder if plaintiff alleges in general terms that due care was exercised to avoid the danger due to the condition described, or if it appear by reasonable inference from the facts alleged that such care was used, or that, by exercise of ordinary care, injury could not have been avoided by plaintiff.

7. Levees and flood control ⚡36—Allegations as to plaintiff's freedom from contributory negligence held sufficient, under statute.

In action against officers of levee district for negligence in failing to repair broken levee and in construction of dam, allegations of complaint as to plaintiff's freedom from contributory negligence and exercise of due care sufficiently met requirements of St. 1919, p. 756, § 1, subd. 4, where it fairly appeared therefrom that, by acts described and alleged to have been negligent, a dangerous condition was created; that neither danger nor injury complained of could have been avoided by exercise of ordinary care; and that by no act or omission on his part caused or contributed to damage of plaintiff.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Thomas Moore against William J. Burton and others. Judgment for defendants, and plaintiff appeals. Reversed.

Dean Edgerton, of Los Angeles, for appellant.

Joe Crider, Jr., I. W. Stewart, and A. B. Shaw, Jr., all of Los Angeles, for respondents.

CASHIN, J. An action by appellant to recover damages alleged to have resulted from the negligence of respondents William J. Burton, Edwin F. Williams, and G. B. Alexander Rife, as trustees of the Palo Verde joint levee district of Riverside and Imperial counties; the corporation respondent being surety for each of said trustees on his official bond. A demurrer to the complaint having been sustained, appellant declined to amend, whereupon judgment was entered for respondents and the appeal taken therefrom.

The levee district mentioned, in which is situated certain land owned by appellant, has constructed for the protection of the lands therein from the overflow waters of the Colorado river certain levees along and near the west bank thereof; one of such levees being referred to in the complaint as the Standard levee, situated between the river and the land of appellant. The complaint alleges that the natural slope of the lands within the district and the flow of the river are from north to south; that during the month of June, 1921, the levee mentioned was by the action of the waters of the river cut and about 50 feet thereof washed away; that several overflows therefrom followed which passed through the broken levee, none of which, however, reached the land of appellant until the last week in August of that year, when the damage complained of occurred in the manner hereinafter stated.

It is further alleged that the trustees negligently failed to repair the broken levee; that between the time of the injury thereto and the damage to appellant's land alleged they negligently caused two dams to be constructed and maintained across a certain borrow pit, the pit mentioned being a part of the system provided for the protection of the lands within the district, and which was, as may be inferred from its description in the complaint, a trench running parallel with and west of the damaged levee; that during the fourth week of August, 1921, the overflow waters of the river passed through the break described and, in the words of the pleader, "the last-mentioned overflow waters, held back from flowing with the natural contour of the land by the two dams constructed across said borrow pit as hereinafter alleged, backed up and overflowed" the land of appellant, causing damage to certain vines and crops growing thereon. The location of ap-

pellant's land with relation to the break in the levee and the dams mentioned is not clear from the complaint. Giving the pleading, however, the construction prescribed by law (Code Civ. Proc. § 452; Estate of Wickersham, 153 Cal. 603, 608, 96 P. 311; Burian v. Los Angeles Cafe Co., 173 Cal. 625, 161 P. 4), it may fairly be inferred from the foregoing allegations as to the effect upon the overflow waters of the river of the dams described that such land was situated to the north or west thereof; that the damage thereto was not directly caused by the failure of the trustees to repair the broken levee, but by the construction and maintenance of the dams, which prevented the flood waters from flowing through the borrow pit, and thence to the south; and that in the absence of such dams these waters would not have reached or overflowed the land described, but by reason thereof spread to the north or west, causing the damage of which appellant complains.

It is contended by respondents that under the provisions of the act relating to the liability in damages of the officers of districts for injuries to person or property from defects and dangers in public work, property, etc., approved May 18, 1919 (Stats. 1919, p. 756), the liability of the officers of a levee district depends upon certain facts therein enumerated, and that it is essential to the statement of a cause of action against such officers that these facts, which, according to the act, "shall first appear," be alleged. The material portions of the act mentioned and upon which respondents rely are as follows:

"Section 1. No officer of any district * * * shall be liable for any damage or injury to any * * * property hereafter resulting from the defective or dangerous condition of any public * * * work or property, unless it shall first appear:

"(1) That the injury sustained was the direct and proximate result of such defective or dangerous condition,

"(2) That such officer had notice of such defect or dangerous condition or that such defective and dangerous condition was directly attributable to work done by him, or under his direction, in a negligent, careless or unworkmanlike manner,

"(3) That he had authority and it was his duty to remedy such condition at the expense of the state or of a political subdivision thereof and that funds for that purpose were immediately available to him, and

"(4) That, within a reasonable time after receiving such notice and being able to remedy such condition, he failed so to do, or failed to take reasonable steps to give adequate warning of such condition; and then only when it shall further appear that such damage or injury was sustained while such public * * * work or property was being carefully used, and that due care was being exercised to avoid the danger due to such condition; provided, however, that this act shall not be construed as enlarging the duty or liability of any public officer."

[1] While the provisions of subdivisions (1) and (2) of the section quoted limit recovery against such officers to cases where "the defective or dangerous condition was the direct and proximate" cause of the injury suffered, thus changing the rule of proof which in ordinary negligence cases requires only that the negligent act shall be shown to have been the proximate, though not necessarily the direct, cause of the injury alleged (*Goehring v. Rogers* [Cal. App.] 227 P. 687), the well-settled rule of pleading in negligence cases, although requiring a causative connection between the act of negligence and the injury to be alleged, does not require that the complaint aver in terms that such negligence was the proximate cause thereof if such connection appears by fair intendment from the facts alleged therein (19 Cal. Jur. Negligence, § 101; *Soule v. Weatherby*, 39 Utah, 580, 118 P. 833, Ann. Cas. 1913E, 75; Standard Ency. of Proc. vol. 20, p. 313); and, as the act neither expressly nor by necessary implication requires the facts mentioned to be directly averred, it is our conclusion that the sufficiency of the complaint in this respect is to be tested by the general rule stated; and, it fairly appearing from the allegations of the complaint that the injuries described resulted directly and proximately from the negligent erection and maintenance of the dams described, the pleading in this particular was sufficient. It appears from the various provisions of the act in question to have been the intention of the Legislature to make a distinction between those cases where defective or dangerous conditions in public work are directly attributable to negligent construction in the first instance by an officer having the immediate control or direction of such work, and those wherein such conditions are due to the negligence of persons not under his supervision, or to use, accident, or natural causes, by requiring in the latter instances notice thereof, the authority and duty, with funds available, to remedy those conditions, and that it shall first appear; these facts being shown, that he failed to remedy them within a reasonable time or give adequate warning thereof.

[2] To hold that it was designed to relieve from liability, unless the facts last enumerated appear, those officers, whose negligence was the direct cause of the conditions from which injury to individuals directly resulted, would be to extend the rule now applicable to cases of nonfeasance to official misfeasance, and with it the immunities which considerations of justice, as well as policy, render proper for the protection of those whose duties in the first instance have been properly performed—a construction limiting a just and long-established rule of liability (*Dillwood v. Riecks*, 42 Cal. App. 602, 184 P. 35; *Perkins v. Blauth*, 163 Cal. 782, 127 P. 50; 22 R. C. L. Public Officers, p. 484), and not required by the language of the statute or rea-

sonally to be held to be the legislative intent.

[3] The complaint in the instant case, having alleged facts from which it fairly appears that the erection of the dams at the place and in the manner described, was, aside from the direct averment, negligent; that the act was done under the direction of the trustees; that a dangerous condition was thereby created which was directly attributable to such negligence, and from which as an immediate result the injury followed, the pleading was, according to our construction of the statute, in these respects, sufficient.

[4] To the facts as alleged in the complaint the further provision of subdivision (4) of the section, requiring that it shall appear that the injury was sustained while the public work or property was being carefully used, clearly has no application; it appearing that the work described, unlike roads, bridges, or works constructed for similar purposes, was not of a character permitting its use by appellant.

[5] It is further urged by respondents that, in actions against public officers, the last-mentioned subdivision changes the general rule that contributory negligence, if relied upon as a defense, must be pleaded and proved by the defendant, by requiring a plaintiff to plead and prove that due care had been exercised by him to avoid the danger due to defective or dangerous conditions, while it is contended by appellant that this provision of the statute relates only to care in connection with the use of public work.

We are of the opinion that it clearly appears from the language of the statute that it was the intention of the Legislature to require the same allegations and proof of the exercise of due care to avoid injury, both in cases where defective public work was being used by the person injured and those wherein the injuries complained of were unconnected with its use by such person. Numerous situations arise, where, for purposes temporary or permanent, structures are erected or conditions created, which, unless due care be exercised as to the place of erection or the manner of construction, may be the direct cause of injury to individuals, who, in no proper sense, can be said to be using such public work, but whose want of ordinary care is a proximate contributing cause of the injury suffered.

In the case of *Ham v. County of Los Angeles*, 46 Cal. App. 148, 160, 189 P. 462, in which it was sought to hold certain highway officials liable for damages growing out of injuries due to the defective condition of a bridge, it was held that the act known as the Pridham Act (Stats. 1911, p. 1115), repealed by the act here in question (which contained, in addition to provisions similar to those in the later act, a provision that "it shall further appear that such damage or injury was sustained while said street, highway, public building, public work, or property was being

carefully used and that due care was exercised to avoid such danger"), changed the rule generally applicable in negligence cases, and placed the burden upon the plaintiff, in actions against public officers in the cases mentioned, of showing affirmatively the use of due care to avoid injury. This provision having been substantially re-enacted by the repealing act, and having been construed as above, the same construction may reasonably, and on the authority of the case cited should be, given to the later statute.

[6] It being the rule that contributory negligence, if relied upon as a defense, must be pleaded as well as proved, a rule that a plaintiff as a condition to recovery must show affirmatively the absence of contributory negligence reasonably and according to the settled principles of pleading requires the ultimate facts in that connection to be alleged. *Allen v. Home Ins. Co.*, 133 Cal. 29, 65 P. 138; *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286, 323, 22 P. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116; *Green v. Palmer*, 15 Cal. 411, 415, 76 Am. Dec. 492.

Again, however, a fair construction of the statute does not lead to the conclusion that it was the intention to require in such cases greater particularity in the statement of facts than in ordinary negligence actions; it being sufficient in the latter class to allege negligence in general terms, specifying the particular acts or omissions alleged to have been negligent (*Cary v. Los Angeles Ry. Co.*, 157 Cal. 599, 108 P. 682, 27 L. R. A. [N. S.] 764, 21 Ann. Cas. 1329; *Stephenson v. Southern Pacific Co.*, 102 Cal. 143, 34 P. 618, 36 P. 407), or the specific acts which constitute the negligence complained of provided the circumstances alleged are such as to justify an inference of negligence (*Tucker v. Cooper*, 172 Cal. 663, 158 P. 181; *Quinn v. Electric Laundry Co.*, 155 Cal. 500, 101 P. 794, 17 Ann. Cas. 1100; *Silveira v. Iverson*, 125 Cal. 266, 57 P. 996); the same rule being applicable to a plea of contributory negligence (*Crabbe v. Mammoth Channel, etc., Co.*, 168 Cal. 500, 143 P. 714). Such intention not appearing, the change in the rule as to burden of proof reasonably requires no more than that it be alleged in general terms that due care was exercised to avoid the danger due to the condition described, or that it appear by reasonable inference from the facts alleged that such care was used, or that by the exercise of ordinary care the injury complained of could not have been avoided by the plaintiff.

[7] In the instant case, it fairly appearing from the allegations that by the acts described and alleged to have been negligent a dangerous condition was created; that neither the danger nor the injury complained of could have been avoided by the exercise of ordinary care by appellant; and that by no act or omission on his part was the damage caused or contributed to, the complaint was sufficient.

We have considered the complaint with reference to respondents' special demurrer, and are satisfied that the allegations are sufficient to meet the objections therein.

For the foregoing reasons, it is our conclusion that the order sustaining the demurrer to the complaint was erroneous.

The judgment is reversed, with the direction to the trial court to overrule the demurrer.

We concur: TYLER, P. J.; KNIGHT, J.

75 Cal. App. 365

PEOPLE v. ANDERSON et al. (Cr. 1205.)

(District Court of Appeal, Second District, Division 1, California. Nov. 28, 1925. Hearing Denied by Supreme Court Jan. 25, 1926.)

1. Indictment and information $\S$ 129(1)—**Charging two offenses in indictment held not violation of statute.**

Indictment may properly charge accused in one count with extortion and in another count with bribery arising out of same state of facts without violating Pen. Code, $\S$ 954.

2. Criminal law $\S$ 1177—**Where punishment of two crimes arising out of same state of facts did not exceed penalty of one, judgment would not be reversed.**

Where accused was convicted of extortion and bribery, and sentences imposed were to run concurrently, and did not exceed penalty for bribery, judgment would not be reversed on ground that conviction was of two crimes arising out of same state of facts.

3. Bribery $\S$ 1(2)—**Marshal held guilty of receiving bribe from one he had not had duty to arrest.**

Where city marshal, with no official duty to enforce penal statute of state, accepted bribe from one he had arrested charged with violation of Pen. Code, $\S$ 148, he is chargeable, under section 68, which defines bribery; power to make arrest not being controlling if he assumed to make it under legal authority.

4. Bribery $\S$ 3 $\frac{1}{2}$ —**Accessory may be guilty of bribery as principal.**

Where attorney aided city marshal in taking bribe, he was guilty of bribery as defined in Pen. Code, $\S$ 68, in view of section 31, and section 971, which declares distinction between accessory and principal abrogated.

5. Extortion $\S$ 15—**Evidence held insufficient to support conviction for extortion.**

Evidence held insufficient to support conviction for extortion as defined by Pen. Code, $\S\S$ 518 and 519, where bribe was taken from prisoner already charged with offense, and no threats were made.

6. Criminal law $\S$ 511(1)—**Testimony of accomplices held corroborated.**

In prosecution of attorney and marshal for bribery, evidence held to sufficiently corroborate accomplices.

7. Bribery $\S$ 1(1)—**Payment of money unnecessary to prove bribery.**

Proof that a bribe was asked, the money thus secured to go to accused, was proof of crime of bribery, regardless of whether any money was thereafter either paid or accepted.

8. Criminal law $\S$ 507(1)—**One agreeing to pay bribe held not accomplice.**

Where attorney asked prisoner for payment of money as bribe for having charges against him released, prisoner was not an accomplice of attorney in commission of crime of bribery by asking of a bribe.

9. Criminal law $\S$ 825(2)—**Instruction relative to status of police officer held not error without request for further instruction.**

Objection that court instructed jury that police officer was executive officer, but did not instruct as to duty of police officer, is without merit, where no request for further instruction was made.

10. Criminal law $\S$ 824(7)—**Failure to instruct as to who were accomplices held not error, in absence of request.**

In criminal prosecution, failure of court to instruct jury fully as to who of witnesses were accomplices was not error in absence of any request for such instruction by defendant.

11. Criminal law $\S$ 349—**Acts of another held admissible to show guilty knowledge of accused.**

Where city marshal, with others, was accused of bribery, in which a policeman had a part, testimony that marshal requested such policeman to contradict affidavit previously made, and to leave state to avoid testifying in investigation of bribery charge, was admissible to show guilty knowledge of marshal.

12. Criminal law $\S$ 1172(7)—**Accused cannot predicate error on instruction properly limiting effect of incriminating testimony.**

Accused, tried with accomplices, cannot predicate error on instructions limiting testimony of his admissions to purpose only of showing his guilty knowledge.

13. Criminal law $\S$ 1172(1)—**Fact that instructions were not clear held not reversible error.**

That instruction was not entirely clear was not reversible error, where jury was not misled.

14. Criminal law $\S$ 1166 $\frac{1}{2}$ (12)—**Court's inadvertent comment on evidence held not reversible error.**

That court inadvertently, and without intent to influence jury, commented on evidence, was not reversible error, where he modified or withdrew statements when his attention was called to them, and later admonished jury to disregard any expression of his which seemed to indicate an opinion on weight or sufficiency of evidence.

15. Criminal law $\S$ 622(2)—**Separate trial held properly denied, where all evidence did not affect both defendants.**

Where attorney was charged jointly with city marshal for bribery, fact that marshal had

attempted to suppress evidence, and had used profane language toward prisoner who had paid bribe, could not be considered in determining attorney's guilt, and court committed no error in refusing separate trial; such decision being in his discretion by provision of Pen. Code, § 1098.

16. Criminal law ⇨622(2)—Separate trial held properly refused, where damaging evidence against other defendant could not be considered.

Where attorney was indicted for bribery with another, who had made sworn statement admitting bribery as charged, but against whom the case was dismissed before any testimony had been admitted and where court instructed such instrument could not be used against attorney, denial of his motion for separate trial was not abuse of discretion.

17. Criminal law ⇨655(5)—Differences between court and counsel held not injurious to defendant.

In trial for bribery, in view of considerable feeling between counsel and defendants, that court had frequent differences with defendant's counsel, and had occasion once to make apology to him, and manifested impatience as to amount of time he consumed in presenting case, held not prejudicial to defendant.

18. Criminal law ⇨1023(12)—Order denying motion for arrest of judgment is not appealable.

Order denying motion for arrest of judgment is not appealable.

19. Bribery ⇨11—Evidence held sufficient to support conviction for bribery accepted from prisoner.

Evidence held sufficient to support conviction for bribery, where money was received from prisoner on agreement to dismiss charge against him.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

B. M. Anderson and another were convicted of extortion and bribery, and they appeal. Reversed as to extortion; otherwise affirmed.

Hearing denied by Supreme Court; CURTIS, J., being disqualified, does not participate.

Stephen Monteleone, Anderson & Anderson, and John L. Richardson, all of Los Angeles, for appellant B. M. Anderson.

Kimball Fletcher, of Los Angeles, for appellant A. P. Morewood.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

CURTIS, J. The appellants and one Stanley B. Abbott were accused of extortion and bribery. The indictment against them consisted of two counts—the first for extortion, and the other for bribery. After the impaneling of the jury, and before the introduction of any testimony, the court, upon the motion of the district attorney, dismissed the action

as to Abbott, and he thereafter testified on behalf of the prosecution. The appellant Anderson was the city marshal of the city of Torrance. He is frequently referred to in the testimony as the chief of police of said city, and at other times as "the chief." Abbott was a policeman of said city, and appellant Morewood was an attorney at law, with his office at the city of Redondo Beach, only a short distance from the city of Torrance. On Saturday evening, at about 6 o'clock, July 24, 1924, Abbott caused the arrest of an automobile party consisting of five men who were motoring through the city of Torrance. These men were J. A. Draffon, E. L. Foster, A. A. Higgins, F. Mangold, and B. F. Frymier. Immediately upon their arrest they were taken to the police station, where charges were made against Draffon of reckless driving and driving a motor vehicle while intoxicated and resisting a public officer. The other four men were charged with attempting to prevent a public officer from performing his duty and with drunkenness. From the police station they were taken to, and confined in, the city jail. The charges of resisting a public officer and of attempting to prevent a public officer from performing his duty preferred against these men grew out of an alleged assault by Draffon upon Abbott, in which it was claimed he was assisted by the other four men, after Abbott had caused them to be "tagged" for reckless driving.

On the following day, Sunday, and while these five men were still in jail, it was suggested to Abbott by Mr. S., a resident of Torrance, who had a casual acquaintance with the arrested men, that, as the men who were under arrest were business men of a neighboring community, they might be willing to pay a reasonable sum of money, either as a fine or otherwise, to secure their release from said charges. The testimony tends to show that Abbott immediately on this suggestion being made to him went to appellant Anderson and informed him of the suggestion made to him by Mr. S., and he suggested to Anderson that the latter see Draffon regarding the matter, but Anderson replied that they would have to have an attorney to handle it for them and suggested that they go to Redondo Beach. On their way to Redondo Beach they discussed the amount of money that the arrested men might be able to raise. Upon arriving at Redondo they endeavored to locate Morewood, but, failing to do so, left word for Morewood to call and see Anderson at Torrance. The next morning Morewood arrived at the police station at Torrance some time before 10 o'clock. He asked for Anderson, and was directed to the latter's home. In a few minutes thereafter Anderson telephoned the police sergeant and directed him to permit

Morewood to see the men in jail. Following the receipt of this telephone message, Morewood returned to the police station and met Frymier, one of the men arrested, who had in the meantime been released on bail. Morewood stated to Frymier that it would be cheaper for the men under arrest to pay a reasonable amount of money than to fight the cases against them, and proposed that for \$950 all of the cases could be settled, \$150 of this amount to go in payment of a fine to be assessed against Draffon, and the balance of \$800 to go to himself, Anderson, Abbott, and others. This proposition was agreed to by Frymier, and it was suggested by Morewood that the cases be continued until 5 o'clock of that evening in order to give the men time in which to raise the money. Accordingly, the cases were continued as agreed. Thereafter Frymier and the other men under arrest raised the sum of \$850, which was delivered to Frymier, and a short time before the hour set for the final hearing of the cases, Frymier paid Morewood \$750, upon the understanding and agreement that all the cases would be dismissed except the one against Draffon for reckless driving, and that this would be settled by paying a fine not exceeding \$150. A few minutes thereafter the cases were again called in court and were all dismissed except the one against Draffon. In this case Draffon pleaded guilty to reckless driving, and was fined \$100, which was paid by Frymier. The money was subsequently divided between appellants and Abbott.

Judgment was rendered against appellants in accordance with the verdict of the jury finding each of them guilty of extortion and bribery. The sentence, however, of each appellant, for the crime of extortion was, by said judgment, made to run concurrently with the sentence imposed for the crime of bribery. The appeal is from said judgment, and also from the order of the court denying appellants' motions for a new trial, and for arrest of judgment.

[1] It is first contended by appellants that they are charged with and found guilty of two alleged crimes, purporting to arise out of the same state of facts, the commission of one of which precludes and refutes any possibility of the commission of the other. Appellants insist that "section 954 of the Penal Code precludes the idea of any intent to either indict or try a person jointly for two offenses, where as to one or the other the jury would be in duty bound to acquit." The question as to the legality of an indictment charging two such offenses has been definitely settled in this state adversely to appellants' contention. *People v. Piner*, 11 Cal. App. 542, 546, 105 P. 780; *People v. Shwartz*, 43 Cal. App. 696, 185 P. 686; *People v. Evanoff*, 45 Cal. App. 108, 187 P. 54.

[2] Conceding that appellants have been

found guilty of two crimes, arising out of the same state of facts, we question whether the judgment should be reversed on this ground, in view of the fact that the sentences imposed as the punishment for said crimes were made to run concurrently. Extortion is punishable by imprisonment in the state's prison not exceeding five years, and bribery by imprisonment for not less than one nor more than ten years. The maximum punishment, therefore, which appellants might suffer under this judgment, cannot exceed ten years. Had they been found guilty of bribery alone, the term of imprisonment could not have been less than that fixed by the court as punishment for the two crimes. In the case of *People v. Sharp*, 58 Cal. App. 637, 209 P. 226, the appellant therein had been found guilty of burglary and robbery, and the claim was made that he had been convicted of two crimes arising out of the same state of facts, and the same contention was made in that case as is now made here. The court, however (page 639, 209 P. 267) disposed of the question as follows:

"If it be conceded, for the sake of argument only, that the acts described were so connected together as to amount to but one offense, it may not be said that the judgment was prejudicially erroneous. If the conviction should have been for one offense alone, that conviction might properly have been for the crime of robbery. Under the law, a person convicted of robbery may be sentenced to imprisonment for life. The form of judgment as now authorized to be pronounced under the 'indeterminate sentence law' (it was sufficiently expressed by the judgment herein) is in legal contemplation a judgment for the maximum period authorized by the statute; hence here, had the conviction been for the crime of robbery alone, the sentence imposed would not have been for a less time than that which was fixed."

[3] It is next contended that count 2 of the indictment fails to state a public offense against the appellants. This contention is based upon the definition of bribery as given in section 68 of the Penal Code. By the terms of this section it is provided substantially that every executive officer who asks or receives a bribe upon an agreement that his action upon a matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, is guilty of bribery. Count 2 of the indictment charges that appellants and Abbott asked and received a bribe upon an agreement that they would refrain from prosecuting and detaining Draffon and his codefendants for the criminal offense of resisting a public officer in the discharge of his duties. It is claimed in this connection by appellant Anderson that the charge against Draffon and others was of a violation of the provisions of section 148 of the Penal Code, that appellant Anderson, as city marshal of the city of Torrance, a municipal corporation of the sixth class,

is only charged by law with the prosecution of breaches and violations of the city ordinances of said city, and that it is not his official duty to enforce the penal statutes of this state, or to prosecute persons accused of violating such statutes. This argument of appellants appears to be satisfactorily answered by the case of *People v. Lips*, 59 Cal. App. 381, 211 P. 22. Lips and one Anderson were deputy sheriffs of the county of Los Angeles and as such officers they arrested J. F. Furay, against whom there was then pending in the state of Texas an indictment. After the arrest of Furay, Lips and Anderson accepted a bribe from him, and in consideration thereof permitted him to escape. It was claimed by Lips that there was no legal duty resting upon him to take Furay into custody, and that, "in the absence of a legal duty, there could be no bribery." The court held that, notwithstanding there might have been no legal duty resting upon the officers to arrest Furay, yet, having made the arrest and accepted a bribe to release him, they were guilty of bribery. The court (page 390, 211 P. 25) quoted with approval from the case of *Moseley v. State*, 25 Tex. App. 515, 8 S. W. 652. In this latter case the Texas Court of Appeals said:

"It is insisted by counsel for defendant that the arrest and custody of John Gable by the defendant was without authority of law, and that therefore it was no offense for the defendant to accept a bribe to release him. We do not so understand the law. It was by virtue of his official authority that the defendant arrested and held John Gable. It matters not whether the arrest and custody were legal or illegal, the said Gable was a prisoner in the custody of the defendant, a peace officer, and was permitted by the defendant to escape, in consideration of money paid him to effect such escape. We are of the opinion that, in a prosecution for this offense, it is not permissible for the defendant to question the legality of his custody of the prisoner. Such an issue is irrelevant and immaterial. The moral obliquity of this offense is the same where the custody of the prisoner is illegal as where it is legal, and the injury to public justice is the same."

The language of this case is peculiarly applicable to the one before us. The indictment herein charged the arrest of the five men, and the acceptance of a bribe by the officers, upon the agreement of the latter not to detain the men arrested. The legality of the arrest, or the power of the officers to make the arrest, or to thereafter detain the men arrested, is not a matter of controlling importance in cases of this character. It is sufficient if the officers assumed to act under legal authority in arresting and detaining their prisoners, and thereafter accepted a bribe upon the understanding and agreement that they would release them and not further prosecute the charges against them.

[4] Appellant Morewood contends that, as section 68 of the Penal Code only refers to

certain officers as being amenable to its provisions, and that as it is neither alleged nor proven that he was an officer of the class mentioned in said section of the Code, nor any officer whatever, he could not be found guilty of bribery as charged in the indictment; therefore the judgment against him cannot stand. It is true that as a private citizen he could not as a principal be guilty of the crime of bribery as defined by the above Code section. But in conjunction with one or more of the officers mentioned in said section of the Code, and as an accomplice of such officer, he could be guilty of the crime as defined by said section 68. Pen. Code, §§ 31 and 971; *People v. Bartol*, 24 Cal. App. 659, 142 P. 510; *People v. Horn*, 25 Cal. App. 583, 144 P. 641; *Bishop v. State*, 118 Ga. 799, 45 S. E. 614.

[5] It is further contended by appellants that the evidence is not sufficient to justify either the verdict of extortion or bribery. As to the verdict finding appellants guilty of extortion, we think appellants' contention must be sustained. The witness Frymier, from whom it is claimed the money was extorted and upon whose testimony the prosecution must rely in support of this charge, testified that Morewood came to him with a proposition or offer that upon payment of a certain sum of money, the charges against all of the five men would be dismissed, with the exception of that against Draffon, and that that could be settled by a payment of a fine. He made no threat to Frymier or to any of the accused men that they would be accused of any crime unless they paid the money. In fact, the evidence shows that they had already been accused of the various crimes enumerated above, and that Morewood's proposition to them was that these charges would be dismissed as against all of them except Draffon. Extortion is defined by section 518 of the Penal Code as the obtaining of property of another with his consent, induced by a wrongful use of force or fear. By section 519 of the same Code it is provided that:

"Fear, such as will constitute extortion, may be induced by a threat, either: * * * 2. To accuse him (the individual threatened), or any relative of his, or member of his family, of any crime."

Count 1 of the indictment sought to charge the crime of extortion as defined by these two sections of the Penal Code. The crime as therein defined is undoubtedly properly and legally charged, but the evidence fails to sustain the charge. We therefore are of the opinion that the judgment, in so far as it is based upon the verdict of the jury finding the appellants guilty of the crime of extortion, is erroneous.

[6-8] As to the verdict finding appellants guilty of bribery, the evidence, in our opinion, is sufficient to support it. Even conceding

that both Abbott and Frymier were accomplices, there is ample evidence to be found in the record to meet the requirements of the statute providing that testimony of an accomplice must be corroborated by other evidence tending to connect the defendant with the commission of the offense before a conviction can be had. There may be some question, however, whether Frymier was an accomplice. The appellants were indicted under section 68 of the Penal Code. By its terms "the asking," as well as "the receiving," of a bribe, is made a crime. The evidence shows that Morewood approached Frymier and proposed that, in consideration of the payment of a certain amount of money to him, the cases against the arrested men would all be disposed of with the payment of a nominal fine. There is no question, according to the testimony of Frymier, that Morewood asked a bribe of him, the money thus secured to go to the appellants and others mentioned by Morewood. This was proof of the crime of bribery, whether any money was thereafter either paid or accepted. The witness Frymier was not an accomplice of Morewood in the commission of the crime of bribery by asking of a bribe. *People v. Powell*, 50 Cal. App. 436, 443, 195 P. 456.

Numerous objections are made as to the validity of the rulings of the trial court in giving and refusing instructions. One of the instructions, the giving of which appellant strenuously insists is prejudicial error, followed the identical language of an instruction given and approved in the case of *People v. Wolff*, 182 Cal. 728, 739, 190 P. 22. The giving of this same instruction was later approved in *People v. Ramey* (Cal. App.) 232 P. 724, and by this court in the late case of *People v. Swaar* (Cal. App.) 239 P. 412.

[9, 10] The court instructed the jury that a police officer was an executive officer. While appellants do not appear to question the correctness of this instruction, they complain that the giving of such an instruction was error, unless the court further instructed the jury as to the duties of a police officer. No request for such further instruction was made by appellants, and, in the absence of such request, they cannot now complain. And for the same reason the failure of the court to instruct the jury fully as to who of the witnesses testifying in the case were accomplices was not error, in the absence of any request for such instruction by appellants.

[11, 12] The court also gave the following instruction:

"Certain evidence has been received of the acts and declarations of the defendants B. M. Anderson and Stanley Abbott, done and made by them after the alleged commission of the crimes of extortion and bribery. Such evidence was received solely as tending to show guilty knowledge or consciousness of guilt on the part of the defendant B. M. Anderson, and you cannot consider any part of such evidence in de-

termining the guilt or innocence of the defendant A. P. Morewood."

It is contended by appellant Anderson that the above instruction does not contain a correct statement of the law upon the subject embraced therein. Appellant Anderson claims, in substance, that the court instructed the jury that they might consider certain acts and declarations of the conspirator Stanley Abbott, made after the termination of the conspiracy, as tending to show guilty knowledge or consciousness of guilt on the part of another of said conspirators, namely, B. M. Anderson. Such a construction might reasonably be drawn if we consider this instruction by itself and without reference to the proceedings shown in the record. A large amount of testimony was admitted, relating to certain transactions occurring between Abbott and Anderson, and after the termination of the conspiracy. These transactions had reference in the main to Abbott, at the request of Anderson, going to the office of the attorney of the latter and there making an affidavit contradicting a previous affidavit made by Abbott, and also to Abbott, at the request and with the assistance of Anderson, leaving the state and remaining absent therefrom for a period of a month or more, in order to avoid testifying before the grand jury while said body was investigating this charge of bribery. Just prior to the admission of this testimony, and at numerous times during its recital, the question arose as to its relevancy and competency. Upon each and all of these occasions the court admonished the jury that such evidence could not be considered by them as against the appellant Morewood, but was competent as tending to show a consciousness of guilt on the part of appellant Anderson. We have no doubt it was to this testimony that the court referred in the above instruction, and we think that this must have been apparent to the jury from the frequent and emphatic admonitions of the court during the trial and while this evidence was being introduced. No injury therefore was sustained by appellant Anderson, and the giving of said instruction was not reversible error.

[13] In our opinion the other instructions given by the court are substantially correct, although the language in some of them is not entirely clear, yet we do not believe that the jury were misled by any of them. Neither did the court err, in our opinion, in refusing any of the instructions offered on behalf of appellants. Neither do we find any error to the prejudice of appellants in any of the rulings of the court in the admission or rejection of evidence.

[14] Appellants have set forth in their brief a number of statements made by the trial judge during the progress of the trial, and it is contended by them that, in these statements, the trial judge commented upon the weight and sufficiency of the evidence to

the serious prejudice of appellants' right. It is apparent to us that these remarks and statements of the court, to which appellants have taken exception, were inadvertently made, and without any intention on the part of the court to influence or bias the jury. In most every instance, when the court's attention was called to the objectionable statements, the trial judge either modified its language or withdrew it altogether, and admonished the jury to disregard the same. In addition to this the court instructed the jury as follows:

"You are the sole and exclusive judges of the weight of evidence and the credibility of witnesses, and it is your function to determine all questions of fact arising from the evidence in the case. With the facts, the court has nothing to do. I have not expressed, nor intend to express, nor have I intimated or intend to intimate any opinion as to what witnesses are, or are not, worthy of credence, what facts are, or are not, established, or what inferences are to be drawn from the evidence adduced. If any expression of mine has seemed to indicate an opinion relating to any of these matters, such expression must be entirely disregarded by you."

Under these circumstances, we hardly think it probable that the jury were improperly influenced by any of the remarks or statements of the trial judge.

[15, 16] The court did not err in denying appellant Morewood's motion for a separate trial. The affidavit filed in support of said motion sets forth in the main two grounds or reasons why Morewood could not have a fair trial if tried at the same time with Anderson and Abbott. The first of said grounds was that, if tried with Anderson, there would be damaging testimony admitted against Anderson which would be incompetent as to Morewood, but which would inflame the passions of the jury against Morewood and Anderson. This evidence as set out in the affidavit was substantially that Anderson had attempted to suppress certain evidence, and that he had used obscene and profane language towards Draffon and the other men arrested while they were in jail. This evidence could not be considered by the jury in determining Morewood's connection with the alleged crime. It in no way connected Morewood with the charge against him, nor did it relate to him in any manner. We fail to understand, therefore, how it could have prejudiced the jury against him. The second ground relied upon by Morewood on his motion for a separate trial was that he was informed that Abbott had made a sworn statement in which he admitted that he had accepted a bribe as charged in the indictment, and that, if he were tried with Abbott, this written statement would be admissible as against Abbott, and its admission would improperly prejudice the jurors against Morewood. As we have already seen, the case was

dismissed as against Abbott before the admission of any testimony. Furthermore, while this written statement was admitted in connection with Abbott's testimony, the court instructed the jury that, having been made after the termination of the conspiracy, it could not be considered by the jury as against the appellant Morewood. The legal presumption is that the jury followed this instruction and disregarded said statement in arriving at its verdict against Morewood. The granting of a motion for a separate trial, made by one defendant jointly charged with others, rests in the discretion of the trial judge (Pen. Code, § 1098), and an order denying such a motion should not be set aside unless it clearly appears that the court abused such discretion. We are of the opinion that the trial court did not abuse this discretion in denying appellant Morewood's motion for a separate trial.

[17] The final contention made by appellant Morewood is that the trial judge erred in making statements in the presence of the jury prejudicial to him. The burden of appellant Morewood's complaint in this respect is that the trial court was so discourteous and disrespectful to his attorney that the latter was prevented from adequately and properly presenting his client's defense. The record shows that the case was on trial for something over two weeks, and that the trial was bitterly contested by all the parties interested therein. Not only was there considerable feeling manifested between the prosecution and the appellants, but the relations between the two appellants were not of the most friendly character. Numerous rulings of the court upon questions arising as to the admission and rejection of testimony were adverse to the contention of appellant Morewood. Frequent colloquies were had between the trial judge and the attorney for said appellant. In some of these verbal engagements more or less feeling was displayed on the part of each party thereto. It is not unusual in trials of this character for the trial judge, on account of the great stress under which he is laboring, to transgress the strict rules that circumscribe his actions. Evidently in this case the trial judge on at least one occasion went beyond what he himself considered the proper limits of correct conduct. In due time, realizing his error, he made an open and frank apology to counsel, in the presence of the jury and of all others in attendance on the court. He manifested some impatience toward counsel as to the amount of time the latter was consuming in the presentation of his case, but we find no instance in which he invaded any of appellant's rights by insisting that the trial proceed with greater rapidity. Our attention has not been called to any single instance in which the court committed any grave error, either in any remark to, or in the treatment

of, said counsel. But appellant Morewood claims that, taking all of the remarks made by the court to counsel and the treatment of counsel by the court as a whole, it so prejudiced counsel in the minds of the jury that he was unable to properly present his client's defense. We do not think this conclusion can be drawn from the facts disclosed by the record. While the trial court on numerous occasions ruled against the contentions of said counsel, and upon others admonished counsel to expedite the trial, and on still others expressed its inability to agree with the position assumed by counsel on different questions arising during the trial, yet we find nothing in any of these acts of the court which tended to show any discourtesy or disrespect on the part of the court toward counsel. It appears to us, after a close study of the record, that it was not the desire or intention of the court to deprive said appellant of any of his legal rights or to place his counsel in any unfavorable light before the jury. We have already referred to the occasion when the court, feeling that it had done an injustice to said counsel, apologized to him in open court. On another occasion, at the close of a court session, during which some words had passed between the trial judge and said counsel, the court voluntarily said:

"Ladies and gentlemen of the jury, I just have one matter that I want to say to you in regard to some of the exceptions taken by Mr. Fletcher to the remarks of the court. I don't want it to be understood in any manner or degree that I am charging Mr. Fletcher with any unfairness whatsoever. I may disagree with him as to the materiality as to some of the things that he is doing, but under no circumstances are you to infer that I am charging Mr. Fletcher with unfairness or to desire to do anything other than what he believes to be proper under his duty to his client."

At its conclusion, counsel thanked the court for making this statement. There were other occasions when the court showed its complete willingness to correct any error that it might have made in its rulings or in its remarks, and to remove any erroneous impression that the jury might have gained by any words spoken or acts done by it. The demeanor of the trial judge towards the counsel in question, taken as a whole, while it may not be entirely free from criticism, we think evinces a sincere desire and clear intent on the part of the court to accord to counsel all the rights and privileges due him as an officer of the court in the discharge of his duty towards his client. We are satisfied that the record does not disclose that any injury was sustained by appellant Morewood on account of the treatment accorded to his counsel by the trial judge.

[18] The appeals from the order denying

appellants' motions for arrest of judgment are dismissed, as said order is not appealable.

[19] We have heretofore stated that in our opinion the evidence is not sufficient to support the verdict finding appellants guilty of extortion. As to the charge of bribery, not only is the evidence sufficient to support the verdict, but there appears to be no error in the record that would justify a reversal of the judgment based upon said verdict finding appellants guilty of the crime of bribery. Therefore the judgment, in so far as it relates to the crime of extortion, is reversed, but in all other respects it is affirmed. The order denying the respective motions of appellants for a new trial upon the charge of extortion is reversed, but said order denying said motions for a new trial upon the crime of bribery is affirmed.

We concur: CONREY, P. J.; HAHN, Justice pro tem.

75 Cal. App. 385

GRISSE v. BOARD OF MEDICAL EXAMINERS OF STATE OF CALIFORNIA.
(Civ. 5336.)

(District Court of Appeal, First District, Division 2. California. Dec. 1, 1925. Rehearing Denied Dec. 30, 1925.)

1. Physicians and surgeons $\S$ 11(3)—**Certiorari proper remedy to review order revoking license; appeal statute being unconstitutional.**

Provision of Medical Practice Act, $\S$ 14, as amended by St. 1921, p. 1012, for appeal from order of board of medical examiners revoking physician's license to superior court of county in which made, is unconstitutional, and certiorari or writ of review is the proper remedy.

2. Physicians and surgeons $\S$ 11(3)—**Extent of review of order of board of medical examiners revoking license stated.**

On application for writ of review of order of board of medical examiners revoking physician's license, court need only determine whether board acted according to provisions of Medical Practice Act, $\S$ 14, as amended by St. 1921, p. 1012, and had jurisdiction over petitioner and whether hearing was had and evidence supporting charge adduced thereat.

3. Physicians and surgeons $\S$ 11(2)—**Revocation of license of physician, filing certificate as owner of cancer institute, authorized.**

Physician's filing of certificate, under Civ. Code, $\S$ 2466, stating that he was sole owner of "Bohannon Cancer Institute" and was doing business under that name, held violation of Medical Practice Act, $\S$ 14, subd. 8, as amended by St. 1921, p. 1012, so as to authorize revocation of license for unprofessional conduct.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Petition by Davis Grisso for certiorari to review an order of the Board of Medical Examiners of the State of California revoking petitioner's license as physician. From a judgment for defendant on order sustaining a demurrer to his petition, petitioner appeals. Affirmed.

Hilton & Christensen, of San Francisco, for appellant.

A. B. Bianchi, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment in favor of defendant, entered upon an order sustaining a general and special demurrer to an amended petition for writ of review.

The petition sets forth that Davis Grisso was a duly licensed and practicing physician and surgeon in the state of California; that a complaint was duly and regularly filed against him by the state board of medical examiners charging him with unprofessional conduct under section 14 of the Medical Practice Act, subdivision 8 thereof (St. 1913, p. 732, as amended by St. 1921, p. 1012); that he filed an answer thereto, and a partial hearing was had in July, 1923, at the city and county of San Francisco, Cal.; that the matter was continued to a subsequent meeting of the Board at Sacramento, Cal., in the month of October, 1923, when and where the hearing was concluded. Dr. Grisso was found guilty as charged, and his license was revoked. A transcript of the evidence produced before the board was appended to the petition for the writ of review, which petition was filed in the superior court of the state of California in and for the city and county of San Francisco.

Defendant filed a demurrer to the petition upon the grounds that it did not state facts sufficient to constitute a cause of action; that the court had no jurisdiction over the parties or the subject-matter and other grounds which need not concern us here. The order sustaining the demurrer was general.

[1] Appellant attacks the ruling upon demurrer as though it were an order upon a special demurrer interposed merely upon the ground that the petition was filed in the wrong forum. As we have stated, that was not the sole ground of demurrer, but, as it was one of the grounds, we shall consider it first. Section 14 of the state Medical Practice Act, as amended, provides:

"* * * That the holder of any certificate which has been revoked or suspended by the board of medical examiners, may within twenty days after receiving notice of said revocation or suspension of his said license, appeal to the superior court of the state of California in the county or city and county in which such suspension or revocation was made by the board of medical examiners. Upon such appeal being taken by such person whose license has been re-

voked or suspended by the board of medical examiners in accordance with the provisions of this act, the said superior court shall have full power to review all of the proceedings and testimony taken in said hearing before the board of medical examiners, and to inquire into the sufficiency of the evidence upon which such suspension or revocation was made. * * *

Respondent contends that, as the license was revoked in Sacramento, Cal., petitioner's only remedy is an appeal to the superior court there because of the foregoing provision of the state Medical Practice Act. Appellant takes the position that such provision is unconstitutional and void, and he may ignore it and proceed in certiorari. The case of *Millsap v. Alderson*, 63 Cal. App. 518, 532, 219 P. 469, settles that controversy in favor of appellant. The provision for appeal contained in the state Medical Practice Act is unconstitutional, and certiorari or writ of review is the proper remedy. Had the demurrer raised that question alone it should have been overruled.

[2] We come next to the question presented by the demurrer for want of sufficient facts to warrant the granting of the relief asked.

Section 14 of the state Medical Practice Act as amended makes provision for the revocation by the Board of Medical Examiners of licenses to practice medicine, outlines the procedure upon such revocation and sets forth the causes for revocation. The facts hereinbefore recited and appearing in the petition for writ of review indicate that the board acted according to the provisions of said act, and that the petitioner was regularly brought before the board for trial. He was a physician and surgeon, licensed by the board, and over whom it had jurisdiction. A hearing was had, and evidence supporting the charge was adduced at said hearing. Upon the application for a writ of review the inquiry of the court need go no further; its powers are limited. The case of *Jordan v. Alderson*, 48 Cal. App. 547, 192 P. 170, is pertinent upon the function of the court in such a proceeding. Therein it was said:

"The proceedings before the board were taken under the provisions of the Medical Practice Act. * * * The complaint charged the petitioner with unprofessional conduct. * * * Appellant contends that the record of the proceedings had and taken before the board shows such an absence of proper evidence as to amount to lack of jurisdiction in the board to make the order under review. It will serve no useful purpose to again state the powers of the court upon certiorari, particularly with reference to the action of the board of medical examiners in revoking a physician's license for unprofessional conduct in procuring an abortion. This subject has been fully discussed in several recent decisions. *Thrasher v. Board of Medical Examiners*, 44 Cal. App. 26 [185 P. 1006]; *Lanterman v. Anderson*, 36 Cal. App. 472 [172 P. 625], expressly approved in *Suckow v. Alderson*, 182 Cal. 247 [187 P. 935]; *Anderson v. Board of*

Dental Examiners, 27 Cal. App. 339 [149 P. 1006]."

[3] The petition for the writ alleges that the section of the state Medical Practice Act under which petitioner's license was revoked is unconstitutional; but the power of the Board under this section has been repeatedly upheld in this state as evidenced by the cases cited herein. Petitioner also asserts that his action in filing with the county clerk of the county of Alameda, Cal., a certificate provided for by section 2466, Civil Code of California, stating that he was the sole owner of "Bohannon Cancer Institute," and was doing business under that name, did not constitute a violation of the state Medical Practice Act. A similar contention was made in *Berry v. Alderson*, 59 Cal. App. 729, 211 P. 836, but the court sustained the action of the board in revoking the license.

There seems to be no merit in the petition for the writ, and the general demurrer was properly sustained upon this theory.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

75 Cal. App. 299

ZENOS v. BRITTEN-COOK LAND & LIVE STOCK CO. et al. (Civ. 5241.)

(District Court of Appeal, First District, Division 2, California. Nov. 24, 1925.)

1. Pleading ⚡122—Defendant must answer positively when facts alleged in complaint presumably within his knowledge.

When facts alleged in a verified complaint are presumably within knowledge of defendant, he must answer positively, and the answer on information and belief should be treated as an evasion and admission of facts alleged in complaint.

2. Pleading ⚡122—Corporation's answer, denying on information and belief facts, alleged sham and frivolous, where facts presumably within knowledge of corporation.

Answer, in suit against corporation to foreclose mortgage, executed by its officers, denying for lack of information and belief execution or authority to execute, was sham and frivolous; facts being presumably within knowledge of corporation by reason of availability of its books and files.

3. Corporations ⚡432(5)—Burden of proof on corporation to show lack of authority of its officers to execute mortgage.

In suit against corporation to foreclose mortgage executed by corporate officers, where in corporation denied authority of officers to execute mortgage, burden of proof of want of such authorization was on corporation.

4. Corporations ⚡1—Separate entities disregarded to prevent fraud when corporation mere instrument of owner of all capital stock.

Where owner of all corporate capital stock uses corporation merely as an instrument through which he transacts his business, separate entities will be disregarded when necessary to prevent fraud and protect rights of third persons.

5. Corporations ⚡425(5)—Corporation bound by acts of officers knowingly permitted for long period.

When a corporation knowingly suffers officers for long time to have actual management of business, and to so act as to lead third persons to believe that they are acting under proper authority, it becomes bound by their acts in its name.

6. Corporations ⚡426(10)—Corporation held bound by mortgage executed by officers, where benefits therefrom retained with full knowledge.

Where corporation held out its secretary and president as duly authorized to contract for it, and, with full knowledge of circumstances, accepted benefits and retained possession of land purchased by them for which officers executed mortgage, corporation held bound by such mortgage.

7. Estoppel ⚡52—Legal effect of "ratification" and "estoppel" same.

Generally speaking, "ratification" applies to a formal declaration of the approval of another's act, whereas "estoppel" is where the party is bound by his own act, but the legal effect is the same.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Estoppel; Ratification.]

8. Corporations ⚡482(4) Plaintiff, suing to foreclose mortgage on defense of want of execution being interposed, could show estoppel, without further pleading.

Plaintiff, in suit to foreclose corporate mortgage, was required to make out a prima facie case, and, on defense of want of execution being interposed, plaintiff could show acts constituting an estoppel, without further pleading.

9. Corporations ⚡426(10)—Corporation, knowingly accepting benefits, held conclusively presumed estopped from denying authority of officers to execute mortgage.

Where purchase-money mortgage executed by president and secretary of corporation represented that they were duly authorized, and corporation knowingly accepted benefits, retained land, and paid interest, corporation, under Code Civ. Proc. § 1962, subd. 3, is conclusively presumed to be estopped from denying authority of officers.

10. Trial ⚡395(7)—Judgment conclusion of law in favor of respondent.

A judgment itself is a conclusion of law in favor of respondent.

11. Appeal and error $\hookrightarrow$ 1071(6)—Failure to make more complete findings does not require reversal, where any further findings must have been favorable to respondent.

Where, taking judgment with facts found, it is evident that any further facts or conclusions of law must have been favorable to respondent, failure to make more complete findings of fact or conclusions of law does not require reversal.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action to foreclose mortgage by John Zenos against the Britten-Cook Land & Live Stock Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

George E. Brannan and Lee Walker, both of Chicago, Ill., and Leo B. Ward, of Los Angeles, for appellants.

J. S. Larew and D. B. Roberts, both of El Centro, for respondent.

NOURSE, J. Plaintiff sued to foreclose a mortgage for \$5,000 on certain land located in the county of Imperial. The cause was tried before the court and resulted in a judgment in favor of the plaintiff, from which the defendant appeals upon a record prepared under section 953a, Code of Civil Procedure.

The facts of the case are that on July 1, 1917, the note and mortgage in suit were executed under seal by Britten and Cook, the president and secretary, respectively, of defendant corporation, in the city of Chicago, where the defendant corporation had its principal place of business. The mortgage was acknowledged before a notary public in the city of Chicago by said officers on July 27, 1917. At the same time and as a part of the same transaction the plaintiff sold and conveyed to the defendant corporation the land described in the mortgage, the note was given as part payment of the purchase price thereof, and the mortgage was given to secure the same. This deed of conveyance was duly recorded and transmitted to the defendant corporation in the city of Chicago. When these documents were executed by the president and secretary of the corporation, these officers constituted a majority of its board of directors and owned 7,000 of the 7,500 shares of the stock of the corporation; this being the full number of shares which had been issued and held by stockholders of the corporation at the time. The remaining 500 shares of the issued capital stock were held by one Kilgour, who was an employee of the corporation in the capacity of a sales agent. Prior to the execution of the note and mortgage these three directors, in meeting assembled, formally approved a written contract with O. E. Cook as general manager of the corporation. This contract, among other things, authorized Cook, who was also the secretary of the corporation, and the one who executed the mortgage in suit:

To supervise the purchase of all land and "to generally supervise all of the activities of the company and to have full charge of all of the details with full power to act on the premises in any manner which in his judgment may be to the best interests of the company, with the exception that all checks shall be drawn in the regular way, and all documents under seal shall be executed in the regular way."

The corporate seal which was impressed upon the document was the official seal of the corporation which had been duly adopted at the first meeting of the board of directors. The land in question was a single tract of 164 acres, the total purchase price of which was \$27,000. The defendant corporation paid a portion of the purchase price in cash, assumed an obligation in the sum of \$9,500, which was secured by a mortgage on a portion of the tract, and executed a second mortgage to the plaintiff in the sum of \$2,500, which the defendant subsequently paid. Interest on the note in suit was paid by the defendant totaling \$615.86, the last payment of which was on the 1st of October, 1919. It further appears that the defendant corporation was engaged in the business of raising hogs for the market and that soon after the conveyance of the land involved herein the defendant, under the direction of its secretary and general manager, commenced to improve and develop the land and to devote it to the purposes of the corporation's business. On numerous occasions after this conveyance and prior to the commencement of this action the directors of the corporation were sent from the Chicago office to Imperial county to inspect the land and properties of the corporation, and on all occasions expressed their approval of the acts of its secretary and general manager, and in some instances carried the expressions of approval into formal resolutions adopted by both the board of directors and by the stockholders in meeting assembled. Prior to the commencement of the action the corporation suffered financial difficulties. A reorganization was had, and the new organization, though not rescinding the transaction or offering to reconvey the property to the plaintiff, repudiated the obligation on the ground that it had not been executed under special authorization of its board of directors.

[1, 2] On this appeal the appellant urges that the judgment must be reversed, because the evidence fails to support the finding of due execution of the mortgage, and because, the trial court not having specifically found on the issues of ratification or estoppel, the respondent cannot avail himself of that answer to the appellant's defense of want of authority to execute the mortgage. The issue of due execution of the mortgage was not properly brought before the trial court. The complaint is in the usual form of a suit to foreclose a mortgage. The execution of the prom-

issory note and of the mortgage to secure its payment was specifically pleaded. The answer did not directly deny any of the material allegations of the complaint. The defendant denied on information and belief only that the corporation executed either the note or the mortgage and denied on information and belief, also, that the corporation had authorized the execution of either the note or the mortgage by resolution of its board of directors or otherwise, or that the corporation had ratified the execution or delivery thereof.

These denials were followed by the pleading that the defendant corporation was informed and believed and upon such information and belief alleged that no interest had been paid by the defendant corporation upon the alleged indebtedness. The answer is plainly sham and frivolous. All the facts alleged in the complaint, and which were denied for lack of information and belief, were facts which were presumably within the knowledge of the corporation, and required a positive denial in the answer. The books and files of the corporation were all available to the pleader, and it had every opportunity to ascertain the truth of the facts alleged in the complaint prior to the filing of the answer, or, at least, in time to enable it to file an amended answer before the trial of the cause, which was held more than one year after the original answer was filed. When the facts alleged in a verified complaint are presumptively within the knowledge of the defendant, he must answer positively, and an answer upon information and belief only should be treated as an evasion and an admission of the facts alleged in the complaint. *Curtis v. Richards & Vantine*, 9 Cal. 33, 38; *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 453, 466; *Loveland v. Garner*, 74 Cal. 298, 300, 15 P. 844; *Zany v. Rawhide Gold Mining Co.*, 15 Cal. App. 373, 376, 114 P. 1026. In view of the rule of the cases cited, the answer should have been treated as sham and evasive, and the respondent was entitled to judgment upon the completion of a *prima facie* case. The character of the pleadings was such, therefore, as to sustain the finding of due execution of both the note and the mortgage.

[3, 4] But notwithstanding the defective pleadings, the parties went to trial, and the appellant endeavored to prove that the note and mortgage were not properly authorized. In this respect its proof was on a line with its pleading. Though it had every opportunity to produce evidence in support of its pleading, it rested upon the testimony of witnesses, who were able to testify merely that they had no information or knowledge upon the subject-matter of their testimony. The appellant also offered in evidence portions of the minutes of the meetings of its board of directors and of its stockholders, from which it is argued that the authority to execute this particular note and mortgage does not ap-

pear. The burden of proof of want of authorization was, of course, upon the appellant. *Patterson v. Robinson*, 116 N. Y. 193, 200, 22 N. E. 372. The portion of the minutes which was offered in evidence discloses some of the transactions of the corporation, and does, as claimed by appellant, fail to mention the note and mortgage in suit. Because of this fact the appellant argues that the case is controlled by *Blood v. La Serena Land & Water Co.*, 113 Cal. 222, 41 P. 1017, 45 P. 252, and *Bliss v. Kaweah Canal & Irrigation Co.*, 65 Cal. 502, 4 P. 507. The *Bliss* Case rested upon the definite finding that no resolution, either general or specific, had been passed authorizing the president of the corporation to execute the document in question, and, in fact, no authority had been given him to affix the corporate seal to any document executed in the name of the corporation. The *Blood* Case was determined upon the admitted facts that the documents in question were executed solely upon the pretended authority conferred by the stockholders of the corporation at its first meeting prior to the organization of its board of directors. In that case there was no act of the board of directors pretending to confer either general or specific authority for the execution of the documents. It was held in each case that the instrument was not duly executed by the corporation; authority therefore not having been given in writing as required by section 2309 of the Civil Code.

In the case before us two circumstances are present which did not arise in the California cases cited. First, it appears that the president and secretary of the corporation who executed the note and mortgage were the owners of the corporation and used it merely as their alter ego in the transaction of their business. Second, the board of directors of the corporation entered into a contract in writing with the secretary of the corporation, whereby he was employed to act as the corporation's general manager, and wherein he was given blanket authority to do anything and everything which in his judgment might be to the best interests of the company with full power to act on the part of the corporation for that purpose.

In regard to the relation of Cook and Britten to the corporation, it appears that they held 7,000 shares out of the 7,500 of the capital stock of the corporation issued at the time of the execution of the documents. The remaining 500 shares were held by one of their employees, who was designated as a sales agent. The corporation was engaged in the business of raising hogs on ranches acquired by Cook and Britten in the county of Imperial. All these properties had been acquired and all the business of stocking them had been conducted by Cook and Britten in the name of the corporation without any specific authorization from the board of directors other than that noted. The board then consisted of

three directors, Cook, Britten, and their sales agent. Where an individual is the owner of all the corporate capital stock and uses the corporation merely as an instrumentality through which he transacts his business, the separate entities will be disregarded when necessary to prevent fraud and to protect the rights of third persons. *Minifie v. Rowley*, 187 Cal. 481, 487, 202 P. 673; *Wenban Estate, Inc., v. Hewlett*, 193 Cal. 675, 696, 227 P. 723, 731. In the last case the Supreme Court say:

That when such a situation exists "equity, looking to the substance rather than the form of the relation, and the law as well, will hold such corporation obligated for the acts of the sole owner of the corporation to the same extent and just as he would be bound in the absence of the existence of the corporation."

Though the cases cited related to a situation where but one individual used the corporate name in the manner suggested, the principle is the same when two own the stock and act in conjunction in the name of the corporation. *The McCormick-Saeltzer Co. v. Grizzly Creek Lumber Co.* (Cal. App.) 240 P. 32.

[5, 6] In relation to the authority under which Cook and Britten acted in executing the note and mortgage, it appears that by the by-laws of the corporation they had been authorized to execute all documents under seal and that Cook had been expressly employed as the general manager of the corporation with full power to act. On this phase of the case the rule applicable is that stated in *Cook on Corporations* (7th Ed.) vol. 3, § 716; *McCartney v. Clover Valley Land & Stock Co.*, 232 F. 697, 702, 146 C. C. A. 623, 1 A. L. R. 1127; *Aigeltinger, Inc., v. Burke*, 176 Cal. 621, 626, 169 P. 373, and cases there cited, which is that when a corporation suffers its officers to have actual charge and management of the business of the corporation and to so act as to lead those having dealings with the corporation to believe that they are acting under proper authority of the corporation, and this conduct continues for a long period of time with the full knowledge and consent of the corporation, it thereupon becomes bound by the acts of its officers done under its name. Here the evidence is that the corporation did not only give to Cook plenary power to do everything which he believed to be essential for the benefit of the corporation, but held out both Cook and Britten as its duly authorized agents to contract for it, and with full knowledge of the circumstances accepted all the benefits of their actions, received and retained possession of the lands which they had purchased in the name of the corporation, and on numerous occasions in both stockholders' meetings and meetings of the board of directors approved the things done for its benefit by these officers.

[7-11] The second point presented by ap-

pellant is that inasmuch as the trial court did not expressly find on the issue of ratification or estoppel those issues are not involved on this appeal. It is not necessary to enter into a discussion of the difference between the doctrines of ratification and estoppel as used in cases of this kind. Generally speaking, ratification applies to a formal declaration of approval of the act of another by the party sought to be bound, whereas estoppel is where a party is bound by his own act, but, as said in *Curtin v. Salmon River, etc., Co.*, 141 Cal. 308, 312, 74 P. 851, 99 Am. St. Rep. 75, the legal effect is the same, and it can matter little by what name it be called. Neither ratification nor estoppel was expressly pleaded in the complaint and, of course, it was not necessary to do so. The suit was one to foreclose a mortgage, and the respondent was required to make out a prima facie case. When the defense of want of execution was interposed, he could then show acts constituting an estoppel without further pleading. *Blood v. La Serena Land & Water Co.*, 113 Cal. 221, 229, 41 P. 1017, 45 P. 252. The defense of estoppel in pais is a mixed question of law and fact. 10 R. C. L. § 151, p. 845. The trial court found that the corporation, by and through its president and secretary, executed the mortgage under its corporate seal on July 1, 1917, paid the interest thereon up to the 1st day of October, 1919, and that the note was given in part payment of the purchase price upon the land upon which the mortgage was a lien, and that the conveyance thereof to the corporation was a part of the same transaction. If the trial court had drawn from these facts the conclusion that the corporation was thereby estopped from denying the note and mortgage, there would have been an end to the argument. It is because the trial court did not draw this conclusion that the appellant now insists that the respondent may not rely upon the doctrine of estoppel. All the evidence shows without conflict the facts from which an estoppel should arise. The original representations in the mortgage itself that the president and secretary were duly authorized to execute it, the knowledge on the part of the corporation of the execution of the mortgage and that it was to secure part payment for the land which the corporation held, the payment of the semiannual interest thereon for a period of some two years, the retention of the benefits of the transactions over a period of three years before the suit to foreclose was commenced, the failure of the corporation either before or after the commencement of the action to restore the consideration or to do equity in the premises, and the detriment which the respondent would suffer if the appellant should prevail, would have required a conclusion on the part of the trial court that the appellant was thereby estopped from denying the due execution of the mortgage. These facts, which are all undisputed,

bring the case within the provisions of subdivision 3, § 1962, Code of Civil Procedure, and, by reason of that section, the conclusive presumption follows that the appellant is estopped from denying its act. The judgment itself is a conclusion of law in favor of the respondent. Taking the judgment with the facts which the court found to be true, it is evident that if any further facts or conclusions of law had been made they too must have been favorable to the respondent. Such being the case, the failure to make more complete findings of fact or conclusions of law does not call for a reversal of the judgment. *Rea v. Haffenden*, 116 Cal. 596, 600, 48 P. 716; *Hulen v. Stuart*, 191 Cal. 562, 572, 217 P. 750.

Judgment affirmed.

We concur: LANGDON, P. J., STURTEVANT, J.

197 Cal. 765

CLARK v. MILLSAP et ux. (L. A. 8195.)

(Supreme Court of California. Jan. 6, 1926.)

1. Corporations §99(1)—Stock issued in violation of Constitution and statute void, and parties receiving them do not become shareholders.

Shares of stock issued in violation of Const. art. 12, § 11, and Civil Code, § 359, prohibiting issuance, except for money paid, labor done, or property actually received, are void, and parties receiving them do not thereby become shareholders.

2. Corporations §1—Corporate entity ignored when used as cover for wrongdoing or fraud.

A corporation is a legal entity when used for accomplishment for legal purposes, but cannot be used as a cover for wrongdoing and fraud, and, in such case, court will look through form of corporation to ascertain its actual purpose and intent.

3. Corporations §30(5)—That corporate directors become trustees on dissolution does not absolve one having absolute control and using corporation as cover for fraud from personal responsibility.

Despite Civil Code, § 400, providing that directors become trustees for creditors on dissolution of corporation, one, who has exercised absolute control over corporation and used it wrongfully as a medium to enrich himself, will be held personally responsible.

4. Corporations §1—To protect third person's rights equity will cast aside legal fiction of corporate existence.

For purpose of protecting third person's rights, or preventing palpable injustice, equity will cast aside legal fiction of corporate existence, and deal with corporation and stock-

holders as identical entities, with identical duties and obligations.

5. Corporations §30(5)—One, having absolute control of corporation through which property unlawfully acquired, cannot defeat action for accounting, because trustees not made parties.

Where attorney was organizer, manager, and promoter of corporation, organized to hold property of a client, and disregarded corporate entity in unlawfully acquiring property, he cannot defeat action for accounting, on ground that other trustees of corporation, powers of which had been suspended, were not made parties.

6. Attorney and client §114—Attorney acquiring client's property through fraud sustained double trust relations to client.

An attorney, who, through fraud and wrong, unlawfully converted property of client to his own use, sustained, under Civil Code, §§ 2224, 2235, a double trust relation to the client.

7. Attorney and client §127—Trustee, gaining advantage of beneficiary, has burden of showing that transaction was fair.

The relation of attorney and client is of fiduciary character, and, under Civil Code, § 2235, where a trustee deals with a beneficiary during existence of trust in such manner as to obtain an advantage, trustee has the burden of showing by evidence that transaction was fair.

8. Attorney and client §123(2)—Client, placing property in name of attorney for purpose of concealment, not in pari delicto with attorney.

A client, who, acting under advice of her attorney, placed her property in his name and possession for purpose of concealment, is not in pari delicto with attorney, so as to defeat right to accounting.

9. Reference §103(2)—Where reference did not include both questions of fact and law, and report was not adopted by court, it may be vacated without granting new trial, especially when not supported by evidence.

Where reference did not include questions of law and fact, and report was not adopted by the court, it may be vacated without necessity of granting a new trial, especially when not supported by evidence deemed satisfactory by court; Code Civ. Proc. § 644, not being controlling.

10. Reference §99(2)—Findings of referee, authorized to take and state account, not conclusive.

Referee, authorized to take and state account, was not authorized to try issues of fact and law, and report a finding and judgment thereon, under Code Civ. Proc. § 638, subd. 1, and findings were not conclusive.

11. Attorney and client §127—Burden on attorney to show that dealings with client fair.

In action by client against attorney for an accounting of property and money of client, alleged to have been fraudulently acquired by attorney, burden was on attorney to show that his dealings with client were in all respects fair.

12. Attorney and client ☞153—Attorney's fee properly denied, if relations with client tainted with fraud.

A court may refuse to allow attorney any sum as attorney's fee, if his relations with client are tainted with fraud.

13. Appeal and error ☞221—Order, awarding attorney fee in full payment, regarded as final, where not objected to by attorney.

Where, in action by client against attorney for accounting, order of court awarding sum in full of all services performed, will be regarded as final, when not objected to.

14. Limitation of actions ☞99(2)—Defense of limitations held not available, under the circumstances, to attorney, in action by client for an accounting.

Where attorney, through fraud, induced client to place her money and property in his name and possession, and client, for over five years, was practically an exile under an assumed name, on advice of attorney, and condition of affairs were withheld from her, action for accounting, held not barred by limitations.

15. Appeal and error ☞1026—Just judgment for client against attorney not overthrown by searching technical examination of record.

A reviewing court, on appeal from judgment in favor of client suing attorney for an accounting, will not examine record so searching technical, if fairly sustainable, as to overthrow a just judgment.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action for an accounting by Ida A. Morgan Clark against Homer C. Millsap and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Anderson & Anderson and F. E. Davis, all of Los Angeles, for appellants.

Bradner W. Lee, Bradner W. Lee, Jr., and Kenyon F. Lee, all of Los Angeles, for respondent.

SEAWELL, J. This is an action in accounting. Defendant and appellant Homer C. Millsap, an attorney admitted to practice law in the courts of this state, was employed in April, 1913, by Mrs. Ida A. Morgan, since married to Charles W. Clark, plaintiff and respondent herein, to act as her attorney and counsellor at law and represent her in certain legal matters then pending or about to be commenced in the courts of this state, both against her and in her behalf. It is alleged, and was found by the court to be true: That at various times between April, 1913, and the 1st day of January, 1922, respondent, without the aid of any independent advice whatsoever in the premises, and relying solely upon appellant as a counsellor at law in good faith to advise and direct her in all matters of a legal or equitable nature that

should arise in the course of his employment as such attorney and counsellor, did, upon the advice, counsel, and solicitation of appellant, as her said attorney, assign, transfer, and set over to him to be by him held for her benefit pending a threatened contingency long since passed, and then to be returned to her, certain real and personal property of great value, consisting of two parcels of land situate in the province of Manitoba, Canada, 500 shares of the capital stock of the Chamber of Commerce Safety Vault Company of Chicago, of the value of \$150 per share, aggregating \$75,000, and three lots of real property situate in the city of Pasadena, this state. Certain mining properties known as the Peris group of quartz mining claims and the Desert Queen mining claim, located in the county of San Bernardino, this state, and owned by Mrs. Morgan, seem not to have been conveyed, but were turned over to the control and management of appellant. That the said defendants and appellants Millsap and his wife, Bernice Williams Millsap, into whose hands also a portion of said properties came, have failed and refused to return any of the said properties or the proceeds therefrom, except certain relatively small specified sums, all of which was in violation of the trust and confidence which respondent reposed in appellant as her counsellor and attorney at law. The complaint sets forth a general plan and scheme adopted by appellant Homer C. Millsap, who was later aided and abetted therein by his wife, Bernice Williams Millsap, by which the said Homer C. Millsap would come into the possession and control of the entire estate of the respondent, and thereupon appropriate to the use of himself and his wife practically said entire estate. A prayer for general relief is added to the petition for an accounting.

The outstanding facts of the controversy are as follows: William Morgan, the first husband of respondent, died January 12, 1912. Appellant's employment by Mrs. Morgan began in April, 1913. Practically all of the properties which form the basis of the judgment in this action, from which this appeal is prosecuted by appellant, came to her by the decree of distribution in the estate of her deceased husband, William Morgan, entered on the 4th day of May, 1914. It was during her earlier period of widowhood that she surrendered herself to the domination of her attorney. The transactions into which she was led show very clearly that she was a woman without previous business experience.

While visiting at her mining properties located in San Bernardino county, respondent became involved in an alleged blackmail plot, the sequel of which was that one Mrs. Budd brought an action against her for the alienation of her husband's affections. The employment of the appellant to defend her against this action was the beginning of the

relationship of attorney and client out of which the present action arose. The trial resulted in a judgment in favor of the plaintiff, Mrs. Budd, against Mrs. Ida A. Morgan, the defendant, in that action and respondent in the instant case, in the sum of \$15,000. The judgment was thereafter reversed. *Budd v. Morgan*, 187 Cal. 741, 203 P. 754. Appellant Homer C. Millsap, as her attorney and counsellor in said action, advised her that the only method by which her property could be made secure against a forced sale upon execution, and thereby defeat any judgment that might be obtained against her, was for him to organize a "holding corporation," and upon its organization she should at once transfer and convey all of her property and tangible assets to said corporation. This project having been consented to, he thereupon organized such a corporation for the admitted purpose of defeating the court's order and processes. The court found, however, that the real reason that moved Mr. Millsap to form the corporation was to gain for himself control and possession of respondent's estate that he might appropriate it to his own use and benefit. The corporation thus formed as a "holding corporation" was styled the M. M. Investment Company. It took over practically the entire estate of Mrs. Morgan. Much of the real property and the larger portion of the securities were converted into cash and taken possession of by Millsap. The original incorporators were Leroy Millsap, a brother of appellant, E. D. Forbes, and appellant H. C. Millsap, all of whom were present at the first meeting of the incorporators, held June 27, 1914, and were elected president, vice president, and secretary, respectively. They also constituted the entire list of the original stockholders. Leroy Millsap was succeeded as president by P. C. Lynch. Forbes shortly withdrew as a director and vice president, and Mrs. Morgan became a director, and was made vice president and treasurer. On the 29th of June, 1914, one of the two shares of stock formerly held by Forbes was transferred to Lynch, and the other share was transferred to H. C. Millsap, and 94 shares were issued to Mrs. Morgan. On the following day 53 of Mrs. Morgan's 94 shares were transferred to Leslie Willis Whitlow, a minor, who was Mrs. Morgan's nephew. No shares of stock were ever delivered to him. Indeed, if any deliveries were actually made to the purported owners of stock, such deliveries were made as a ruse and in furtherance of the general fraudulent plan. On July 21, 1914, one of H. C. Millsap's shares of stock was transferred by him to his stenographer and law clerk, Miss Georgia Elster. On September 8, 1914, 25 of the 41 shares of stock remaining in the name of plaintiff were transferred to H. C. Millsap, and 15 shares were transferred to Whitlow. The foregoing brief entries exhaust the information furnished by the stock certificate

book. Stubs of certificates have been torn from the stock book and one certificate was not issued. The last certificate to be issued was No. 16. Important records of the corporation were lost or destroyed, if actually made. The capital stock of the corporation was 100 shares of the par value of \$100 per share. Speaking to the purpose of the corporation's existence, Mr. Millsap at the trial said:

"The whole proposition as I have explained—to cover up; that was their desire; and that was the only way I knew how to do it."

Again he testified:

"As I have explained before, and as I understand, this whole arrangement from the very inception of the thing, it was to defeat these people, if possible. It seems to me, from the facts in the case, that any reasonable justifiable means on earth of defeating those people should be pursued. Mrs. Morgan, of course, gave Mr. Lynch her power of attorney. I had no thought in the matter, other than to accomplish what we were all trying to do. Our theory was to defeat the litigation. Mr. Lynch said that we had started this thing, and in his notion the proper thing to do was to send to Mrs. Morgan from time to time such money as would be sufficient to carry her along, and that, upon the termination of the litigation, then we would settle the whole thing up."

He testified to the fact, which was amply established by the testimony of other witnesses, that—

"All the money we received was money received from the property which Mrs. Morgan transferred to the corporation."

He also stated that no dividends had ever been declared by the corporation. In speaking further as to the purpose to be served by the formation of the corporation, he said:

"Now, Leslie Whitlow, was a young man, a nephew, and I didn't really pay any particular attention to Mr. Whitlow, because I felt that Mr. Whitlow was cognizant of what was going on. In fact, he had nothing to do with it, as I rather looked at it. Now, as I have explained before, that was the position that we took at the inception, and I had always understood that Mrs. Morgan in reality—I felt in reality that, whenever the time came that Mrs. Morgan could procure a transfer of the stock, whatever the assets of the corporation were would go to Mrs. Morgan."

"The Court: Q. That is what I am getting at. Was not the whole theory of the transaction, then, that this was Mrs. Morgan's property that was transferred to the corporation for the purpose of holding the property, that being for the purpose of defeating possible judgment creditors of Mrs. Morgan, and that, when the danger was over by reason of lapse of time, or by reason of successful art, of the litigation as far as Mrs. Morgan was concerned, that property would be turned back to her; in the meanwhile she was paid the proceeds and given sums of money from time to time? Wasn't that the whole transaction? A. That is the ultimate

effect I expected to accomplish, but here is the situation. * * *

The appellant at this point digressed from the question to make the claim that the stock of the corporation and its assets belonged to its stockholders and not to Mrs. Morgan, as she had transferred her stock to Whitlow, retaining but one share, and that her interest in the corporation was limited to one share.

Repeatedly throughout his testimony appellant admitted that the only property owned at any time by the corporation was property transferred to it by Mrs. Morgan and that no one else at any time had contributed or paid a dollar thereto for the purchase price of stock issued to the said several stockholders. Neither is it claimed that any one performed services for the corporation. Miss Elster, formerly Millsap's stenographer, described the purposes of the corporation in these words:

"The M. M. Investment Company was a closed corporation, organized and incorporated under the laws of the state of California, to which all of the property of Ida A. Morgan, or all of the property of Ida A. Morgan then in the United States, was transferred. The real purpose of the formation of this corporation was to avoid the payment of any judgment which might be obtained in California against Mrs. Morgan. * * * The whole thing was planned, cut, and dried. * * * From my knowledge gained in the office and from some conversations in the office, I saw that the purpose of the formation of the company was to avoid payment of any judgment which might be obtained in the case of *Budd v. Morgan*."

The fraudulent purpose of the corporation being admitted, it is not necessary to devote more time to that subject. Its office was at Mr. Millsap's law office, where the books and documents were supposedly kept, unless removed elsewhere for convenient purposes, and there seem to be but few records of any important proceedings which bear the stamp of verity. Records and correspondence that might be of value to the respondent and which doubtless bore a "telltale" aspect were destroyed. Respondent had been advised to destroy all letters and writings of every kind which would tend to throw any light upon her transactions with the corporation or her attorney, Millsap. Bernice Williams Millsap, codefendant and wife of Homer C. Millsap, prior to her marriage and a short time thereafter was stenographer and confidential secretary of said Homer C. Millsap, and latterly handled the respondent's funds and mingled them with her own funds and with those of her husband, as found by the court. On February 28, 1920, the corporate powers, rights, and privileges of the M. M. Investment Company were suspended for failure to pay the corporation tax required by the laws of this state. On July 18, 1920, said tax having been paid, said corporation was restored to its former corporate powers, rights, and privileges.

On March 5, 1921, said corporation's powers, rights, and privileges were again suspended for a failure to pay the corporation tax, and it has since stood suspended and incapable of exercising corporate powers.

The amended complaint states four causes of action. The first cause of action joins H. C. Millsap, said suspended corporation, and Bernice Williams Millsap, and alleges the misappropriation by them and each of them of moneys and property belonging to the plaintiff in the sum of \$60,232.57. By the second cause of action it is alleged that in May, 1913, plaintiff, Mrs. Morgan, employed said Homer C. Millsap as her attorney to defend her in the suit of *Budd v. Morgan*, supra, for which it was agreed by her and said Millsap that he should receive in full for all services performed by him the sum of \$7,500, said Millsap to pay all costs and expenses of every kind and character that might arise out of said action; that in May, 1914, she paid him said sum of \$7,500 for the purposes above stated; that she was compelled thereafter to pay costs and counsel fees arising out of said action, aggregating \$1,951.30, which Millsap had agreed to pay, and which it was his duty under said contract to pay, but that he has since refused and failed to pay said sum or any part thereof, wherefore she asks to be reimbursed for said payments made by her on account of Millsap's failure and refusal to keep his contract. The third cause of action sets out circumstances antedating and attending the making of a promissory note by respondent in favor of H. C. Millsap in the sum of \$20,000 while she was in hiding at Vancouver, British Columbia, where she had been advised by Millsap to go and remain under a fictitious name to avoid being served with any kind of legal process. The note, which purported upon its face to have been executed at Los Angeles, Cal., under date of June 30, 1914, was in fact signed at Vancouver, British Columbia, on December 25, 1914. It had been prepared by Millsap at Los Angeles and dispatched to Vancouver by special messenger, Miss Georgia Elster, Millsap's stenographer, who was directed to explain to the plaintiff, Mrs. Morgan, that her signature did not "mean anything" as to her and she would be held harmless, but her signature thereto was necessary to the execution of the general plan and scheme that he was evolving for her benefit and welfare. The note as carried by the messenger had written upon it in ink, "Paid in full, September 8, 1914, H. C. Millsap." Said \$20,000 note was signed according to instructions, but remained in the possession of its maker, Mrs. Morgan. It was intended that it should remain in her possession. This transaction, if free from the taint of fraud, would have reduced his obligation to that extent. There is nothing about the transaction itself which suggests that it had any connection whatso-

ever with the payment of an attorney's fee. It bears no such indicia and the transaction is not in accord with the ordinary course of business. The bona fides of this transaction presents one of the main controverted facts urged upon appeal; the contention of appellant being that the item of \$20,000 was the fee that he was to receive for professional services rendered through a long course of litigation. On the other hand, the claim is made by respondent that appellant Millsap agreed to perform all the services undertaken by him for the sum of \$7,500, out of which sum he was to pay the costs as heretofore noted. The trial court found against appellant's contention and refused to allow him any credit on account of said note, on the ground that its execution was fraudulently procured and its execution was without consideration. By the fourth cause of action plaintiff alleges much of the matter contained in the first cause of action and prays for judgment for the sum of \$60,232.57 on account of moneys had and received. In avoidance of the statute of limitations, it is alleged that all knowledge of the fraudulent dealings of appellant Millsap with respect to respondent's property was designedly kept concealed from her and that she was misled and deceived by the fraudulent statements and acts of appellant Millsap as to the true condition of her estate. It is also claimed that all books, papers, and records purporting to relate to the business and transactions in controversy were at all times in the possession and under the control of appellants and that she at no time had access to or was accorded the privilege of inspecting any books or papers purporting to record said transactions affecting her property, but was compelled to rely upon the statements of her attorney, H. C. Millsap, which information subsequently proved to be false and untrue. She also alleged that no claim was made by appellant as to his right to an attorney's fee in the sum of \$20,000, nor did she have any knowledge of the fraudulent use or appropriation of any part of her estate by appellants until six months next preceding the commencement of said action. The deceptions practiced, and the withholding of knowledge and information from the respondent, and her confidence and faith in her said attorney are sufficiently pleaded and proved to relieve her from the bar of the statute, and it is unnecessary to refer further to this issue.

The defendants Homer C. Millsap and Bernice Williams Millsap demurred separately to the amended complaint. The grounds of demurrer are practically the same, being both general and special. Misjoinder and defect of parties defendant, in that the directors of the M. M. Investment Company at the time of the forfeiture of its charter and the trustees thereof, other than Homer C. Millsap, were not joined as defendants in the action, and secondly, that the M. M. Investment Com-

pany, a defunct corporation, was improperly joined as a party defendant in the action with the other defendants, were also urged as grounds of demurrer, but the objections were overruled. Homer C. Millsap answered individually, and also as a trustee for the M. M. Investment Company, and Bernice Williams Millsap made joint answer with him. Defendant H. C. Millsap admitted his employment in April, 1913, by respondent, to represent her in the case of Budd against Morgan, and also to represent her in the matter of the estate of William Morgan, deceased, which proceeding was then pending in the superior court of the county of Los Angeles. He denied that any agreement had been made between Mrs. Morgan and himself as to the amount of the compensation to be paid him for his legal services until the 15th day of January, 1914, on which day a contract was made and entered into between him and Mrs. Morgan. He averred that he continued to render services for her pursuant to said contract of employment until June 30, 1914, on which day the prior contract was, by mutual consent, canceled, and a contract for remuneration in the sum of \$20,000 was made because of threatened litigation not contemplated by said parties at the time the other contracts were made. He denied that he was at all times the sole adviser of plaintiff, Mrs. Morgan, or that she at all times followed or relied upon his advice, or that she delivered or intrusted to him the property described in the complaint. He denied that he took any part in the sale of the 500 shares of capital stock of the Chamber of Commerce Safety Vault Company made to R. Floyd Clinch. He further denied that he had advised the plaintiff that her said property could be more easily and effectively managed if a corporation were formed and said property was transferred, conveyed, assigned, or delivered to said corporation. He admitted and averred that there was pending, at the time plaintiff transferred and conveyed to said corporation the property described in the complaint, certain actions for damages against Mrs. Morgan, amounting to \$110,352, and that Mrs. Morgan, for the purpose of defeating the collection of any sum whatsoever by plaintiffs against her in said several actions, and to avoid the payment of any judgment or judgments which might be rendered against her, conveyed to the corporation the property described in the complaint and received in payment therefor stock of the M. M. Investment Company, which, subsequently to the transfer, was sold and transferred by her. Incorporation of the M. M. Investment Company under the laws of the state of California is admitted, but denial is made by Mr. Millsap that he was, at any time subsequent to July 21, 1914, an officer or director of said corporation. Denials are also made to the allegations of the complaint to the effect that defendant H. C. Millsap col-

lected certain large sums of moneys belonging to Mrs. Morgan, but admissions are made that said sums were received by the M. M. Investment Company. Both defendants, by answer, denied, after the transfer of the properties to said corporation was made, that the plaintiff had any interest therein, except as that of a stockholder. Both denied that Bernice Williams Millsap received at any time any money or property belonging to the plaintiff. It is not denied by either of the defendants that large sums of money belonging to the investment company were received by them. Their denials go only to the ownership of the property. Attorney Millsap, by separate answer, denied that he agreed to defend the Budd Case for \$7,500, or that he was paid that sum by plaintiff for said services, but, on the contrary, averred that plaintiff had agreed with him upon a \$20,000 fee basis, and that he (Millsap) was to pay the costs, etc. While the answer makes reference to each allegation of the complaint, not all of the issues raised therein are squarely met, but in a number of respects the denials are somewhat evasive. The defendants admit that the plaintiff is not indebted to either of them in any sum, but affirmatively aver that she is indebted to the M. M. Investment Company in the sum of \$35,500, and on behalf of said corporation ask that judgment in that sum, together with interest, be entered against her and in favor of said corporation. The provisions of sections 337 to 341, both inclusive, of the Code of Civil Procedure, are pleaded as a bar to the action.

The court found in favor of the plaintiff and against defendants H. C. Millsap and wife on every material allegation of fraud alleged in the complaint and on every material issue pleaded therein. In view of the findings made by the court, the objections made to the pleadings on the ground of misjoinder of parties defendants, that is to say, whether the corporation or its trustees were necessary parties, are of but slight consequence. The positions taken by the defendants as to the question of misjoinder is rather unique. By their demurrer, they objected to the joining of the corporation with them and complained because the trustees of the corporation were not joined. During the trial of the case the court dismissed the corporation from the action on motion of plaintiff, a ruling which defendants had previously insisted upon, but to which ruling when about to be made, interposed vigorous objection.

It is alleged by the complaint that H. C. Millsap was one of the original organizers of the corporation and was an officer and director thereof at the times it twice forfeited its charter by failure to pay its franchise tax, and he thereupon, by operation of law, became a trustee of said corporation. Section 416, Code of Civil Procedure. By his answer, he assumed to be a trustee by demanding, on

behalf of the corporation, a judgment in its favor and against plaintiff in the sum of \$37,500. By so doing, he placed himself in the office of a trustee. According to the claims of appellants that the corporation was legally organized and that its corporate entity could not be collaterally attacked, this single circumstance would not render the defendants immune from liability in an action brought against them based upon fraud in a transaction such as this case presents. But whether the defendant H. C. Millsap will be heard to urge a failure to join the trustees with him is a question attended with serious doubt. At the time the action was commenced, the respondent was the equitable owner of all the stock of the corporation. The persons in whose names it stood upon the books, and the number of shares of stock purported to be held by each, were as follows: Homer C. Millsap, 27 shares; Georgia Elster, his stenographer, 1 share; Leslie Whitlow, nephew of respondent, 68 shares; T. C. Lynch, 3 shares. Not one of the foregoing named persons, excepting Mrs. Morgan, paid anything at all for the stock that stood in their respective names.

[1] About the time the corporation was formed, Mrs. Morgan paid into it the sum of \$10,000, which sum was equal in amount to its paid-up capital stock. This sum was to be regarded as surplus earnings and was to be used as an expense fund. It was soon thereafter depleted. Article 12, § 11, of the Constitution of this state provides:

"No corporation shall issue stock or bonds, except for money paid, labor done, or property actually received." etc.

Section 359, Civil Code, contains a restatement of the constitutional provision. It has been held that shares of stock issued in violation of said prohibition are void and the parties receiving them do not thereby become shareholders. *J. F. Lucey Co. v. McMullen*, 178 Cal. 425, 173 P. 1000; *Kellerman v. Maier*, 116 Cal. 416, 48 P. 377; *Cortelyou v. Imperial Land Co.*, 156 Cal. 373, 104 P. 695; *Jefferson v. Hewitt*, 103 Cal. 624, 37 P. 638; *Ewing v. Oroville Min. Co.*, 56 Cal. 649. The statute was again violated by the issuance of stock, as no effort was made to conform to the requirements of the provisions of the Investment Companies Act, in effect November 1, 1913, statutes and amendments 1913, p. 715. By section 5 of said act it is made unlawful to issue any security or stock, unless a certificate or a temporary permit authorizing the issue thereof shall first have been secured from the commissioner of corporations as provided by said act. It further provides that—

"It shall further be unlawful for any investment company, * * * as in this act defined, to sell, offer for sale, negotiate for the sale of or take subscriptions for any stock, stock certificate, bond or other evidence of in-

debtedness of any kind or character without exhibiting to the prospective purchaser or prospective purchasers of such securities, or any thereof, a copy of the certificate issued to such investment company in accordance herewith."

A corporation may, however, without applying for a certificate, issue to each of its directors one share of stock for the purpose of qualifying as directors. The commissioner of corporations, if satisfied that the investment company intends to do a fair, just, and equitable business, may, forthwith upon the filing of the statement and other papers required by section 4 of said act, issue to said investment company, upon such conditions as he may prescribe, a temporary permit to issue its securities pending the examination of said statement and other papers, and may, from time to time, for cause, rescind, alter, or amend said temporary permit. But no application was filed at any time by H. C. Millsap, acting for the corporation, for permission to sell stock or effort made to comply with the requirements of the act in any respect. To do so would have put himself and his corporation under the scrutiny and examination of the commissioner of corporations, evidently a thing he sought to avoid.

[2-5] But waiving the question of failure to comply with the several statutes of this state regulating the formation and transaction of business by corporations, the plaintiff, by force of the broad and liberal principles of equity, was not required to make either the corporation, or the trustees thereof, parties defendant. In the instant case the corporation, as has been so many times said, was solely a creature of H. C. Millsap, managed and controlled by him. It transacted no business whatsoever, except to receive, as a medium, the property of respondent, and formally convey it to other persons. The proceeds of sales went into his own possession. Instead of the corporation being a "holding" concern, it was in fact merely a "disbursing" concern. Millsap throughout his long course of handling the estate of respondent did not pretend that he was acting for, or that the transactions were being conducted in behalf of, the corporation, but that they were personal matters between himself, Mrs. Morgan, and third parties. All of the papers executed by Mrs. Morgan or by Millsap were executed as the individual act of each, and this of itself would be sufficient to estop him from now asserting that he was not acting for himself but for the corporation. It is a well-recognized rule of law that a corporation may be considered a legal entity when used for the accomplishment of a legal purpose. Corporations, however, cannot be used as a cover under which wrongs may be committed and fraud perpetrated. In such a case the court will look through the form of the corporation to ascertain its actual purpose and intent. If the purpose and intent of the corporation are bad, its corporate en-

tity will be no cover for wrong, fraud and bad faith. *Macfadden v. Jenkins*, 40 N. D. 422, 169 N. W. 151. Upon the dissolution of a corporation the directors become the trustees for the creditors and they may be sued in any court in the state. Section 400, Civil Code. This does not mean, however, that a person who has at all times exercised absolute control over a corporation and used it wrongfully as a medium to enrich himself will not be held personally responsible for this misfeasance. And it may not be necessary under some circumstances to make the corporation which was used as an entity merely to consummate a wrong a party to the action. The facts of a case may be such as to require a court of equity, which always has inherent power in such cases, to treat the corporation and the individuals owning all of its stock as identical. Thus corporate entity, existing as such entirely distinct from its members, may be ignored in order to circumvent the fraudulent purposes of the stockholders in its organization. *Ayer & Lord Tie Co. v. Commonwealth*, 208 Ky. 606, 271 S. W. 693. In order to redress wrongs committed by fraud and protect third persons' rights or to prevent a palpable injustice, equity will interfere and cast aside the legal fiction of a corporate existence and deal with the corporation and stockholders as identical entities with identical duties and obligations. "Where an individual is the owner of all the corporate capital stock and uses the corporation merely as an instrumentality through which he transacts business, the separate entities will be disregarded when necessary to prevent fraud and to protect the rights of third persons." *Minifie v. Rowley*, 187 Cal. 481, 487, 202 P. 673; *Wenban Estate, Inc., v. Hewlett*, 193 Cal. 675, 696, 227 P. 723, 731. In the last-cited case this court said:

That, when such a situation exists, "equity, looking to the substance rather than the form of the relation, and the law as well, will hold such corporation obligated for the acts of the sole owner of the corporation to the same extent and just as he would be bound in the absence of the existence of the corporation."

While many of the cases cited relate to a situation where but one individual uses the corporate name in the manner suggested, the principle is the same when two or more own the stock and act in conjunction in the name of the corporation. *The McCormick-Saeltzer Co. v. Grizzly Creek Lumber Co.* (Cal. App.) 240 P. 32; *Zenos v. Britten-Cook Land & Livestock Co., a Corporation et al.* (Cal. App.) 242 P. 914; 6 Cal. Jur. 591. "Corporate entity is ignored in order that fraud or some kindred wrong may be defeated." *Erkenbrecher v. Grant*, 187 Cal. 7, 203 P. 641; *Relley v. Campbell*, 134 Cal. 175, 66 P. 220; *Rutz v. Obear*, 15 Cal. App. 435, 115 P. 67; *Deming v. Maas*, 18 Cal. App. 330, 123 P. 204;

Minifie v. Rowley, supra. The doctrine of corporate entity is not so sacred that a court of equity will hesitate to look through form to the substance of the thing, and it may, in proper cases, ignore it to preserve the rights of persons imposed upon or circumvented by fraud. In such cases, corporate fiction is disregarded. So, in the instant case, as corporate entity was absolutely disregarded by H. C. Millsap in all of his transactions with the respondent, except in such respects as the requirements of law compelled him in order to accomplish his purposes, to adhere to the forms of corporate procedure, he will not be permitted to defeat an action against himself for an accounting of property which came into his hands as the result of his unlawful methods merely because all the trustees of the defunct corporation, of which he was one, were not sued in conjunction with himself, when as a matter of fact, he was the organizer and the manager and promoter of the scheme and project by which the fraud was committed.

[6, 7] Appellant sustained a double trust relation to respondent. First, by force of the provisions of section 2224, Civil Code, which provides that—

"One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

Second, the *Metropolis Trust & Savings Bank v. Monnier*, 169 Cal. 592, 147 P. 265, restates the universal test which must be applied to every transaction between attorney and client by which the attorney during the continuance of his employment gains any advantage from his client, in the following language:

"The relation of attorney and client is of a fiduciary character, and the Civil Code (section 2235) clearly provides that all transactions between a trustee and his beneficiary during the existence of the trust, by which he obtains any advantage from his beneficiary, 'are presumed to be entered into by the latter without sufficient consideration and under undue influence.' This does not mean that a trustee may not deal with his beneficiary; but, if he does deal with him in such manner as to obtain an advantage, the trustee has the burden of showing by evidence that the transaction was fair."

See, also, *Sanguinetti v. Rossen*, 12 Cal. App. 623, 107 P. 560.

That appellant gained an advantage from his client, no doubt can exist. That he did not meet the burden of showing that the transaction was fair, which the law casts upon him, is amply supported by the evidence set out in the record.

[8] The commonplace maxims of equity, "He who seeks equity must do equity" and "He who comes into a court of equity must

come with clean hands," have no application to the facts adduced in the instant case. Certainly the law will not hold a client in *pari delicto* with her attorney, who, acting under his influence and advice, places her property in his name and possession for purposes of concealment. As between the two, the client is not, in the eyes of the law, as culpable as the legal adviser. *Herrick v. Lynch*, 150 Ill. 283, 37 N. E. 221, lays down the true rule in such cases. It is there said:

"We do not think, however, that under the circumstances there should be an application of that rule of equity which denies relief to one party against another when both have been engaged in a fraudulent transaction. The parties were not in *pari delicto*. One was legal adviser; the other client. The advice of the former being adopted, he procured title to the latter's interest in valuable real estate. Equity will not tolerate the idea that an attorney may make use of his peculiar power over his client to procure a contract which is illegal and contrary to public policy, and to then invoke the aid of the law to enable him to retain that which he has obtained through his fraudulent artifices."

It was not intended by the conveyances made by respondent to said corporation that any beneficial interest in the property transferred or conveyed upon appellant's advice should pass or vest with the legal title thus conveyed. Such are the admissions of appellant.

[9, 10] Appellant's further contention is that the trial court committed reversible error by refusing to accept as conclusive and binding the findings of the referee appointed by the court, with the consent of counsel, to take and state the account of all transactions had between the parties thereto and each of them. It was further stipulated that all exceptions or objections to the report or findings of the referee might be made by either party at the time of the trial with like effect as if a bill of exceptions had been prepared, settled, and allowed and filed in said action. The referee made his report from what was shown upon the face of certain books and documents, and, in doing so, reported the transactions as existing between Mrs. Morgan and the M. M. Investment Company, making no mention of Homer C. Millsap, except as to the \$20,000 promissory note. This gives rise to the claim that, as the referee stated no account and made no report as to anything due the plaintiff from the Millsaps, the court was thereby bound by what appeared upon the referee's report as to who the real parties to the equitable proceeding were. The referee was authorized only "to take and state the account of all transactions had between the parties hereto." Of course, this meant that he was only to furnish the court with a report as to what the books and accounts showed as to charges, receipts, and disbursements of every kind, to account for

property and funds, and did not authorize the referee to try all issues of fact and law and to report a finding and judgment thereon as provided by section 638, subd. 1, of the Code of Civil Procedure. The referee was appointed to aid the court in the computation of accounts in the interest of time. We think the attitude of counsel clearly shows this to have been the understanding, as shown by the objections made by counsel on both sides. The court went fully into the whole matter of the accounting. Section 644, Code of Civil Procedure, is not controlling in the light of the circumstances of this case, as the reference did not include both questions of fact and law, and was not adopted by the court, and therefore was susceptible of vacation without the necessity of the granting of a new trial. *Harris v. San Francisco S. R. Co.*, 41 Cal. 393; 22 Cal. Jur. 698. Besides, the report was not supported by evidence which was deemed satisfactory by the court and it had the inherent power to set it aside, as if it were a jury verdict. *Cappe v. Brizzolara*, 19 Cal. 307.

We think the point must be decided against appellant on the theory that a clerical duty only was committed to the referee and he was not empowered to make findings on the issues not properly coming within his limited duty. The order of reference did not take the cause from the court and commit it to the referee for decision.

[11-13] The contention of appellant Millsap that he was entitled to a credit of \$20,000 as and on account of an attorney's fee, instead of \$7,500, as allowed by the court, is a question of fact, arrived at by the court upon a consideration of conflicting evidence which involves the unraveling of transactions intermingled with fictitious and fraudulent acts. The burden of showing that his dealings with his client in all respects was fair was upon appellant, and he failed to satisfy the court of the justness of his claim. It is to be observed in this connection that a court may refuse to allow an attorney any sum as an attorney's fee, if his relations with his client are tainted with fraud. "Fraud or unfairness on the part of the attorney will prevent him from recovering for services rendered; as will acts in violation or excess of authority, and acts of impropriety, inconsistent with the character of the profession, and incompatible with the faithful discharge of its duties." 6 Corp. Jur. 722, 723. But as opposing counsel did not object to the allowance of the sum of \$7,500 as an attorney's fee, and the court awarded that amount in full of all services performed, the order in that respect will be regarded as final.

[14] The statute of limitations cannot be invoked in appellant's behalf. Respondent was practically an exile from her residence for a period of about five years, living a portion of the time in a foreign country under an as-

sumed name, upon the advice of appellant, and all information concerning the condition of her affairs was withheld from her on the theory that if her presence should be discovered she would be unable to furnish any information on supplemental proceedings as to her financial situation. This, at least, is the version of respondent. After her return to Los Angeles she was denied an inspection of the books and accounts of the corporation and refused information which she was entitled to receive.

[15] We have examined the findings, which are voluminous, and, while there may be some slight inconsistencies, they are not so serious as to confuse the substantial issues. A reviewing court in such a case as this will not make its examination of a record so searchingly technical, if fairly sustainable, as to overthrow a just judgment. An officer of the court, such as an attorney, who finds himself enmeshed by the skeins which he has designedly woven to encompass another, will not be assisted by a court of equity from the peril of his position, if to do so would militate against the advantage of the client upon whom he had sinister designs.

The court found that plaintiff was entitled to recover the sum of \$31,394.54, together with interest thereon, amounting to \$17,693.11, from defendant H. C. Millsap and the sum of \$8,561.97, together with interest thereon, amounting to \$2,114.82, from the defendant Bernice Williams Millsap, and it was ordered and adjudged that the sum of \$10,676.79 of said judgment be joint as to said defendants Homer C. Millsap and Bernice Williams Millsap, and that plaintiff have and recover costs.

Finding no reversible error in the record, the judgment appealed from is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; LAWLOR, J.; LENNON, J.

197 Cal. 751

PEDRO v. POTTER et al.

WILFERT v. SAME.

(L. A. 8002.)

(Supreme Court of California. Jan. 6, 1926.)

1. Landlord and tenant $\Leftrightarrow$ 80(1)—Sublease subject to conditions of original lease held not to incorporate agreements of original lease; "condition."

A sublease, providing that it was made subject to conditions of original lease, which gave lessor option to terminate, did not incorporate provision of original lease for payment of all loss and damage; as a "condition" means a qualification or restriction annexed to a conveyance providing that in certain event an estate shall commence, be enlarged or defeated (citing Words and Phrases, Condition.)

2. Landlord and tenant ☞210—Sublessee held not entitled to apportionment of rent paid on termination of lease.

Where sublease did not provide for apportionment of rent paid in enumerating causes for damage in event owner exercised option to terminate lease, sublessees held not entitled to an apportionment of rentals.

3. Landlord and tenant ☞80(1)—Sublessee charged with notice of conditions of original lease and estopped to deny them.

By taking sublease subject to conditions of original lease, sublessee was put on notice of conditions therein and was estopped to deny them.

4. Landlord and tenant ☞210—Tenant not entitled to apportionment of rent where deprived of enjoyment of premises by inevitable casualty.

A tenant, who is deprived of the beneficial enjoyment of leased premises by an inevitable casualty without fault of landlord or tenant, is not entitled to an apportionment of rent, in absence of a covenant in lease so providing.

5. Landlord and tenant ☞130(4)—Sublessees held not entitled to recover advanced payments of rent under implied covenant of quiet enjoyment.

Where sublease provided for possible termination by original lessor, the sublessees cannot recover advanced payments of rent as for breach of implied covenant of quiet enjoyment under Civ. Code, § 1927, especially where action was not based on that section.

6. Landlord and tenant ☞80(3)—Under indemnity against damage to crops, sublessees entitled to damages for labor and time in preparing soil.

A reasonable construction, under Civ. Code, § 1643, of sublease indemnifying sublessees against damage to crops in case of termination of lease, entitles sublessees to damage for labor and time necessarily spent in preparing soil for planting, though no crops were actually planted.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge pro tem.

Actions for damages by Nick Pedro, and by F. A. Wilfert, against D. A. Potter and W. L. Owen, copartners, doing business under the firm name and style of Potter & Owen. Judgment for plaintiff in each case, and defendants appeal. Appeals consolidated. Judgments modified, and as modified affirmed.

Gibson, Dunn & Crutcher, of Los Angeles, for appellants.

Newby & Palmer, of Los Angeles, for respondents.

SEAWELL, J. On August 25, 1921, D. A. Potter and W. L. Owen, the defendants and appellants herein, leased from the Bradbury estate a portion of the Rancho Laguna, consisting of approximately 65 acres, situate in

the county of Los Angeles, for the term of five years, beginning September 1, 1921, and ending August 31, 1926. The lands were leased for farming purposes and at an annual rental of \$2,890, payable semiannually in advance on the 1st day of September and March of each year during the term. Said lessees covenanted to pay said rent throughout said term and agreed not to assign or hypothecate said lease without the written consent of the lessors. It was provided in said lease, however, that said lessees might sublet said lands or any portion thereof for like farming purposes, subject to all the terms and conditions provided in the original lease, "the subtenants to pay the rent and to be answerable to said lessees under the term of any sublease not in conflict with the terms of this (said original) lease." Said lessees covenanted and agreed for themselves, successors, and subtenants, not to commit or suffer to be committed any strip or waste on said property and not to pollute or suffer to be polluted or filled in any of the flowing wells upon said property, and upon the termination of the lease to leave all casing which was then in or might thereafter be placed in any wells by said lessees. Said lessees were given the right at the termination of the lease to remove all pumps, pipe lines, machinery, and improvements placed on said property by them, excepting the casing placed in said wells. The lessors reserved the right to terminate the lease at any time by giving 60 days' written notice and paying to the lessees "all loss and damage occasioned thereby." Said lessors were given the option of purchasing all of the improvements placed upon the premises by the lessees except the casing in the wells, which was to be left upon said premises, within 60 days after the expiration of or upon the sooner termination of said lease, by giving written notice of such intention to purchase. Covenants to protect the property against liens, etc., suffered by the fault of the lessees or their subtenants, and agreements to submit to arbitration the question of the amount of damages suffered in the event that their tenancy should be terminated before the expiration of their full term; values of improvements, and the adjustment of other matters likely to result in disputes or disagreements, were specifically provided for by the lease, as well as the usual covenants and agreements to be kept by a lessee, but as these are not matters in any wise involved in the action, further notice of them is unnecessary.

On August 15, 1921, appellants executed two separate subleases upon the portion of the rancho above referred to, one to respondent Nick Pedro, and the other to respondent F. A. Wilfert. The subleases are very similar in all material respects, and counsel, having agreed that the questions of law ap-

plicable to one case are also applicable to the other, stipulated that the two appeals might be consolidated, and they are so presented upon an agreed statement of facts in lieu of a bill of exceptions. By said subleases respondent Wilfert became the tenant of 45 acres of said rancho, at an annual rental of \$2,025, and respondent Pedro became the tenant of the remaining 25 acres at an annual rental of \$900. In each case the term is for five years from August 15, 1921, rent payable six months in advance in equal installments. The main question raised by the appeals involves the construction of the two subleases with reference to the original overlease, and is based upon the following language which is contained in each of the subleases, to wit:

"This lease is made subject to the conditions of the lease of this property from the Bradbury estate to parties of the first part."

As the right to recover damages and the amount thereof rests upon language peculiar to each lease, it is necessary to make a brief résumé of each. By the lease made between appellants, the sublessors, and Wilfert, the latter agreed to equip the water well on said property and put it in condition to pump and to pay one-half of the expenses of equipping the same and thereafter to pay his own operating expenses during the life of the lease. In case of sale of the property, appellants agreed to take over the pumping plant at its appraised value and also to compensate Wilfert for all "damage to crops from sale." It was further agreed that the appellants, sublessors, were to retain a one-fourth interest in a well described in the lease and were to have the use of said well and water on land they might lease, and they were to pay their part of the cost of operating expense thereof. It was also agreed that Pedro should have a one-fourth interest in said well and to pay his part of the operating expenses. The sublease made between appellants and Pedro of even date with the Wilfert sublease contained the agreement whereby Pedro was to share in the cost of equipping a well on said property and putting it in a condition to pump to the extent of one-fourth of the total cost. He was also to pay his part of the operating expenses of said well. Like the Wilfert lease, it contained the clause that in case of sale of the property the appellants were to take over the interests of the sublessee in the pumping plant at its appraised value and also to compensate the sublessee for all damage "to crops from said sale." A reservation was also made by appellants of a one-fourth interest in the water of the well, to be used on any lands they might lease; appellants to pay their portion of the operating expenses. It also contained a reciprocal provision that Wilfert was to have a one-half interest in said well and to bear his portion of the operating expenses. Both of said subtenants paid the first installment

of rent in advance. By the agreed statement of facts before us it is made to appear that the lease made to Pedro was a sublease of land held by Potter & Owen under a lease by them from the heirs of the Bradbury estate; that while in possession under said sublease he was served on the 14th day of December, 1921, by the Bradbury estate with a notice that said overlease, or main lease, would be terminated 60 days thereafter and a demand that as a subtenant he surrender possession of said premises within 60 days thereafter, as in said original lease provided; that in pursuance of said notice terminating said lease, the tenant, Pedro, delivered up possession on February 6, 1922, and has not since been in possession of said premises. It was also stipulated that the same situation as above recited existed as to Wilfert, who received a similar notice of the termination of his sublease, and that he surrendered the demised premises to the owners, as provided by the provisions of the main lease, on the 6th day of February, 1922. It is further stipulated that the surrender of possession by Pedro and Wilfert was not voluntary, and that neither waived any rights which he was entitled to under his sublease for damages against appellants. It is agreed that said Pedro and Wilfert, as occupants of said premises under their respective subleases, performed labor and expended money in the preparation of the soil for the planting and harvesting of crops thereon; that Pedro, upon entering into the possession of said premises, paid the sum of \$450 on account of rental, and that on the 14th day of December, 1921, he was served with notice that his tenancy had been terminated; that between August 15, 1921, and December 14, 1921, he expended the sum of \$704.80 in preparing the soil for a future crop. It is agreed that the reasonable value of the work performed by him amounted to \$250; also, that he expended upon the pumping plant the sum of \$215.60 and that the stipulated appraised value of his one-fourth interest in said pumping plant was the sum of \$474. It is stipulated and agreed that the foregoing amounts as found by the trial court are correct and fairly represent the value of the services performed and are reasonable appraisements of each item and thing as made by the court. It is agreed that the only question raised upon the Pedro appeal is the right of plaintiff to recover all of said amounts as against the appellants Potter and Owen.

Wilfert paid to appellants rental in the sum of \$1,012.50, and also expended, in preparing said premises for cultivation, between the 15th day of August, 1921, and the 14th day of December, 1921, when notice of termination of his tenancy was served upon him, the sum of \$562. It was stipulated that the reasonable value of his personal services during said time was \$300, and that he expended upon the pumping plant the sum of \$392.03,

and that the appraised value of his one-fourth interest in said pumping plant was the sum of \$948. It was also stipulated that the value of the services rendered and materials furnished by him as found by the trial court are supported by evidence, and the only question urged upon appeal is as to the liability of defendants for certain charges made against them. It is admitted that said subtenants, Pedro and Wilfert, raised nothing of value on the premises leased by them during their occupancy, and that each was in the exclusive possession of said premises until said surrenders were made, to wit, February 6, 1922, and that said Pedro had planted and attempted to raise certain crops which failed for lack of water prior to said surrender. It is further agreed that Pedro is entitled to recover as against appellants the sum of \$474, the stipulated appraised value of his one-fourth interest in the pumping plant installed upon said premises. Appellants contend that the following items allowed by the court are not recoverable in the action: Rent, \$450; work and labor, \$704.80; personal supervision of cultivation, \$250; and \$215.60 expended upon the pumping plant. The correctness of the items, as such, is not disputed. As to Wilfert, it is agreed that he is entitled to recover the sum of \$948, the appraised value of his one-fourth interest in the pumping plant; but appellants dispute his right to recover the following sums: \$1,012.50, rent paid in advance; \$562, work and labor; \$300, personal supervision of the work and labor performed upon said premises; and \$392.03 expended upon the pumping plant. The correctness of said items, as such, is likewise admitted. Finally, "it is stipulated and agreed that the questions to be decided by the appellate court are the proper construction of the terms and provisions of the sublease under which the said tenants took possession, and of the main lease from the owners of the said premises to the defendants, Potter & Owen, and whether or not the plaintiff should recover from the defendants the respective amounts awarded by the court, all of which amounts were expended in good faith by the plaintiffs in each action, in expectation of recouping the said expenditures from the crops which would have been planted upon the demised premises if the notice to terminate their respective subleases had not been given."

The total amount of the Wilfert judgment was \$3,214.53, and the Pedro judgment was \$2,094.40. The original lease, subleases, and notice to surrender possession are set out in *hæc verba* in the complaint and are found by the court to be true. The labor, for which compensation was allowed in each case, was found by the court to have been properly and necessarily performed in order to plant and harvest crops upon the respective demised premises, and the amounts expended upon the pumping plant were found to have been

a necessary and proper expenditure of moneys. The court further found that there was not sufficient time between the date of said subleases and the termination thereof for plaintiffs to have matured crops upon the demised premises, and no crops were in fact harvested therefrom; and the use of said premises during the period of occupancy by said subtenants—August 15, 1921, to February 6, 1922—was merely nominal and of no value to the respective occupants.

[1-3] The important question raised in these cases is whether the following clause contained in the subleases, "This lease is made subject to the conditions of the lease of this property from the Bradbury estate to parties of the first part," can be construed as incorporating by reference into said subleases the clause contained in the original lease by which it is claimed a covenant was created to apportion rent in case the original lease be terminated, to wit, "by paying to the lessees all loss and damage occasioned thereby." We do not think that it can be so construed. No inference arises from the use of the clause "this lease is made subject to the conditions of the lease of this property from the Bradbury estate," that it was intended thereby to incorporate and make all of the stipulations and agreements of the Bradbury lease a part of said subleases. The term "condition" has a well-understood meaning in law when used with reference to estates. "A condition is a qualification or restriction annexed to a conveyance of lands, whereby it is provided that in case a particular event does or does not happen, or in case the grantor or grantees do or omit to do a particular act, an estate shall commence, be enlarged, or be defeated." 2 Words and Phrases, 1394; *Anderson v. Palladine*, 39 Cal. App. 256, 178 P. 553; *Matter of Russell*, 163 Cal. 668, 126 P. 875, Ann. Cas. 1914A, 152. "In its more extended sense the word 'condition' signifies a clause in a contract or agreement which has for its object the suspension, rescission or modification of the principal obligation, or, in case of a will, to suspend, revoke or modify the devise or bequest." As tersely defined by this court in the *Matter of Russell*, supra, "In law, it [condition] means 'a qualification, restriction or limitation, modifying or destroying the original act with which it is connected,' or defeating, terminating or enlarging an estate granted." 1 Bouv. Law Dict. Rawle's Revision, 382. It will be found upon an examination of said subleases that the only language contained therein upon which respondents may at all rely in support of the claim that they are entitled to an apportionment of rentals paid is a clause which has reference solely to the happening of the event which would destroy respondents' leasehold interest. It will further be noted that damages which were likely to accrue to the subtenants from a number of causes in the event that the

Bradbury estate exercised its option to terminate the original lease were *ex industria* provided against, but the right of an apportionment of the rentals was not included therein. We are not at liberty to reform said instruments, as no such relief was sought in the court below, and we cannot say from an inspection of said instruments that the parties thereto, at the time of execution, failed to express themselves fully upon all subjects which they regarded as important to themselves. The termination of the subleases was certainly within the contemplation of all the parties to the transactions. It is not claimed that the termination of respondents' leasehold interests was occasioned by the fault of appellants. It cannot be claimed that the respondents did not have notice of the fact that the leasehold estate which they accepted was subject, upon notice given, to termination at the will of said grantors. They would be estopped by the recitals and covenants which they signed and sealed with their own hands to deny the existence of the conditions set out in said original lease. The rule of law which governs this precise situation is stated in *Georgous v. Lewis*, 20 Cal. App. 255, 128 P. 768, as follows:

"It is the duty of a person contracting for a sublease to ascertain the provisions of the original lease; and a subtenant is charged with notice of the existence of the original lease, and is bound by its terms and conditions. 1 *Woods on Landlord and Tenant*, § 93, p. 184; *Jones on Landlord and Tenant*, § 455; *Blachford v. Frenzer*, 44 Neb. 829, 62 N. W. 1101; *Dunn v. Barton*, 16 Fla. 765.

"But even if this were not so, the clause contained in the sublease under consideration that it was 'to hold only to the conditions of the original lease' was actual notice to the plaintiff of the existence of the original lease; and knowing of its existence he was charged with knowledge of its covenants, conditions, and limitations which, by reference, were made a material part of the terms and conditions of the sublease. *Coalinga, etc., Co. v. Associated Oil Co.*, 16 Cal. App. 361, 116 P. 1107; *Brock v. Desmond & Co.*, 154 Ala. 634, 45 So. 665, 129 Am. St. Rep. 71.

"The expressed covenants of the original and sublease are obviously opposed to the existence of an implied covenant which was to endure beyond the term granted to the defendants by the original lease."

It is appellants' contention that a lessee cannot recover back from his lessor rent paid in advance. In the instant cases the tenants occupied the demised premises covered by the advance payment for the full six-month period, less seven or eight days. There is no escaping the conclusion that the sublessees had actual notice of the existence of the covenants and conditions contained in the original lease in the face of the fact that they rely upon the language of their subleases as expressly incorporating therein the terms, covenants, and provisions of the original lease. It must be held, therefore, that

the sublessees had full knowledge that the tenancy of the sublessor was dependent upon the will of the overlord and that they had taken subject to the will of the overlord, and, further expressly agreed to a termination of their leases in the event of the sale of the premises by the overlord, a contingency which was likely to and which in fact did happen. The subleases, while providing for the recoupment of moneys paid out for certain improvements made by the tenants, contain no covenants for the recovery of rent paid in advance in case the estate of said subtenants be terminated before the expiration of the full term. The wisdom of such a contract is not a matter for our determination, nevertheless it is conceivable that with all the facts that were within the knowledge of the sublessees such a contract may have appeared to be to the advantage of said sublessees, and that it was intended to be, as it was made, without the insertion of a clause covenanting for a repayment or apportionment of rent paid in advance.

[4] It is a general rule in this state, as at common law, that a tenant who, after the beginning of the term, is deprived of the beneficial enjoyment of the leased premises by inevitable casualty, happening without the fault of either the landlord or tenant, would not be entitled to an apportionment of rent in the absence of any covenant in the lease so providing. *C. M. Staub Shoe Co. v. Byrne*, 169 Cal. 122, 145 P. 1032; *Harvey v. Weisbaum*, 159 Cal. 265, 113 P. 656, 33 L. R. A. (N. S.) 540, Ann. Cas. 1912B, 1115; *Meek v. Cunha*, 8 Cal. App. 98, 96 P. 107; 15 Cal. Jur. 721. The destruction of the premises by fire furnishes the most common illustration of the rule. In such a case courts have refused to apportion rent after destruction of the leased premises by fire, flood, etc., assigning, among other reasons, that as neither the lessor nor lessee is responsible for the destruction of the property, it is but equitable to divide the losses, or, put in another form, as the lessor must lose the property, the lessee should lose the term. But the reason of the rule does not rest solely upon the equitable principle of the division of losses occasioned by inevitable casualty. Other reasons of the rule take into consideration the law of contracts and the fundamental principles that govern leasehold estates. As an illustration, the lease is held to be an interest in real estate passing from the lessor to the lessee. The consideration for the advance payment is not only the use of the premises, but the conveyance by way of lease and the obtaining possession of the premises. It is further illustrated thus: The fact that rent was to be paid in advance might have been the controlling factor in the mind of the lessor when he executed the lease and delivered the possession of the premises to the lessee; in many cases the landlord may have expended more money than the advanced rent, and for the very reason that he

is receiving rent in advance, it may have been the very inducement to the lease. Again it is said:

"The lessee has only paid the money he agreed to pay at the time he agreed to pay it; and as he has not seen fit to have any provision inserted in the lease as to the recovery of the advance rent, or a part thereof, in case the premises are destroyed by fire, the law will not insert such provision for him, particularly as in many cases it might work a great hardship on the lessor."

We cannot say that the principles of law announced in cases where the destruction of the premises was caused by fire are not or should not be applicable in a general sense to a case where a sublessee who has been deprived of the enjoyment of the leasehold estate without the fault of the sublessor but by the happening of an event which the sublessee expressly stipulated that if it should happen would put an end to his lease, and who made no provision for a return of rent paid in advance in such event. Tiffany, in his work on Landlord and Tenant (volume 1, p. 1099), thus states the rule:

"In cases in which the loss of possession is due to the stipulations of the lease, he [tenant] may lose his advance payment, but this is merely a natural and legal result of the stipulation for payment in advance. One who agrees to pay in advance cannot well complain if, as a result of the agreement, he is in a position different from that in which he would be had he not so agreed."

[5] No question of damages for the breach of an implied covenant of quiet enjoyment and possession of the demised premises arises, or could arise in this case by force of section 1927, Civil Code, as the subleases made provision for a disturbance of the sublessees' possession, and the complaint does not contain a single allegation sounding in breach of covenant for quiet enjoyment and possession. Respondents, in their brief, emphatically repudiate the claim that the action is brought under the provisions of section 1927, Civil Code, as the following language makes plain:

"In the case at bar the plaintiffs are not *being sued* [suing] for a failure to pay rent due prior to an eviction, but are seeking a recovery of rent paid in advance under an *express covenant* of indemnity against loss occasioned by the exercise of the option of the owners of the land to terminate the tenancy." (*Italics supplied.*)

If, therefore, no express covenant is to be found in the subleases, which we hold there is not, the question of the right to recover said advance rent is lost so far as the present action is concerned.

Baranov v. Scudder, 177 Cal. 458, 170 P. 1122, contains nothing in conflict with the particular point involved in this case, but is in affirmance of it. That case approves what was said in *Georgous v. Lewis*, supra, to the effect that as the sublessee knew that his sub-

lessor was but a lessee of the owner of the demised premises, he also knew the contents of the lease.

Anything said in the *Georgous* Case which may be construed as holding that a sublessee, knowing that he is a sublessee, is not under the protection of section 1927, Civil Code, against a breach of any condition in the overlease, if no act of omission or commission on the part of the sublessor occasions a breach, is regarded as dictum and disapproved. *Baranov v. Scudder*, supra, was an action by a sublessee against a sublessor for damages for breach of covenant for quiet enjoyment and possession sustained by the sublessee through eviction by the landlord for a breach of the covenant in the original lease against subletting. The fact that the sublessee knew of such a covenant, or was charged with such knowledge, was not deemed sufficient to absolve the lessor from the provisions of section 1927, Civil Code. It is there said:

"One may agree, in future, to convey property to which he has no title, and the other party to the pact, knowing of the lack, may expect that the day fixed for performance will bring to him that title."

Continuing, the argument is that the sublessee, assuming that he had knowledge of the covenant against subletting, had the right to assume that the sublessor would procure, if not, in fact, that he had already procured, the overlord's consent to the sublease. But that case holds that where the sublease, as in the *Georgous* Case, and likewise in this case, contained the express provision that it was "to hold to the conditions of the original lease," takes the case without the operation of section 1927. It is said there, as it must be said here:

"Scudder (the sublessor) could have readily protected himself against the effects of an eviction such as later resulted to Baranov (the sublessee) by a clause in the sublease, but omitted to do so."

Surely, a lease contract may be so written, as in this case, as to take it without the protection of section 1927, Civil Code. We must therefore hold that the respondents are not entitled to recover the advance payments of rent in the action as maintained in the court below.

[6] It is next contended that the court erred in allowing damages in the way of expenditures made in preparing the lands for the planting and cultivating of crops and for expenditures made on the pumping plant. As to the first item, as no crops were actually planted, it is claimed, under the provision made for allowing the sublessees "all damage to crops," the labor and time necessarily spent in making the soil ready for the planting of crops does not constitute damages to crops, and therefore such expenditures are not recoverable. We think this would be a narrow construction to be placed upon the

contract and would result in unjust consequences. The intention of the parties is to be found in the instruments considered as a whole and with reference to the contingencies that were intended to be taken into consideration by the contracting parties. Surely it was not the intention or the understanding of the parties that by the use of the words "damage to crops" the sublessees should be entitled to damages only in the event that they would be compelled to surrender the demised premises at a time when crops were, as it is argued, in a state of maturity and practically ready to be harvested. We think that the contract cannot be so construed. In so holding we are not writing into the contract provisions not found therein, but simply placing a reasonable construction upon language therein contained. Section 1643, Civ. Code. We are not disposed to disturb the judgment of the lower court as to allowances made with respect to moneys expended upon the pumping plant found by the trial court to constitute an element of damage.

The cause is before us on an agreed statement of the case. No fact is disputed or contested, as such. The stipulation of the parties is that this court may construe the contract and place such construction upon it as in law it should receive, allowing or disallowing such items of damages as may appear to be within the intent of the parties thereto. It is very evident that the stipulation was made to avoid a retrial of the action. In making our order we are not called upon to make new or different findings than those made by the trial court.

It is therefore ordered that the judgments be modified by striking from the judgment awarded respondent Wilfert the sum of \$948, and by striking from the judgment awarded Pedro the sum of \$450 on account of rents paid in advance by each, and as so modified, said judgments to stand affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; LAWLOR, J.; LENNON, J.

197 Cal. 723

WOOD v. LONGYEAR. (L. A. 7327.)

(Supreme Court of California. Dec. 30, 1925.)

1. Abatement and revival ☞64—Liability of lessees joint and several, and action against them for breach of lease not abated by death of one.

In view of Civ. Code, § 1659, obligation of lessees is joint and several, and an action for breach of lease did not abate by death of one of defendant lessees, as action could proceed against remaining defendant in so far as an individual remedy against him was sought.

2. Action ☞38(5)—That lessees joined in pleas did not render the action joint.

That defendant lessees united in their defenses and affirmative pleas did not change na-

ture of proceeding against them for breach of lease, from a joint and several action to a joint action.

3. Abatement and revival ☞64—Cross-defendant may waive requirement of joint action, where one of defendants died.

Even though action against lessees for breach of lease became a joint action under Code Civ. Proc. § 382, where lessees united in their answer, counterclaims, and cross-complaint, cross-defendant waived such requirement by proceeding with trial after death of one of defendants, which waiver did not injure remaining defendant.

4. Landlord and tenant ☞124(1)—Provision in lease held mere description of leased premises and not express warranty.

Provision in leasing agreement, occurring in portion of agreement containing description of premises leased, "one rock-crushing plant with a capacity of about 100 tons per hour," merely constituted words of description, and was not an express warranty, especially in view of absence of any language indicating intent of lessor to warrant capacity of rock crusher.

5. Appeal and error ☞1011(1)—Trial court's finding on conflicting evidence not disturbed.

Trial court's finding on conflicting evidence that lessees were not entitled to rescind leasing agreement under Civ. Code, §§ 1932, 1933, and that their attempted rescission was ineffectual, will not be disturbed by appellate court.

6. Appeal and error ☞1052(8)—Error, if any, in admission of evidence held not ground for reversal, where proper judgment rendered.

In action against lessees for breach of lease, which proceeded to trial notwithstanding death of one of lessees, error, if any, in admitting testimony of conversation between plaintiff and deceased lessee was immaterial and not ground for reversal, where, under the evidence, judgment had been properly rendered in favor of lessor.

In Bank.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by H. S. Wood against E. J. Longyear and another, wherein defendants filed a cross-complaint. From a judgment against him, the named defendant appeals. Affirmed.

E. S. Williams, of Los Angeles, for appellant.

Lawler & Degnan and J. B. Irsfeld, all of Los Angeles, for respondent.

RICHARDS, J. This appeal is by the defendant and cross-complainant, E. J. Longyear, from a judgment in the plaintiff's favor for the recovery of rent, with interest and costs, amounting to the sum of \$5,503.83, claimed to be due said plaintiff upon a lease by him to the defendants of certain premises occupied by and used as a rock-crushing plant. The complaint, which was filed on October 30, 1917, sets forth, in substance, that on or about April 14, 1916, an agree-

ment in writing was entered into between said plaintiff and the defendants W. A. Boland and E. J. Longyear whereby the said plaintiff leased to said defendants the premises described therein for a period of three years from and after said date for a stipulated rental of \$400 per month for the first year of said lease and of the sum of \$725 per month for the remainder of the term, payable quarterly; that said defendants paid said rental up to and including the quarter ending May 31, 1917, excepting a balance of \$210.30 on account of said last quarter, but that they failed and refused to pay the rental due for the quarter ending August 31, 1917, and also for the quarter ending November 30, 1917, amounting to the sum of \$2,175 for each of said quarters, and for the total of these sums, amounting to \$4,560.30, with interest, the plaintiff brings this action. The defendants appeared to said complaint, and united in an answer thereto and also in a counterclaim in the same pleading and in a cross-complaint in a separate pleading. In the first count in their second answer the defendants, while admitting the making of said leasing agreement, aver that the said lease contained an express warranty that the rock-crushing plant upon the leased premises had a capacity of 100 tons per hour, and that the defendants relied thereon in agreeing to enter into said lease; and that, by reason of the fact that said rock-crushing plant did not have any capacity in excess of 30 tons per hour, the terms of said warranty had been violated by said plaintiff; and that, on account of such warranty and of the plaintiff's said violation thereof, the said defendants had, on or about the 24th of August, 1917, rescinded said leasing agreement and surrendered possession of all of the premises described therein to said plaintiff, and hence that no sum whatever was due or payable to said plaintiff from the defendants or either of them. By the second count in their said answer the defendants set forth that by a clause in said leasing agreement it was provided that, if said rock-crushing plant upon said premises should be destroyed by fire, flood, or other unavoidable accident so that operation of the same must be suspended for a longer period than one week, the said lessees should not be required to pay rent during the period of such suspension; and that, owing to the fact that on or about April 6, 1917, war was declared between the United States and Germany, and as a result thereof and of the general conditions arising therefrom, and particularly of the requisition by the United States government of all railroad facilities and means of transportation, it became impossible for said lessees to get cars or transportation facilities for their output by reason of which the suspension of operations of their said plant became necessary, and the same were in fact suspended and continued to be suspended during the remain-

ing term of said lease, the said lessees were thus absolved under the foregoing provision in said lease from any further payment of rent for said premises or the use thereof.

The third count in the defendants' said answer contains their counterclaim based upon the breach by plaintiff of the express warranty referred to in the first count thereof and of the otherwise faulty and defective construction of said rock-crushing plant whereby the said defendants were unable to adequately or profitably operate the same, but, on the contrary, were put to large expense in attempted repairs thereon and to great loss and damage in its attempted operation, amounting to the net sum of \$4,667, for which they seek recovery in the way of affirmative relief. By the fourth, fifth, and sixth counts in the defendants' said answer they further amplify the extent of the injury and damage which they allege themselves to have suffered from the unsuccessful operation of said rockcrushing plant due to the plaintiff's breaches in his aforesaid warranties and to his misrepresentation as to its working capacity; the aggregate of which they allege to be the sum of \$85,000, for which they seek recovery. By their separate cross-complaint the said defendants repeat substantially the averments of their foregoing answer and counterclaim, and pray for substantially the same amount of recovery by way of affirmative relief. To this cross-complaint the plaintiff presented an answer wherein he denied the existence of any express warranty in said leasing agreement as to the capacity of said rock-crushing plant, and also denied the making of any representations as to the working capacity of said plant as an inducement to the entering into said lease by said defendants, and denies any defectiveness in construction or working conditions of said plant which was not repairable by said defendants as provided for in said lease, and denies any right in the defendants to work rescission of said lease upon either of the foregoing grounds; and, generally speaking, otherwise denies specifically the averments of the defendants' said answer, counterclaims, and cross-complaint.

The cause came on for trial before the court without a jury upon the issues, as thus framed on November 25, 1918. At the opening of the trial, counsel, who had theretofore represented both of the defendants, suggested to the court that the defendant W. A. Boland had died in the state of Michigan on September 15, 1918, and on the basis of that suggestion objected to the further progress of the trial upon the ground that, the defendants having been sued jointly, and having also appeared jointly by their answer, and also in and by their cross-complaint, the court had no jurisdiction to proceed with the trial until the representatives of the deceased defendant had been brought before the court. The court overruled this objec-

tion, and, upon the insistence of the plaintiff, directed the trial to proceed in so far as the defendant, Longyear was concerned. The trial then proceeded with the introduction of much evidence, upon the conclusion of which it was submitted to the trial court for decision. Thereafter the trial court made and filed its findings of fact and conclusions of law, wherein it found that the leasing agreement had been entered into as alleged and admitted, and the premises duly delivered to the defendants thereunder, and that there remained unpaid to the plaintiff the sums due as rent therefor according to the averments of the complaint. The court further found that there had been no proof presented in support of the averments of the defendants' answer as to any interference with or suspension in the operations of the said rock-crushing plant upon said premises by reason of the state of war existing between our government and Germany, or of the conditions which prevailed in consequence thereof, and that the operation of said plant had not been suspended upon that account. The court further found that it is true that said leasing agreement contained the following words: "Together with one rock-crushing plant with a capacity of about one hundred tons per hour," but it is not true "that plaintiff covenanted or warranted said rock-crushing plant to have such capacity, nor did the defendants rely upon such recital as a warranty of the capacity of said rock-crushing plant. On the contrary, the intent of the parties in executing said lease, in the use of the words aforesaid, was that such words were to be accepted merely as descriptive of the property leased and not as a covenant or warranty of the capacity of any part thereof." The trial court further proceeded to make findings against said defendants specifically upon the issues tendered by their counterclaim and cross-complaint respectively. In its conclusions of law the court reiterated its aforesaid finding of fact as to the words in the lease relating to the capacity of the rock crusher as not constituting a warranty, but as merely descriptive of said portion of the property leased. The court also concluded that as a matter of law the defendants' attempted rescission of said leasing agreement was ineffective for the reason that no right of rescission then existed in favor of defendants against plaintiff. Finally, the court directed judgment against the defendant, Longyear, for the sums demanded in the plaintiff's complaint with interest and costs. Judgment was entered accordingly, and it is from such judgment that the defendant, Longyear, prosecutes this appeal.

[1-3] The first contention of the appellant to be disposed of is that urged by him at the opening of the trial of the cause, and which was to the effect that, his codefendant Boland having died since the issues in the case were

made up and prior to the date set for the trial, the trial court had no jurisdiction to proceed with the trial until the legal representatives of his deceased codefendant had been brought before the court. This contention was predicated upon the assumption that the obligation of the defendants for the breach of which the action had been instituted was a joint obligation and the liability of the defendants thereon a joint liability, and hence that, since said action had been abated as to one of said defendants by virtue of his death, it was in abeyance as to both until revived by proper proceedings against the legal representatives of the decedent. This assumption, however, fails in the light of section 1659 of the Civil Code, which reads as follows:

"Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several."

In the case of *Gummer v. Mairs*, 140 Cal. 535, 537, 74 P. 26, 27, this section of the Civil Code was construed as applied to tenants in common in the following language:

"In this case the consideration for the promise inured to the benefit of Enos and Mairs equally. They purchased the whole of the land, each taking an equal interest, and were tenants in common, and the 'presumption,' therefore, is, that their promise was 'joint and several.' It is quite true that, notwithstanding the consideration moving to each was the same, the contract might have been made a joint contract by an express statement or agreement to that effect, but in the absence of evidence showing a contrary intention, the presumption stated in said section 1659 must control."

A like interpretation was placed upon this section of the Civil Code in *Bell v. Adams*, 150 Cal. 772, 90 P. 118, and *De Angeles v. Cotta et al.*, 62 Cal. App. 691, 217 P. 821. There being nothing in the instrument itself to overcome this presumption, it follows that the trial court was correct in holding that the obligation of these defendants was a joint and several obligation, and hence that the action might have been begun and might proceed against either of them in so far as an individual remedy against either was sought, unaffected by the death or other disability of the other defendant. The appellant, however, urges that, since the defendants had united in their answer, counterclaims, and cross-complaint, a different situation was thus created which prevented the trial court from proceeding to hear and determine the merits of the defendants' affirmative pleadings until the legal representatives of the appellant's deceased codefendant had been brought before the court. We are unable to perceive, however, how the defendants, by uniting in their defenses and affirmative pleas, could operate to change the nature of the proceeding from a joint and several ac-

tion to a joint action; but, conceding section 382, Code of Civil Procedure, to be applicable to such a situation, we incline to the view that the requirements of said section were intended solely for the benefit of the defendant (in this case the plaintiff and cross-defendant), and hence could be waived by him; and, if so, were waived by his insistence upon proceeding with the trial. By such waiver, the appellant herein was not injured, and hence cannot complain. The trial court therefore properly determined to proceed with the trial of said action as to the defendant, Longyear, and to render a judgment therein affecting only the rights and defenses of the living defendant before it.

[4] The next and, in fact, the main contention of the appellant herein is that the leasing agreement in question contains an express warranty that the rock-crushing plant upon the leased premises had a capacity of 100 tons per hour, which warranty being violated, the lessees had all of the defenses and affirmative rights and remedies which are asserted in their answer, counterclaims, and cross-complaint. The alleged express warranty as to the capacity of the said rock-crushing plant occurs in that portion of said leasing agreement which embraces the description of the premises leased and their appurtenances, and is in fact a part of said description. It is embraced in no other portion of the leasing agreement, and is noticeably absent from the particular portion thereof which purports to set forth the respective covenants, obligations, and liabilities of the lessor and lessees respectively as parties to said agreement. There is also noticeably absent from the clause in said portion of said lease which embraces the words "together with one rock-crushing plant with a capacity of about one hundred (100) tons per hour" any words of express warranty or any other words evincing an intention that said phrase was inserted therein for the purpose of warranting the capacity of said rock-crushing plant. Being inserted in said instrument as an obvious portion of the description of the premises leased and their appurtenances, the natural assumption is that the phrase in question was intended merely as an identifying part of said description. This assumption might be weakened or overthrown, it is true, by the language of other portions of said leasing agreement indicating an intent on the part of the lessor to warrant the capacity of said rock-crushing contrivance, but, when we look to the body of said instrument generally, we find the existence of conditions which strengthen rather than overthrow the assumption that the phrase in question was merely descriptive of said appliance and was not intended to warrant its working capacity. The instrument discloses that the rock-crushing appliance in question was old and apparently much out of repair, and that, by the express

terms of said lease, the burden was placed, not upon the lessor, but upon the lessees of putting and of keeping said rock-crushing plant in workable order. These conditions and agreements are inconsistent with the idea that the lessor, by the use of the phrase referred to, and in the portion of said lease wherein the same is found, intended to warrant the working capacity of a complicated appliance which was not in working condition at the time of the execution of said lease and of its delivery to the lessees thereunder and which the latter and not the lessor were to assume the responsibility and expense of putting and keeping in condition for its intended use.

We are of the opinion that the trial court was correct in its interpretation of the foregoing phrase in said leasing agreement as constituting words of description and not of warranty. This conclusion renders unnecessary a determination of the question as to whether the phrase in question is to be interpreted as referring to a contemplated capacity in said rock-crushing plant of 100 tons per hour of crushed rock only or of crushed rock, sand, and gravel passing through said plant, although there was much evidence introduced into the record relating to this disputed interpretation.

[5] The next contention which the appellant urges is that the rock-crushing plant, the operation of which constituted the main use to which the leased premises were to be put, having become dangerous to life and limb, and unsafe to operate after its delivery to and attempted operation by said lessees, they were entitled to treat said leasing agreement as terminated under the provisions of sections 1932 and 1933 of the Civil Code. This contention is predicated upon one or both of two alleged supports. The first of these is the alleged guaranty of the working capacity of said plant, but this support, as we have seen, has failed. The other support relied upon is that of the evidence showing the unsafety of further attempts to operate said plant after a few months of endeavor so to do, arising from its age, original deficiencies of construction, and general worn-out condition. As to this, however, the state of the evidence was that of substantial conflict, and the findings of the trial court were against the said defendant's contentions in each and all of the foregoing regards. The findings of the trial court were also against the defendant upon the issue presented in his answer, counterclaims, and cross-complaint as to existence of any false representations on the part of said plaintiff as to the condition or capacity of said rock-crushing appliance or as to any reliance placed by the said lessees thereon which would have entitled them to a rescission of said agreement, and, as a result deducible from these findings, the trial court found and concluded that the said lessees not only were not entitled

to rescind said leasing agreement, but that their attempted rescission thereof was ineffectual as defective in substance and as attempted too late. It is almost needless to reiterate that this court will not disturb the findings of the trial court upon these matters, based as they are upon substantial conflicts in the evidence presented in the case.

[6] Finally, the appellant contends that the trial court committed reversible error in overruling the said defendant's objections to the introduction of certain evidence relating to conversations between said plaintiff and the appellant's codefendant Boland, and also between the plaintiff and certain other persons more or less intimately associated with this particular defendant during the pendency of the negotiations preceding the making of said lease. These conversations had relation to the issue raised by the said defendant in relation to his right to rescind said leasing agreement, when he attempted so to do, and bore upon his contention and testimony that he had no knowledge of the plaintiff's breach of his aforesaid warranty or of the defective condition of said plant prior to July 1, 1917, when or shortly before he made his attempted rescission; but, since we have hereinbefore held that the plaintiff committed no breach of warranty, and since the right of the defendant to rescind said agreement was properly denied by the trial court on other grounds, the error, if any, of the trial court in the admission of said testimony becomes immaterial, and hence furnishes no ground for a reversal of the case.

The judgment is affirmed.

We concur: MYERS, C. J.; WASTE, J.; SEAWELL, J.; LENNON, J.; LAWLOR, J. SHENK, J., deeming himself disqualified, did not participate herein.

197 Cal. 787

DE RECAT CORPORATION v. DUNN et al.
(S. F. 11743.)

(Supreme Court of California. Jan. 15, 1926.)

Trial ⚡6(3)—Proceeding to trial and judgment without notice, where defendant's attorney resigned, held without error.

Proceeding after several continuances to trial and judgment on day set without notice to defendant, whose attorneys had resigned, held not abuse of discretion; Code Civ. Proc. § 286, requiring notice "when an attorney dies or is removed or suspended or ceases to act as such," not being applicable.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. T. B. Warne, Judge.

Action by the De Recat Corporation against B. J. Dunn and others. From a judgment for

plaintiff and an order denying his motion to set aside judgment, defendant B. J. Dunn appeals. Judgment and order affirmed.

Edwin V. McKenzie and Frank J. Mahoney, both of San Francisco, for appellant.

Arnold C. Lackenbach, of San Francisco, for respondent.

RICHARDS, J. This appeal is from a judgment herein in favor of the plaintiff and against the defendant and appellant B. J. Dunn, and also from an order denying the said defendant's motion to set aside said judgment upon the ground hereinafter to be stated. The action was one for money had and received, and was commenced by the plaintiff on June 5, 1923, against all three of the defendants, doing business as copartners under the firm name and style of Dunn, Hurst & Martin, who were all duly served with process. The defendants Hurst and Martin defaulted, and their defaults were duly entered. The defendant Dunn answered on August 15, 1923. On December 12, 1923, the plaintiff moved the trial court to set the cause for trial, and an order was accordingly made setting the cause for trial upon March 1, 1924, of the making of which order notice was duly given to the attorneys who were at that time the attorneys of record for said defendant Dunn. On the date so set for the trial of said cause it was continued for trial to the 26th day of August, 1924. On or about August 21, 1924, Mr. V. G. Skinner, one of the attorneys of record representing the defendant Dunn, called up Mr. Lackenbach, the attorney of record for the plaintiff, and requested a postponement of the trial, giving as the reason therefor the asserted fact that he and his associate, Mr. Lemberger, had been representing Mr. Dunn in a number of actions, and that Dunn had failed to pay their fee for such services rendered, and that he did not wish to try said case unless Dunn paid his said attorneys their fee. The request of Mr. Skinner was acceded to, and accordingly Mr. Lackenbach appeared in court on the day set for the trial and suggested a continuance of the cause, which request was granted and the cause continued to be reset. On or about September 15, 1924, counsel for plaintiff appeared in court with a request that the cause be reset for trial upon September 25, 1924, which request the court granted. On September 19, 1924, notice of the setting of the cause for trial upon September 25, 1924, at the hour of 2 p. m., was duly served upon said A. F. Lemberger and V. G. Skinner as attorneys of record for the defendant Dunn. On the evening of September 24, 1924, the said attorneys of record for defendant Dunn served a notice upon Mr. Lackenbach, the plaintiff's attorney of record, that they had resigned as attorneys of record for said defendant Dunn, and on the following day filed

a copy of said notice and of their said resignation with the clerk of said court.

Upon September 25, 1924, at the time set for the trial of said cause, plaintiff's counsel, Mr. Lackenbach, appeared, and, upon the case being called for trial, stated substantially the foregoing facts to the court, and further stated that the plaintiff, who was an indispensable witness in the case, was compelled to leave California for the east, where he was permanently to reside, and that he therefore insisted upon going on with the trial of the cause. Neither the defendant Dunn nor his counsel was present, and the fact of the attempted resignation of his said counsel from the case was brought to the court's attention. The court proceeded with the trial of the cause, with the result that a judgment was presently rendered and entered in the plaintiff's favor. Thereafter, and on October 3, 1924, the defendant Dunn appeared in court by his then counsel, Frank J. Mahoney, and moved the court to set aside and recall its aforesaid judgment, offering in support of said motion the judgment roll and papers in the case, including the said notice of resignation of said defendant's former attorneys of record theretofore filed. Upon this showing Mr. Mahoney stated the contention of himself and his client to be that the court was without jurisdiction to render said judgment at the time the same was rendered and entered by virtue of the provisions of section 286 of the Code of Civil Procedure. It was thereupon conceded by plaintiff's counsel that no such notice as is provided for in said section of the Code had been given.

In response to said motion plaintiff's counsel presented his own affidavit setting forth substantially the facts with relation to the several settings of said cause for trial and the continuances thereof for various reasons as hereinabove set forth, and also stating the facts relating to his client's compulsory departure from the state of California, which had induced his insistence upon the trial of said cause upon the date last set therefor. It further appeared upon said hearing that the defendant Dunn had been notified on the day before the trial of said cause of the resignation of his former counsel, who had at the time informed him that the case could not go to trial upon the following day because of the operation and effect of section 286 of the Code of Civil Procedure. The matter having been submitted to the court, the motion to set aside said judgment was denied, and thereupon this appeal from said judgment and from said order denying the said defendant's motion to set aside the same was taken.

The sole question presented upon this appeal is as to the operation and effect of section 286 of the Code of Civil Procedure upon the situation as presented by the foregoing admitted facts. Section 286 of the Code of Civil Procedure reads as follows:

"When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action, for whom he was acting as attorney, must before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney, or to appear in person."

The phrase in said section which is brought immediately under review is that reading "ceases to act as such," the contention of the appellant being that the interpretation to be put upon said phrase is "ceases to act as the attorney for the particular party to an action for whom he was formerly acting as attorney," while on the other hand, the respondent insists that this phrase in said section means "ceases to act as an attorney"; or, in other words, "ceases to be an attorney." In the absence of direct authority in the decisions of the courts of this state, we are thus put to a study of the origin and history of this section of our Code of Civil Procedure, for what light these may shed upon the interpretation to be placed upon this particular clause therein. It would seem to be fairly beyond dispute that section 286 of the California Code of Civil Procedure came directly into our jurisprudence from a like section of the New York Code of Civil Procedure existing therein in practically identical form at the time of the original adoption of our California Codes. The section of the New York Code of Civil Procedure then in existence was codified therein from 2 Revised Statutes of New York, p. 287 (Edition of 1829), and to have been ingrafted therein from an act of the New York Legislature adopted in 1787 (chapter 35, § 4), which reads as follows:

"When any attorney shall die, or cease to act, or be put out of the roll of attorneys, the persons for whom he was attorney shall be warned to appoint another attorney in his place so that in the meantime no damage or prejudice may come to the party." 1 Laws of New York (1 Greenleaf 1778 to 1787).

The foregoing provisions of the New York statutes and Codes do not seem to have been made the subject of any direct interpretation by the courts of that state bearing upon the meaning to be given to the phrase, "ceases to act," therein, but apparently this particular provision in the laws of New York has been carried into the statutes of other and later formed commonwealths, since it appears in practically identical language therein. The state of Michigan adopted a similar provision prior to 1872, as appears from the Compiled Laws of Michigan of that year (Comp. L., § 5630), the language of which is substantially identical with that of our own Code section. In the case of *Coon v. Plymouth Plank Road Co.*, 32 Mich. 248, the said provision came before the Supreme Court of that state for interpretation in a case not distinguishable as to its facts from the case at bar, and in which

Mr. Justice Cooley, after quoting the provision of the Michigan statute, said:

"We do not understand this to apply to a case where a practicing attorney for any reason declines to go on with a particular case while still continuing in practice. It might be made the means of serious mischief if it could have such a construction. The plain meaning of the statute is to provide for cases in which the attorney or solicitor, by reason of death, disability, or other cause, has ceased to practice in the court. His refusal to proceed in a particular case is not ceasing to 'act as such' attorney or solicitor; it does not even disconnect him with the case; for that can only be accomplished by consent of the parties, or of the court, or by regular proceedings for the substitution of another."

The concluding clause in the foregoing excerpt from the opinion of Mr. Justice Cooley is in harmony with the doctrine early enunciated by the Supreme Court of the United States in the case of *United States v. Curry et al.*, 47 U. S. (6 How.) 106, 12 L. Ed. 363, wherein it was held that "no attorney or solicitor can withdraw his name, after he has once entered it on the record, without the leave of the court." This rule was reaffirmed by the same high tribunal in the case of *Rio Grande I. & Col. Co. v. Gildersleeve*, 174 U. S. 603, 19 S. Ct. 761, 43 L. Ed. 1103, from the decision in which case it appears that a similar rule had been given effect in the states of Massachusetts, Illinois, and Indiana. See *Fay v. Hayden*, 7 Gray (Mass.) 41; *Dana v. Adams*, 13 Ill. 691; *Sloan v. Wittbank*, 12 Ind. 444. These cases and others of later decision are collated and cited in support of the text to the same effect in 1 Thornton on Attorneys at Law, pp. 242-256. The case of *Branch v. Walker*, 92 N. C. 87, cited by the above author, is an instructive case touching the power of an attorney of record to withdraw at will from the case. The court, in dealing with that subject, says:

"It is a mistaken notion that an attorney can become counsel of record in an action, and cease to be counsel at his own will, pleasure and convenience. He is, in an important sense, an officer of the court, and under its direction and control in respect to matters affecting the court and the administration of public justice, and as soon as he is duly retained in an action or proceeding, he has, by virtue of his office, authority to manage and control the conduct of the action on the part of his client during its progress, subject to the supervision of the court, and he is the proper person on whom notice should be served in respect to matters pertaining to the conduct of and proceedings in it after it is brought; and his authority and responsibility continue until it is completely determined in the court wherein it is pending."

Section 286 of the Code of Civil Procedure was adopted in this state in the year 1872, and has since remained in substantially its original form, and while, as we have seen, this court has not heretofore been called upon

to give its judicial interpretation to the particular clause therein here under review, certain other states, which have also ingrafted a similar provision upon their Codes or statutes have done so. In the case of *McInnes v. Sutton*, 35 Wash. 384, 77 P. 736, the Supreme Court of that state, in a situation substantially identical with that presented upon this appeal, held, upon the authority of *Coon v. Plymouth Plank Road Co.*, supra, that the phrase in the Code provision of that state, "ceases to act as such," did not relate to the voluntary refusal of an attorney for a party to proceed with a case when it is regularly called for trial and the adversary is prepared with his witnesses to proceed. "If such were the meaning of the statute," says the court, "it could, by collusion between attorney and client, easily be used as a means of effecting at least a 20-day delay, which, in some instances, might amount to a practical denial of justice. The relation of attorney and client, when once established in a case, is not to be so easily severed, when the rights of others depend thereon. The interdependent relation is such that what is the client's duty is often the attorney's duty, and the client cannot escape his obligation to the court and to his adversary to proceed with a trial, for the mere reason that his duly appointed confidential agent—his attorney—may have declined to act." The Supreme Court of Washington in said case referred approvingly to the discussions of the Supreme Court of the United States above cited, with reference to the power of an attorney of record in a case to delay the trial thereof by an attempted withdrawal from the case, and held that the trial in that case proceeded regularly, notwithstanding such attempted withdrawal of counsel for the defendant, and approved the action of the trial court in refusing to set aside a judgment entered therein. In the case of *Van Cott v. Wall*, 53 Utah, 282, 178 P. 42, the same precise question was presented to the Supreme Court of that state in the interpretation of a section of the Compiled Laws thereof identical in form with our own Code section (Compiled Laws 1907, § 119), and wherein the said court adopted the interpretation placed upon the phrase, "ceases to act as such," approved by the Supreme Court of Washington in the case above cited, and further quoted with approval the language of the Supreme Court of Michigan in the case of *Coon v. Plymouth Plank Road Co.*, supra. The court further called attention to a decision of this court in the *Matter of Bollinger's Estate*, 145 Cal. 751, 79 P. 427, wherein it was held that the trial court did not err or abuse its discretion in refusing a further continuance of a contest in a probate matter after counsel for the contestant had attempted to withdraw from the case, and after their client, having had opportunity to do so, had failed to employ other counsel. In that case this court said:

"If a contest of a will is initiated in good faith, and the contestant shows due diligence, every opportunity should be given for a full investigation of the issues made by the contestant, but if a contest must be continued for an indefinite time every time an attorney withdraws from the case, there would be no end to the matter."

Counsel for the appellant seems to rely strongly upon the decision of the District Court of Appeal in the case of *McMunn v. Lehrke*, 29 Cal. App. 298, 155 P. 473, wherein that court appears to have adopted the interpretation of section 286, Code of Civil Procedure, for which the appellant herein is contending. In that case, however, the record discloses that the question of the interpretation to be given to the phrase, "ceases to act as such," was not presented in the light of the origin or history of said section of our Code nor with any citation of authority, but was merely assumed to bear the meaning assigned to it without mature discussion or consideration. We cannot approve the language of said court in the interpretation placed by it upon this section of the Code, or of the particular phrase therein here under review. While it is true, as was said by this court in the *Matter of Bollinger's Estate*, *supra*, that litigants should be given a fair opportunity to present the merits of their case, we are satisfied that no sufficient or compelling ground was presented by the attempted withdrawal of the appellant's attorneys of record from the case upon the eve of the trial thereof, and that the trial court did not abuse its discretion in proceeding with the trial thereof and in entering judgment therein in plaintiff's favor under the circumstances of this case.

The judgment and order are affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LENNON, J.; CURTIS, J.

198 Cal. 1

IN RE MORRISON'S ESTATE.

STATE v. SCOTT. (S. F. 11081.)

(Supreme Court of California. Jan. 15, 1926.)

1. Wills §322—Order of proof is discretionary.

In trial of will contest, order of proof is within discretion of court.

2. Trial §76—Objection to evidence of declarations of testator regarding his will held too late.

In contest of will, objection to testimony of declarations of deceased that paper exhibited to witnesses was his last will held too late, where not made until after witnesses had completed testimony.

3. Wills §297(1)—Declarations of testator, exhibiting paper, that it was his last will admissible as *res gestæ*.

In contest of will, testimony of declarations of deceased, at time he exhibited paper claimed to be his will, that it was his last will held admissible as part of *res gestæ*.

4. Wills §297(1)—Declarations of deceased that he had made will admissible on issue of forgery of claimed will.

Where olographic will was contested as forgery, and testimony of handwriting experts was in sharp conflict, declarations of deceased shortly before his death that he had made a will and left his property to proponent as his sole beneficiary held properly admitted as tending to show existence of document such as the one produced.

5. Appeal and error §1046(5) — Occasional impatience of judge with handwriting experts held not prejudicial.

In contest of olographic will, where outflow of opinion of handwriting experts was not confined to limits prescribed by Code Civ. Proc. § 1944, occasional impatience manifested by trial judge with prolixity of examination of such witnesses held justifiable in most cases, and not prejudicial.

In Bank.

Appeal from Superior Court, Alameda County; Stanley Murray, Judge.

Application by Marion Scott, also known as Maude Scott, for the probate of the will of Leon Morrison, also known as L. Morrison, deceased. From a decree in favor of proponent, the State and others, contesting the will, severally appeal on a single record. Affirmed.

U. S. Webb, Atty. Gen., Frank L. Guereña and L. B. Browne, both of San Francisco, and E. E. Gehring, L. Gonsalves, and Glickman & Glickman, all of Oakland, for appellant.

H. L. Hagan and Milton T. U'Ren, both of San Francisco, for respondent.

RICHARDS, J. There are in this proceeding three appeals from a judgment of the superior court in and for the county of Alameda admitting to probate an instrument alleged by the respondent to be the last will and testament of Leon Morrison, deceased, and by the terms of which the said respondent, Marion Scott, was made the sole devisee and legatee of said decedent. There were three separate contestants against the admission of said will to probate and three separate appeals, but by stipulation between the parties these several contests and appeals were presented upon a single record and upon briefs filed by the contestant, state of California.

Leon Morrison died in the county of Alameda, state of California, of which county he was a resident, on June 20, 1921, leaving

a considerable estate therein, consisting principally of two clothing stores in the city of Oakland, which, since the inception of proceedings for the administration of his estate, have been converted into cash. The record herein shows that shortly after the death of said decedent the respondent herein commenced a proceeding in said court for the probate of a lost or destroyed will of said decedent under the provisions of sections 1338, 1339 of the Code of Civil Procedure, but later dismissed said proceeding, whereupon the public administrator was appointed the administrator of the estate of said decedent. Several months thereafter the respondent produced and filed for probate the instrument alleged by her to be the decedent's last will and testament, the validity of which has been put in issue by the contestants herein. The said instrument is in the form of an olographic will, and reads as follows:

"Oakland, Cal. Janry 12, 1921.

"At my death I give all my property to my dear friend Marion Scott. L. Morrison."

[1-3] The three contestants herein are, respectively, Mordko Grulin Grysolet, who alleges himself to be a brother and heir at law of the deceased; L. Soshokoff, who alleges himself to be a nephew and heir at law of said deceased; and state of California, which alleges that the decedent left no heirs. The opposition of each of the two contestants who aver themselves to be heirs of said deceased is based upon the following grounds, viz.: That said pretended will is void because not made or executed by the decedent, nor written, dated, or signed in his handwriting; that at the time of the alleged signing of said instrument said Leon Morrison was not of sound and disposing mind; that, if said pretended will was executed by said decedent, it was while he was under undue influence and was also laboring under an insane delusion. The opposition of the state of California to the admission of said instrument to probate is based upon its denial that the decedent left any will, and upon its further denial that said alleged will is the last or any will of said decedent. To each of these several contests the proponent of said will filed her answer, denying the averments thereof. The issues as thus framed came on for trial in said court and before Hon. Stanley Murray sitting as judge pro tem. therein, whereupon the proponent of said document offered the same in evidence, and in support of said offer was sworn as a witness, and testified that the said instrument was in the handwriting of the decedent. She further testified that the first time she had seen said document was upon a date several months after the death of said decedent, when she had received the same through the mail and in an envelope addressed to herself. After being submitted to a lengthy

cross-examination by the contestants as to the circumstances under which she had received said document and as to her sources of knowledge as to the decedent's handwriting, the obvious purpose of which was to break down the proponent's story as to the circumstances under which the document in question had been received by her, and also to destroy the value of her testimony that the instrument was in the handwriting of the decedent, the proponent produced two further witnesses whose names were John W. McKenzie and Barney A. Hoffman. The first of these testified that during the months of May and June, 1921, he was a nurse at the Fabiola Hospital in Oakland during the period when Leon Morrison was a patient in said hospital, and that he met and ministered to Mr. Morrison frequently in a professional way. The witness was then shown the document purporting to be the will of Mr. Morrison, and was asked whether he had ever seen it before, to which he testified that he had, and that it was the paper which Mr. Morrison had shown him at the Fabiola Hospital on the evening of the 16th of June, 1921, while the former was a patient there. He further testified that Hoffman, who was also a nurse, was present when he was shown said paper; and he identified said document as being the same paper which was shown to himself and Hoffman by Morrison himself at said time. He further recited in detail the circumstances under which the paper had been exhibited to him by Morrison, stating that on the evening of said day, while in the toilet of said hospital, to which said Morrison had been assisted by himself and Hoffman, Morrison had taken from his pocket said paper, and handed it to him, saying, "Mac, do you want to take a look at this? This is my last will and testament." The witness stated that he looked at the paper, and examined it curiously, because, as he said, "It seemed odd for anybody to hand me anything of that kind." He then passed it to Hoffman, who also examined it, and handed it back to the witness, who in turn handed it back to Mr. Morrison, who folded it up and put it in his purse. Having so testified fully to the circumstances under which the witness had been shown said paper and to the statement made by Mr. Morrison regarding the same while in the act of handing said paper to him for his inspection, and having done so without objection of any kind on the part of the contestants, or any of them, the witness McKenzie was subjected to an exhaustive cross-examination by counsel for each of said contestants, during which every incident in connection with said episode was made the subject of scrutiny. The witness was then excused, whereupon the other witness, Hoffman, was called by the proponent and similarly examined, without objection, and testified to the same circumstances and the same language used by the decedent, and he also was exhaustively cross-examined by

counsel for the contestants. It was not until the examination and cross-examination of the witness Hoffman had been concluded and the proponent had closed the presentation of her prima facie case that counsel for the contestants undertook to voice any objection whatever to the testimony given by McKenzie and Hoffman, or any portion thereof, and the objection thus tardily urged was not to any particular portion of the evidence given by these two witnesses, but was to the whole thereof upon the ground that the offer and admission of such evidence was not in accordance with the orderly procedure to be followed in the trial of contests of wills. The trial court overruled said objection, and apparently did so properly upon the authority of *Estate of Latour*, 140 Cal. 414-437, 73 P. 1070, 74 P. 441, wherein it was held that the order of proof in such cases was a matter within the discretion of the trial court. The cause then proceeded; the contestants introducing a number of witnesses for the purpose apparently of impeaching the credibility of the proponent and her two witnesses. After evidence of this sort had been presented, occupying over 100 pages of the printed record, counsel for the contestants again undertook to question the admissibility of the testimony offered by the witnesses McKenzie and Hoffman, and then for the first time presented the objection that, while the testimony of these two witnesses was competent as to the identification of the offered paper, the accompanying declaration of the testator was not admissible as to whether or not it was his will. The court overruled said objection, whereupon contestants moved the court to limit the testimony of these two witnesses solely to the matter of identification. The court, however, permitted the testimony of these witnesses to stand "for what it is worth," and the point that the trial court was in error in these rulings is the first point of error urged upon this appeal. It is our opinion, as above indicated, that the contestants' objection to the evidence of these two witnesses came too late, and also that the tardy request of the contestants that the effect of the said evidence should be limited solely to the matter of identification came also too late; but, were it otherwise, we are further of the opinion that the testimony of these two witnesses, both as to the identity of the document offered by the proponent as an authentic document and as to the decedent's statement made at the moment of its production by him for the inspection of these witnesses, to the effect that it was his will, was legally admissible, and was not subject to the objection which the contestants now strenuously urge against its admissibility.

The circumstances of this case are peculiar. The offered will of the decedent was an olographic will, the existence of which the proponent had reason to surmise, but the whereabouts of which was unknown to her

until the receipt of it through the mails several months after the death of the testator. A direct attack was made by all of the contestants upon the authenticity of the document; and, while the proponent might possibly have contented herself with the proof offered by herself as a witness to the decedent's handwriting, there would seem to be some justification for her attempt to show, as a part of her prima facie case, that the document offered had been seen in the possession of the decedent a few days before his death, and that with direct reference to it the testator had designated this particular instrument as "his last will." The three cases upon which the appellants chiefly rely in support of their objection to the inadmissibility of the said declaration of the testator do not, in our opinion, apply to such a situation as is here presented, for the reason that the declarations of the testator made at the moment of submitting to the scrutiny of these two witnesses the identical document here produced as the last will of such decedent were part of the *res gestæ*, or, in other words, of the immediate transaction to which said witnesses were testifying, viz. their identification of the offered instrument as an existing document at the time of its presentation to them for inspection by the testator. In *Estate of Gregory*, 133 Cal. 131, 65 P. 315, no such evidence was offered and no such question presented. The same may be said in *Estate of Thomas*, 155 Cal. 488, 101 P. 798, both of which cases we shall submit to a closer scrutiny at a later point in this opinion. In the case of *Throckmorton v. Holt*, 180 U. S. 552-573, 21 S. Ct. 474, 45 L. Ed. 663, it was conceded that evidence touching the identity of a certain document would be admissible when part of the *res gestæ*. As illustrating this exception to what the court in that case states to be the otherwise general rule the court cited the case of *Burge v. Hamilton et al.*, 72 Ga. 568. This was a case where a testator, during an interview with his legal advisor attending the making of a codicil to his will, and with the original will in his hand, identified the same and the several pages thereof as and declared the same to be the original will; and the court upheld the admissibility of the testator's declarations to that effect as going directly to the identification of the particular document as the will of the testator and as part of the *res gestæ*. In so doing the court, in the case of *Burge v. Hamilton*, supra, exhaustively reviewed the authorities, in the course of which it cited with approval the case of *Gould v. Lakes*, 6 Law Reports (P. D.) p. 1, wherein it was held that the statements of a testator with reference to the constituent parts of an instrument purporting to be his will were admissible, citing *Sugden v. Leonard*, 1 L. R. (P. D.) 154. The foregoing cases in principle have direct application to the question presented by the case at bar. For both of the

foregoing reasons we are of the opinion that the testimony of the witnesses McKenzie and Hoffman as a whole was properly before the court, and hence that the court committed no error in its refusal to grant the appellants' belated motion to strike out such testimony or to limit the application thereof.

[4] A more serious question is presented with respect to the rulings of the trial court in the admission of the testimony of the witnesses Collins, Caufield, and Sterne under the following circumstances, and at a later stage of the trial: After the contestants, in support of their assertion that said document offered as the decedent's last will was a forgery, had presented much testimony on the part of expert witnesses as to the handwriting of the deceased for the purpose of showing that said instrument was not in his handwriting, the proponent presented a witness named Charles F. Collins, who was a fellow inmate with Morrison at the Fabiola Hospital, and who was asked to relate a conversation between himself and Morrison wherein mention of a will was made by Morrison. The witness, over objections by the contestants, testified that Morrison in that conversation said that he had made a will and left his entire estate to Miss Scott. The objection urged by one of the counsel for the contestants to the admissibility of this evidence was in the following form:

"I object on behalf of the heirs on the ground that this is incompetent, irrelevant, immaterial and hearsay as declarations inadmissible to show the contents of the will,"

—to which the court responded:

"It doesn't appear to me that way. It may be a circumstance to show that there was a will; objection overruled."

At the conclusion of the testimony of the witness, counsel for contestants moved to strike from the record all of the testimony of Collins upon the same ground, and also upon the ground that it was "inadmissible to prove the existence of any will at any time or at that time." The court denied said motion. Similar evidence was also offered by two other witnesses, Martin Caufield and Albert Sterne, to which similar objections and similar rulings were made. The contestants urge upon this appeal that the testimony of these three witnesses was inadmissible over their said objections, and cite in support of their said contention the same line of authorities which were cited by them in support of their effort to have excluded or limited the testimony of the witnesses McKenzie and Hoffman. In most of these cases, however, the question of the admissibility of the declarations of a decedent as to whether he had made or had not made a will arose in proceedings where the issue of fraud or menace or undue influence was involved, as in the case of *In re Calkins*, 112 Cal. 296, 44 P. 577,

and also *Estate of Gregory*, 133 Cal. 131, 65 P. 315, wherein the contestants' specification was to the effect that the proponents of the decedent's later will had procured her signature to the same while she was in an intoxicated condition. The court in the *Gregory* Case elaborated upon and followed the rule laid down in the *Calkins* Case to the effect that the declarations of a decedent were inadmissible upon the issue of undue influence; and, after doing so, undertook in a sentence to give application of the same doctrine to cases wherein the issue of forgery was involved. In *Estate of Arnold*, 147 Cal. 583-594, 82 P. 252, wherein the only issues involved were those of fraud and undue influence, this court held, upon the authority of *In re Calkins* and *Estate of Gregory*, supra, that the declarations of the testator when not part of the *res gestæ* were not admissible as narrations of the exercise or effect of undue influence. In *Estate of Thomas*, 155 Cal. 488-494, 101 P. 798, wherein the sole issue involved in the contest of the decedent's offered will was that it was a forgery, this court upheld the action of the trial court in permitting the admission of declarations of the alleged testator as to the existence within his knowledge of certain facts which were, if known by him, contrary to the recitals contained in the disputed will to the effect that such facts were not known to him at the time of the alleged making of the contested will.

This court, in passing upon this question, cited *Estate of Gregory* and *Estate of Arnold*, supra, as to the correctness of the rule as applicable to that class of cases, and also cited *Throckmorton v. Holt*, supra. In so doing, however, the court stated that there was a strong counter current of authority "by which it is held that where the issue is forgery, declarations of the testator, even as to his testamentary intent, though forming no part of the *res gestæ*, will be received as tending to prove the issue." In *Estate of Snowball*, 157 Cal. 301, 107 P. 598, wherein the sole issue was that of undue influence, the court reaffirmed the rule approved in *Estate of Arnold*, supra, but held that, even in such a case, the declarations of the decedent showing her state of mind and mental attitude toward the various objects of her bounty were admissible, and might be legitimately considered by the jury, if limited in the instructions of the court to that purpose. In *Estate of Ricks*, 160 Cal. 467-485, 117 P. 539, the court approved the rule laid down in *Estate of Snowball*, supra. In *Estate of Gleason*, 164 Cal. 756-762, 130 P. 872, wherein also the sole issue was that of undue influence, the court held that the declarations of a testator as to his state of mind at the time of the execution of his will when not part of the *res gestæ* were inadmissible, citing a number of the cases above referred to and among them *Estate of Gregory*. In *Estate*

of Carson, 184 Cal. 437, 194 P. 5, 17 A. L. R. 239, involving the issue of undue influence, the subject was somewhat remotely considered and the doctrine in the Arnold Case generally approved. In *Estate of Sweetman*, 185 Cal. 27, 195 P. 918, the issues involved arose out of an attempt on the part of the proponents to probate a lost or destroyed will; the immediate question presented being as to whether such will was in existence at the date of the death of the decedent. Evidence was offered and admitted as to the declaration of the decedent made three days before her death that a certain will theretofore executed by her was in existence. The admissibility of this evidence was conceded, but the court divided as to the effect of its admission as overcoming the presumption which arises when a will cannot be found that it has been destroyed *animo revocandi*. This case is here cited, not for the purpose of showing that the court therein passed upon the question of the admissibility of such evidence, but of showing the propriety of recourse to this class of evidence when the direct issue is as to whether a certain document alleged to be the decedent's will was in existence prior to his death or was a later creation. In the light of the foregoing review of our previous decisions it cannot be said that the immediate question herein presented has been definitely decided. This much, however, may be said, as was said in the *Estate of Thomas*, *supra*, that—

"There is a strong counter current of authority by which it is held that where the issue is forgery, declarations of the testator, even as to his testamentary intent, though forming no part of the *res gestæ*, will be received as tending to prove the issue."

The question at the last analysis largely depends upon the circumstances of the particular case. It must be conceded that the circumstances of the instant case are peculiar, since, while the contestants herein, or some of them, at least, alleged as grounds of contest that the will in question was the product of undue influence, and also of an insane delusion on the part of the testator, these grounds of contest were upon the trial wholly abandoned by the contestants, and the only evidence offered by them, or any of them, aside from their attempt to discredit the proponent's witnesses, was confined to the offer of expert testimony upon the subject of the decedent's handwriting. Upon this subject the testimony of these opinion witnesses, pro and con, was sharply in conflict. In this state of the case, and after all of such expert testimony had been presented, the trial court permitted the introduction of the testimony of the three above-named witnesses for the proponent to the effect that the testator had declared to each of them a short while before he died that he had made a will and left his property to the proponent

herein. An instructive and persuasive case bearing upon an almost identical situation is that of *Hoppe v. Byers*, 60 Md. 381. In that case, as in this, the sole question was whether the proffered document offered for probate was in the handwriting of the decedent or was a forgery, and the only direct testimony upon that issue was the testimony of handwriting experts. In such a state of the case the contestants offered in evidence the declaration of the decedent made to his wife a few days before his death "that he had made no disposition of his property, and that the law made for him the only will he wished; that she would get a good part of his property and the balance would go to his grandchildren." In upholding the admission in evidence of this declaration on the part of the alleged testator, the Supreme Court of Maryland said:

"There was no witness who could prove that he saw the deceased write or sign it. Proof as to his handwriting, by witnesses acquainted with it, was the only direct testimony by which the genuineness of the instrument could be established or assailed. Such testimony was offered, and we infer from the record, that a large number of witnesses, and perhaps an equal number on each side, testified upon this subject, those for the caveators swearing that to the best of their knowledge and belief the writing was not, and those for the caveatees that it was, the handwriting of the decedent. The jury had also before them on the same paper the admittedly genuine part of the letter and were at liberty to compare this with the disputed writing. But in this state of case was no other evidence admissible? Were the jury bound to decide the issue and make up their verdict upon such testimony alone, and do the rules of evidence inexorably exclude from their consideration every other fact or circumstance that would tend to throw light upon the subject, so as to render it probable or improbable that such a paper was ever written by the deceased, or in corroboration of the direct testimony as to handwriting given on either side? We think not. It must be admitted that testimony as to handwriting, in any case of alleged forgery, though the best the nature of the case admits of, is usually the most unsatisfactory species of evidence courts of justice have to deal with. It is matter of common experience in such cases that witnesses of equal honesty and character, and with equal means of knowledge, are found to testify both for and against the genuineness of the disputed signature. The difficulty and doubt are increased in a case like the present, where the instrument alleged to be forged is set up as a will which takes effect only after death, and where a forgery, if committed, would surely, if ever, come to the knowledge of the party whose testament it purports or is said to be. It seems to us that in such a case every collateral fact and circumstance which is not clearly immaterial and irrelevant ought to be admitted, to aid the jury in reaching the truth, which after all is the object of every jury trial."

The foregoing decision and the reasons which are given to support it has been cited with approval by a number of other states in

decisions made since its rendition, and the doctrine therein declared, with notes embracing these decisions, has been embodied in the text of the following authors in the editions of their works on evidence issued or revised since the decision of the Maryland case: See 1 Greenleaf on Evidence (16th Ed.) pp. 57, 81, 261; 4 Chamberlayne on Evidence, § 2649; Chase's Stephens Digest of Law of Evidence (2d Ed.) p. 100; 1 Elliott on Evidence, § 533; 1 Wigmore on Evidence (2d Ed.) § 112, 3 Id. §§ 1735, 1736. In the author's note to Wigmore on Evidence, § 112, supra, the case of *Hoppe v. Byers*, supra, and the later decisions of other states adopting its doctrine are cited at length, and the case of *Throckmorton v. Holt*, supra, which indicates a different rule, is criticised as against the weight of authority and as "a lonesome decision." In the comparatively recent case of *State v. Ready*, 78 N. J. Law, 599, 75 A. 564, 28 L. R. A. (N. S.) 240, it was held in a case involving a prosecution for the forgery of a will that evidence was admissible of the declarations of a testator indicating an intent to execute a will of the tenor of that alleged to have been forged if made at a period not so remote from the date of the will as to render them immaterial, citing in support thereof 3 Wigmore on Evidence, supra, as stating the correct rule. From this résumé of the most recent authorities touching this subject, and the comment of the standard text-writers thereon, we are satisfied that, under the limitations stated in the foregoing excerpts from *Hoppe v. Byers*, supra, and under the circumstances of this particular case, the declarations of the testator that he had made a will and had named therein the proponent herein as his sole beneficiary were admissible in evidence as tending to show the existence of such a document prior to the death of the decedent.

[5] The remaining contentions of the appellants herein relate to a large number of alleged errors and irregularities on the part of the trial judge occurring during the trial of the cause. The trial of the cause was had before the court sitting without a jury. It occupied several weeks, and the record thereof and of the evidence taken therein is embraced in four bulky volumes containing more than 1,000 pages of typewritten testimony and numerous exhibits. The appellants herein have furnished us with no appendix to their briefs, and with but one opening brief wherein the irregularities complained of are recited and commented upon in a space of 50 pages largely taken up with comment and with only brief and disconnected excerpts from the testimony. With respect to many, if not most, of these alleged errors and irregularities it would be impossible to estimate their seriousness without recourse to a much more extended review of the record than the appellants have seen fit to assist us in making. We have, however, suffi-

ciently examined the record to conclude that the contentions of the appellants as to the rulings and conduct of the trial judge are not sufficiently well founded to justify a reversal of the case. A few examples will suffice. The appellants criticize the trial court for certain occasional interruptions and possibly strictures of the trial court made during the giving of the testimony of the handwriting expert witness Heinrich, called on behalf of the contestants. The testimony of the witness Heinrich in chief occupies 54 pages of the reporter's transcript, during the course of which the witness was given the utmost latitude in stating his conclusions as to the authenticity of the disputed will based upon comparisons with admittedly genuine specimens of the testator's handwriting, and also in giving his views as to the peculiarities and divergencies of different schools and systems and national traits in handwriting. The efforts of the trial judge to confine the witness' outflow of opinion to the limits prescribed by section 1944 of the Code of Civil Procedure were only occasional, and did not in our opinion, evince any disposition to unduly curb or discredit the testimony of this witness or discount the proper degree of weight to be accorded to it. The same thing may be said as to the testimony of the witness Eisenschimmel, whose testimony in chief, covering substantially the same ground as the former witness, occupied 45 pages of the reporter's transcript. The trial judge did, at the outset of this witness' testimony, make an effort to abbreviate his examination in chief with the suggestion that, after he had given his conclusions that the will was a forgery, his reasons therefor might well be left to be developed upon cross-examination, but this course was not followed, and the witness proceeded to testify with great fullness, going far beyond the Code limitation in theorizing upon handwriting in general. Some of these excursions the court very properly checked, but his course in so doing did not, in our opinion, indicate any disposition not to give an open-minded consideration to such of the witness' testimony as was relevant to the inquiry. With respect to the testimony of the witness McGovern, called for the proponent, the appellants complain at the action of the court in permitting the said witness to change his testimony as to a particular date when he first saw and examined the disputed will after consulting a letter which he drew from his pocket and handed to the court at its request for inspection, but which letter was not put in evidence. The episode occurred within the observation of contestants' counsel, who made no comment upon the same at the time, and made no request either for an inspection of the letter or for its presentation in evidence. Their later urged objection to the action of the trial judge in the premises was evidently an afterthought. It would unduly lengthen this

opinion to pursue the subject farther. Looking to the record as a whole, it would seem that the trial judge distributed his comments and suggestions freely and rather impartially among the several handwriting experts on both sides of the case, frequently asking questions and displaying a very decided and intelligent interest in the subject of handwriting, to which he stated he had given considerable study. That the trial judge did occasionally, as the case dragged its weary length toward its conclusion, manifest impatience with the prolongation and prolixity of the examination of the witnesses for both sides of the case is true; but this is not unusual during trials, and was in the main in this case justifiable. We do not find that his action throughout or in so doing either interfered with a full presentation of the evidence, or disclosed an attitude of partiality or prejudice in respect to the merits of the case. With the question as to whether the trial judge ruled rightly upon the motion of the contestants to disqualify him from participation in the hearing upon motion for new trial we are not concerned, since the appellants concede that it rested in his own power and discretion to decide the question of his own disqualification, and the correctness of his ruling in that regard is not contested upon these appeals.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LENNON, J.; CASHIN, Justice pro tem.

75 Cal. App. 404

PEOPLE v. SWOAPE et al. (Cr. 1243.)

(District Court of Appeal, Second District, Division 1, California. Dec. 2, 1925.)

1. Criminal law ⌘622(1)—Granting motion for separate trial within sound discretion of court.

The granting of motion for separate trial to defendants, jointly charged with commission of offense, rests in the sound discretion of the court, under Pen. Code, § 1098.

2. Criminal law ⌘622(2)—Court's refusal to grant defendant separate trial because of other defendant's statements and admissions not abuse of discretion.

In prosecution for grand larceny, *held*, court did not abuse discretion in refusing to grant one defendant's motion for separate trial because of other defendant's statements and admissions, where trial court repeatedly instructed

jury statements made by such defendant could not be considered as to other defendants.

3. Criminal law $\S$ 507 $\frac{1}{2}$, 1170(2)—Sustaining objection to question whether witness had been charged with or arrested for same offense erroneous, but not injurious.

It was error to not permit inquiry on cross-examination to show that state's witness had been charged or arrested for same offense as accused, thus showing him to be accomplice, requiring corroboration under Pen. Code, $\S$ 1111, the examination not being properly restricted, under Code Civ. Proc. $\S$ 2051, to convictions for felonies, but, in view of witness' admitted participation, such error was harmless.

4. Criminal law $\S$ 1166 $\frac{1}{2}$ (12)—Defendant not prejudiced by court's intimation counsel would be in contempt if further attempt made to elicit information which it erroneously believed inadmissible.

In larceny prosecution, where trial court erroneously excluded testimony on cross-examination, under mistaken theory that it was inadmissible, *held*, defendant was not prejudiced by trial court's intimation thereafter that counsel would be in contempt of court if he further attempted to elicit such information.

5. Larceny $\S$ 70(3)—Refusal of instruction on accessories held error, in view of evidence.

In larceny prosecution, where it was possible from evidence jury did not believe accused had aided and abetted in actual theft, but believed that after property was stolen accused obtained full knowledge of the facts and concealed same from magistrate, or protected persons charged with crime, *held*, court erred in refusing to give requested instruction to effect that if defendant's co-operation was only after crime had been committed he was entitled to acquittal.

6. Criminal law $\S$ 69—Accessory before the fact aiding and abetting commission of crime, punishable as principal.

An accessory before the fact, who aids and abets in the commission of a crime, is punishable as a principal, in view of Pen. Code, $\S$ 971.

7. Criminal law $\S$ 1167(1)—Defendant not injured by alleged variance of information charging theft of drill pipe and evidence showing theft of line pipe.

In prosecution for larceny, *held*, accused was not injured by reason of alleged variance between information charging theft of "drill" pipe, and evidence showing theft of "line" pipe, where it was disclosed pipe was originally drill pipe, but prior to time it was stolen it was converted to line pipe.

8. Criminal law $\S$ 829(13)—Refusal of requested instructions as to competency of codefendant's written statement not error, where covered by other instructions in substance.

In prosecution for larceny, refusal of court to give requested instruction that written statement of one codefendant was not competent evidence against other defendant *held* not erroneous, where the substance thereof was contained in given instructions.

9. Criminal law $\S$ 742(2), 780(1)—Court should instruct on law of accomplices when it is involved, and leave decision to jury.

When question of accomplices arises in trial of case, the generally accepted rule is for court to instruct jury touching law of accomplices, and to leave question whether or not witness was accomplice for decision of jury as matter of fact.

10. Criminal law $\S$ 742(2)—When facts are undisputed, it is for court to say whether witness was an accomplice.

Whenever the facts are in dispute as to whether witness did things which would make him an accomplice, jury's determination thereon will not be disturbed, but where the facts undisputed it becomes a question of law for court whether facts make witness an accomplice.

11. Criminal law $\S$ 780(2)—Witness' uncontradicted testimony required instruction that he was accomplice.

In prosecution for larceny, where testimony of witness to effect that he knew property was being stolen and assisted in loading it on truck was uncontradicted, refusing instruction that witness was an accomplice, and that instructions given on subject of accomplices should be applied, was error.

12. Criminal law $\S$ 780(3)—Refusal of instruction as to sufficiency of corroborative evidence, which defined "corroborative evidence," held to deprive defendant of substantial right.

In prosecution for larceny, refusal of defendant's requested instruction to effect that corroboration of accomplice is not sufficient if it merely shows commission of offense or circumstances thereof, and which defined "corroborative evidence" as additional evidence of a different character to the same point, *held* to deprive accused of substantial right.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Corroborating Evidence.]

13. Criminal law $\S$ 780(3)—Instruction on feigned accomplices, not based on evidence, erroneous, as permitting jury to engage in guesswork.

In prosecution for larceny, court's instructions as to feigned or pretended accomplices *held* erroneous, as permitting jury to engage in guesswork, as to whether accomplices in case were real or feigned, inasmuch as there was no evidence upon which such instructions should be given.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

William F. Patterson and Charles Slack were convicted of grand larceny, and they appeal. Reversed.

Wood & McArthur and Earl W. Wood, all of Long Beach, and Wallace Collins, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Hamish B. Eddie, of Los Angeles, for the People.

HOUSER, J. On an information which charged R. L. Swoape, William F. Patterson, and Charles Slack with the crime of grand larceny, the defendants Patterson and Slack were convicted. Each of them appeals from the judgment and from the order denying his motion for a new trial.

[1] At the outset it is urged by appellant Slack that he is entitled to a new trial, for the reason that by the order of the trial court he was denied a separate trial from his codefendants. By the information all the defendants were charged jointly with the commission of the offense, and in such circumstances, by statutory provision, the granting of a motion for a separate trial rests in the sound discretion of the court. Section 1098, Pen. Code; *People v. Anderson*, 59 Cal. App. 408, 431, 211 P. 254. The determinative question is whether the trial court abused the discretion vested in it. The principal reason urged by Slack for a separate trial was that it appeared from an examination of the transcript of the record of the preliminary examination that defendant Patterson had made statements or admissions involving the other defendants and particularly involving said defendant Slack, which said statements and admissions, if competent against the defendant making them, would not be admissible against the said defendant Slack, and consequently that such admissions and statements were prejudicial to said defendant Slack.

In the case of *Commonwealth v. Place*, 153 Pa. 314, 26 A. 620, where a motion for a separate trial was denied to one of the two defendants, it was held that:

"The fact that one defendant was attempting to escape by throwing the blame on the other, was no reason why the court should grant them separate trials."

In the case of *People v. Hotz*, 261 Ill. 239, 103 N. E. 1007, where a similar question was before the court, it is said (syllabus):

"The court, by expressly limiting testimony as to statements made by one of the defendants to such defendant alone, sufficiently protected the rights of his codefendants, and the denial of separate trials on the ground that such statements would be offered in evidence was not error."

[2] In view of the fact, as appears by the record herein, that the trial court repeatedly instructed the jury in substance that the statements made by the defendant Patterson could not be considered as to the other defendants, and that any confession would apply only to the defendant making it, while from a practical standpoint the efficacy of such admonition may be doubted, presumably from a legal standpoint the jury was able to and did disregard the confession made by the defendant Patterson so far as it contained any implicative statements regarding the defendant Slack. It must therefore be held that

the trial court did not abuse its discretion in denying a separate trial to defendant Slack.

[3] One of the witnesses for the prosecution testified to his participation in the commission of the offense of which the defendants were charged. On cross-examination, among other questions, he was asked:

"Q. You have been charged by an information with this same crime, have you not? Q. Well, have you been arrested for this same offense?"

Counsel for defendant Slack explained that the purpose of the questions was to show that the witness was an accomplice; but an objection interposed by the people as to each of such questions was sustained by the court on the theory that, according to the provisions of section 2051 of the Code of Civil Procedure, the only permissible question to be asked the witness in connection with the matter was whether he had ever been convicted of a felony. If it be assumed that the witness had never been convicted of a felony, the credibility of the witness would be still open to investigation. It would seem but reasonable that, for the purpose of attacking the credibility of the witness by showing that he was an accomplice, or that he had been charged with the commission of an identical offense for which the defendants in the action were on trial, and that the witness was testifying with the hope of obtaining immunity, the defendants should have been permitted to show the facts. In such circumstances the provisions of section 2051 of the Code of Civil Procedure, with reference to a conviction of a felony, would not be exclusive. As is stated in 40 Cyc. p. 2683, where authorities are cited:

"As indicating interest or bias, it is proper to show that a witness for the prosecution or the defense in a criminal case has himself been officially accused of or indicted for the crime for which defendant is on trial, particularly where the witness testifies for the prosecution under a promise of or in the expectation of leniency or immunity."

In *State v. Rosa*, 71 N. J. Law, 316, 58 A. 1010, it is said:

"* * * The fact that a witness knows himself to be officially accused of the crime which his evidence tends to fasten upon another person cannot be overlooked in considering whether he is free from every influence that might lead to falsehood."

In *State v. Burpee*, 65 Vt. 1, 25 A. 964, 19 L. R. A. 145, 36 Am. St. Rep. 775, appears the following:

"If he was under suspicion of having committed the identical crime in question, and had been arrested for it, he was testifying as it were with a rope about his neck, and might naturally desire and seek to screen himself in the account he gave as to how the cattle came into his possession."

In the case of *People v. Demera*, 64 Cal. App. 121, 220 P. 673, where it appeared that

the witness was the originator of the crime and had been jointly charged therewith with the defendant, but which witness before taking the witness stand had had the action dismissed as to him, the court said:

"While he was upon the stand the counsel for the defense endeavored to bring these facts before the jury in order to attack his credibility as a witness which, of course, they had a right to do."

See, also, *People v. Robles*, 34 Cal. 591, 594.

The testimony given by the witness here in question was of a most damaging character to the case of the defendants. The credibility of the witness, so far as the defendants were concerned, was of vital importance. If the witness was an accomplice of the defendants, it was necessary before a conviction of the defendants could be had thereon that the evidence of the accomplice be corroborated by such other evidence as tended to connect the defendants with the commission of the offense. Section 1111, Pen. Code. The defendants were therefore entitled to show by this witness just what was his position with reference to the situation then before the court. That right having been denied the defendants, it follows that in that regard the defendants were injured by the action of the court were it not for the further fact that within the testimony of the same witness, his complicity appears in that it was shown that he did take part in the commission of the crime. The error of the court therefore became immaterial, as did another alleged error of the court in sustaining an objection to the following question asked the witness by counsel for defendants: "Well; you did help steal this pipe, didn't you?"

[4] In connection with the asking of such questions, misconduct of the court is charged, in that the judge strongly intimated to counsel for defendants that if any further attempt were made to elicit the desired information from the witness counsel would be in contempt of court and be ordered to suffer accordingly. But from the judge's viewpoint, believing, as he apparently did, that the questions were improper, the course pursued by him was entirely regular and fully justified. No undue harshness or arbitrariness was indulged in by the court, nor was any personal reflection cast upon either of the defendants. In such circumstances we are unable to agree with appellants that the jury was prejudicially affected against defendants by reason of any alleged misconduct on the part of the court.

[5, 6] Defendant Slack requested the court to give to the jury the following instruction, which was by the court refused:

"The court instructs the jury that an accessory, as defined in the Penal Code of this state, is a person, who after full knowledge that a felony has been committed, conceals it from the magistrate, or harbors and protects the

person charged with it or convicted thereof, and if you believe that the defendant Charles Slack is such an accessory and not a principal in the commission of the crime charged, you should find the defendant Charles Slack not guilty."

It is suggested that, because defendant Slack claimed and attempted to prove that he was only an accessory after the fact, he was entitled to have the quoted instruction given to the jury. Had he been an accessory before the fact or aided and abetted in the commission of the crime, he would have been punishable as a principal. Section 971, Pen. Code. His requested instruction proposed to tell the jury that in view of the particular offense of which he was charged, if his co-operation with the thieves was only after the crime had been committed, he was entitled to an acquittal. The case of *People v. Gassaway*, 28 Cal. 404, is in point. It is there held (syllabus) that:

"Upon a trial for robbery, if the evidence is circumstantial and involves the inquiry whether the defendant was guilty, if guilty at all, as principal or as an accessory after the fact, the court should instruct the jury, if requested, that the defendant cannot be convicted if he was only an accessory after the fact."

The evidence included testimony that the night after the pipe was stolen Slack met one of the men who were concerned in the affair and said to him:

"Say, the boys got caught taking the pipe last night. Now you don't know anything about it, and see that you don't. There has been three or four dicks around the office all day."

The evidence tended to show that Slack did not know that the pipe was to be stolen, but that about noon of November 19th, which was the day following the theft, he heard that it had been taken and who had taken it; that Slack met a man by the name of Ponder, who, it appeared from the evidence, helped steal the pipe, the last night of November before Ponder became a fugitive from justice, and said to him:

"I thought you were in jail. You took my truck when you got that pipe, didn't you? You will be in jail."

Also, that with full knowledge of the theft and who committed it Slack took no action against the guilty parties.

It is possible that the jury did not believe that Slack aided and abetted in the actual theft of the pipe, but did believe that after the pipe was stolen he obtained full knowledge of the facts and thereafter concealed them from the magistrate, or harbored or protected the persons charged with the commission of the crime; and that thereupon the jury concluded that Slack should be found guilty of the crime charged in the information. It would therefore appear that the court erred in refusing to give to the jury the requested instruction.

[7] It is contended by appellants that, whereas the information accuses them of the crime of grand larceny in that they "did willfully, unlawfully, and feloniously take, steal and carry away 20 lengths of 6-inch drill pipe," etc., the evidence shows that instead of the pipe being "drill" pipe it was "line" pipe that was stolen, and hence that a fatal variance exists between the allegation and the proof. The evidence disclosed that the pipe was originally drill pipe, but that by reason of the removal of the tool joints thereof prior to the time that the pipe was stolen the pipe was thereby converted, from drill pipe to line pipe. It is clear that the defendants were in no wise injured in their defense by reason of such alleged variance, and for that reason they are in no position to complain of the discrepancy.

[8] Complaint is made by appellant Slack that the court erred in refusing to give to the jury, at his request, an instruction to the effect that:

"The court instructs the jury that the written statement of the defendant Patterson is not competent evidence against the defendant Slack, and that no portion of said statement should be considered by this jury against the defendant Slack."

The specification of error, however, we think not well founded, for the reason that the substance of the requested instruction was contained in one of the other instructions given by the court to the jury.

[9-11] A man by the name of Johnson was a witness for the prosecution. He testified, in substance, that he knew the pipe was being stolen and assisted in loading it on the truck that carried it away. There was no contradiction of his testimony in that regard. In such circumstances the defendant Slack requested the court to give to the jury the following instruction:

"The court instructs the jury that the witness Johnson is an accomplice in the commission of the offense charged in the information herein, and for which the defendants are on trial, and that the instructions that are here given to you on the subject of an accomplice should be applied by you to the testimony of said witness."

The requested instruction was by the court refused.

In the case of *People v. Coffey*, 161 Cal. 433, 436, 119 P. 901, 902 (39 L. R. A. [N. S.] 704), the rule with reference to the duty of the trial court, where the question is whether a witness is an accomplice, is stated as follows:

"When the question of an accomplice arises in the trial of a case, the general and accepted rule is for the court to instruct the jury touching the law of accomplices, and leave the question whether or not the witness be an accomplice for the decision of the jury as a matter of fact. *People v. Kraker*, 72 Cal. 459, 14 P.

196, 1 Am. St. Rep. 65. Whenever the facts themselves are in dispute, that is to say, whenever the question is whether the witness did or did not do certain things, which, admittedly, if he did do them, make him an accomplice, the jury's finding, upon familiar principles, is not disturbed. But where the facts are not in dispute, where the acts and conduct of the witness are admitted, it becomes a question of law for the court to say whether or not those acts and facts make the witness an accomplice. For the law declares in mandatory terms that: 'A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.' Pen. Code, § 1111."

The point is elaborated in the case of *People v. Southwell*, 28 Cal. App. 430, 433, 152 P. 939, 940, where, among other things, it is said:

"Under this state of the case, and assuming that the corroborative evidence, admittedly slight, was sufficient to support the conviction, it was very material to the defendant to have the law as to the testimony of accomplices explicitly stated to the jury. It was not for the jury to decide whether each or any of the witnesses were accomplices, but under the testimony, it was the duty of the court to give the requested instructions advising the jury that Mrs. Willie Martin and Rena McMonagle were both accomplices as to the crime charged against the appellant. Under the state of the record as we have described it, there should have been left to the jury no discretion of judgment to determine as to whether these witnesses were accomplices; the testimony showed as a fact that they were. For aught that appears, the jury may not have applied the rule of section 1111 of the Penal Code, to the testimony of these witnesses, but may have given full credit and weight to their testimony and left out of account altogether the requirement that such testimony, before it was sufficient to warrant a conviction, should be corroborated by other and independent evidence. For this error alone, we think that the appellant is entitled to a new trial."

The comment made by the court in the case last cited, respecting the possible effect on the jury of the failure of the court to declare as a matter of law that the witnesses therein referred to were accomplices, is applicable in the instant case. Relying upon the testimony given by Johnson, the jury would have been correctly instructed by the court had it been told that Johnson was an accomplice and that his testimony was to be weighed in accordance with the law affecting the testimony of accomplices, as elsewhere given by the court to the jury. Johnson's testimony affected all the defendants, but particularly implicated defendant Slack, and all the defendants were entitled to have Johnson's testimony judged by the jury in accordance with

the provisions of the statute affecting the testimony given by accomplices. That right was denied them; and it is impossible to determine the severity of the injury which each of them suffered by reason of such refusal.

[12] Defendant Slack also requested the court to give to the jury the following instruction:

"The court instructs the jury that, in a criminal action, a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as tends to connect the defendant with the commission of the offense charged and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof; and the jury are further instructed that by corroborative evidence is meant additional evidence of a different character to the same point."

In lieu of such instruction, the court gave to the jury another instruction which, in substance, covered the law as presented in defendant Slack's proposed instruction, with the exception that it omitted the statement that "the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof; and the jury are further instructed that by corroborative evidence is meant additional evidence of a different character to the same point." The first clause in such omitted statement is a part of the language of the statute (section 1111, Pen. Code); and the latter part, that is, that "by corroborative evidence is meant additional evidence of a different character to the same point," in view of the fact that the evidence of accomplices was relied upon to a very considerable extent by the prosecution, was of extreme importance to the defendant's case and should have been given to the jury. The question here presented was passed upon by the Supreme Court in the case of *People v. Sternberg*, 111 Cal. 11, 43 P. 201, where it was said:

"Members of a jury might be in excusable ignorance of the legal definition of corroborative evidence and yet possess (or at least they should) intelligence enough to comprehend what was meant when they were told that it was additional evidence of a different character to the same point. The second and third proposed instructions are correct in law. They were not covered by any that were given, and should have been declared, if applicable to the case. That they were applicable no doubt can be entertained. The evidence of accomplices was before the jury. It was defendant's right that his triers should know that it was a duty imposed upon them by law to receive this evidence with distrust. The question of the support of such testimony by corroborative evidence was a vital one for their determination. They were instructed in the language of the code (Pen. Code, § 1111) that they could not convict unless there was corroborative evidence. Defendant was plainly within his right in asking that they be told what corroborative evidence is. That the jury was instructed in the

language of section 1111 of the Penal Code, that the evidence of an accomplice is not sufficient to convict unless he is corroborated by other evidence which, in itself, and without the aid of the testimony of the accomplice, tends to convict [connect] defendant with the commission of the crime, informed them of the amount and kind of corroborative evidence required, but they were still left without enlightenment as to what in law constitutes this character of evidence."

In *People v. La Rue*, 62 Cal. App. 276, 216 P. 627, the court, in commenting upon the importance to a defendant of an instruction similar to the one here being considered, used the following language:

"Where the prosecution relies for a conviction upon the testimony of an accomplice, even though corroborated, the proposed instruction should be given, because the jury may reject the corroborating evidence as unworthy of belief, and in such case the instruction would be vital."

See, also, *People v. Coffey*, 161 Cal. 433, 436, 119 P. 901, 39 L. R. A. (N. S.) 704.

It therefore becomes clear that, through the refusal of the court to give the instruction requested by defendant Slack, said defendant was deprived of a substantial right.

[13] Appellants specify further error in that, at the request of the people, the court gave to the jury the following instructions:

"The court further instructs the jury that the question whether a witness is an accomplice in fact and intent or only a feigned or pretended accomplice, is to be determined by the jury from all the evidence and circumstances in proof in the case.

"The uncorroborated testimony of one who, under the direction of the officers of the law, or of any other person, or upon his own initiative, feigns complicity in the commission of a crime merely for the purpose of detecting and prosecuting the perpetrators thereof is not an accomplice in law and the law does not require corroboration of such witness."

It is contended by appellants, and not denied by respondent, that the record discloses no evidence upon which either of such instructions could be given. Such being the case, it must be assumed that there was no evidence of a feigned accomplice having operated in the course of the commission of the offense. The harmful effect of the criticized instructions is apparent. They permitted the jury to indulge in guesswork as to whether any or all of the accomplices in the case were real, or whether, under the direction of officers of the law or on their own initiative, they were feigning complicity in the perpetration of the crime. If the jury concluded that the latter state of affairs existed, the instructions informed the jury that the testimony of such accomplices required no corroboration, thereby giving to such testimony weight and credit not permitted to be given to the testimony of accomplices by the terms of the statute.

Other specifications of error are presented by each of the appellants, but, if the correct conclusion has been reached on those points which have already been touched upon herein, it is useless to devote further consideration to the appeal.

It is ordered that the judgment and the order denying the motion for a new trial as to each of appellants be and they are reversed.

We concur: CONREY, P. J.; CURTIS, J.

75 Cal. App. 349

PEOPLE v. BURKETT et al. (Civ. 2924.)

(District Court of Appeal, Third District, California. Nov. 27, 1925. Hearing Denied by Supreme Court Jan. 25, 1926.)

1. Intoxicating liquors ⚡272—Written notice to owner of premises not required, where permanent injunction only is sought.

Provision of St. 1915, p. 236, § 3, requiring two weeks' written notice to owner of premises before filing of complaint for abatement of liquor nuisance, relates to temporary injunctions only, and notice is not necessary where only permanent injunction is sought.

2. Courts ⚡107—Expressions in judicial opinion read in light of particular question considered.

Expressions in a judicial opinion must be read in light of particular question presented for decision and under consideration.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by the People against Grant Burkett and others to abate liquor nuisance. Judgment of dismissal, and plaintiff appeals. Reversed with direction.

William E. Rothe, Dist. Atty., of Chico, and Clinton W. Johnson, Deputy Dist. Atty., of Oroville, for the People.

Bond & Deirup and J. Oscar Goldstein, all of Chico, for respondents.

FINCH, P. J. The complaint alleges that the defendant Park Hotel Company is the owner of a certain described building; that a designated part of the building "is, and for many months prior to the filing of this complaint has been, used for the purpose of unlawfully selling, serving, keeping, storing, and giving away intoxicating liquor"; that the defendants "during all the time herein mentioned have been and now are conducting and maintaining the same as a place where intoxicating liquors have been, and now are, kept, sold, stored, or given away," contrary to the state and national prohibition laws. The prayer is for a judgment, among other

things, abating the alleged nuisance, and enjoining the further maintenance thereof by defendants. The complaint does not allege that the district attorney had served notice of the existence of the alleged nuisance upon the owner of the property prior to the filing of the complaint. The defendants Burkett and Park Hotel Company filed separate demurrers to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. The court sustained the demurrers and dismissed the action. This appeal is from the judgment of dismissal. A temporary injunction was not applied for.

Counsel for respondent Burkett, evidently through oversight as to the contents of the complaint, contends that the allegations thereof show the maintenance of a nuisance, not at the time the complaint was filed, but only at times prior thereto. Counsel's error is apparent from the parts of the complaint herein set out.

[1] The only other ground upon which respondents attempt to justify the ruling of the court is that the complaint is insufficient in the failure to allege that written notice was served upon the owner of the property by the district attorney prior to the filing of the complaint. They rely upon the provisions of section 3 of chapter 132, Statutes of 1915. That section reads as follows:

"The complaint in such action must be verified unless filed by the district attorney. Whenever the existence of such nuisance is shown in such action to the satisfaction of the court or judge thereof, either by verified complaint or affidavit, and the court or judge is satisfied that the owner of the property, has received written notice of the existence of such nuisance, signed by the complainant or the said district attorney at least two weeks prior to the filing of the complaint, the court or judge shall allow a temporary writ of injunction to abate and prevent the continuance or recurrence of such nuisance. On granting such writ the court or judge must require, except when it is granted on application of the people of the state, written undertaking on the part of the applicant, with sufficient sureties, to the effect that he will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled thereto."

The foregoing provisions, excepting the words herein italicized, are in the precise language of section 4 of chapter 17, Statutes of 1913, relating to the abatement of houses of prostitution. The other sections of the act of 1915 are largely literal copies of those contained in the act of 1913. The provisions of that act have been declared valid in several cases arising thereunder. *People v. Barbieri*, 33 Cal. App. 770, 166 P. 812; *People v. Casa Co.*, 35 Cal. App. 194, 169 P. 454; *Selowsky v. Superior Court of Napa County*, 180 Cal. 404, 181 P. 652. The provision of section 3 of the

act in question here, requiring service of notice upon the owner of the property alleged to be a nuisance, so clearly relates to the issuance of a temporary injunction only that argument in support of the proposition seems to be superfluous. If section 3 were stricken from the act entirely, the provisions of the remaining sections would fully authorize a judgment, in a proper case, permanently enjoining and abating a nuisance of the character defined in the act, and it is not perceived that the provisions relating to the issuance of a temporary injunction have any bearing whatever in a case where no application is made for a temporary injunction. Respondents rely upon some of the language used in the case of *In re Brambini*, 192 Cal. 19, 28, 218 P. 569, 573. In that case it is said:

"The next question presented is that arising from the fact that the state law requires that a written notice be given to the owner of the premises before the suit is instituted (Stats. 1915, p. 237, § 3, *supra*), while the Volstead Act does not require such notice. It is only necessary in the matters at bar to determine whether or not such notice is jurisdictional. If it is jurisdictional in the sense that the superior court would not have authority to issue the preliminary injunction without this notice, then the injunction in this case having been issued without such notice, is void, and the petitioners are entitled to discharge. On the other hand, if the failure to give such notice merely goes to the sufficiency of the complaint as a foundation for the temporary and permanent abatement of the nuisance, and if the error of the court in issuing the temporary injunction is an error committed in the exercise of its jurisdiction, the preliminary injunction in this case comes under the head of an injunction improvidently issued as distinguished from one utterly void and petitioners' remedy was not to violate the injunction, but to apply to the court for its dissolution and in default of such dissolution to appeal to the higher court for a reversal of the order of the superior court in issuing, or in failing to dissolve, the injunction. The authorities fully support the view that such a defect in the complaint is not jurisdictional, because it goes merely to the sufficiency of the facts alleged as a basis for the injunctive relief asked for, and not to the power of the court to issue the injunction."

[2] The only question considered in the paragraph quoted was whether the temporary injunction issued by the trial court was void by reason of the failure to serve notice upon the owner of the existence of the alleged nuisance, and the language used must be understood as applying to that question alone. A permanent injunction had not been issued.

"Expressions in a judicial opinion must be read in the light of the particular question presented for decision and under consideration." *City of Oakland v. Buteau*, 180 Cal. 83, 88, 179 P. 170, 173.

The language of the court in the *Brambini* Case is not even the expression of an opinion

that notice to the property owner is a prerequisite to the issuance of a permanent injunction, but only that, when application is made for both a temporary and a permanent injunction, notice to the owner of the existence of the alleged nuisance is necessary to justify the issuance of a temporary injunction.

The judgment is reversed, with direction to the trial court to overrule the demurrers.

We concur: HART, J.; PLUMMER, J.

75 Cal. App. 789

PEOPLE, Plaintiff and Appellant, v. E. G. DE LONG, Alice Shepardson, John Doe, Jane Doe, Richard Roe, and Jane Roe, Defendants and Respondents. (Civ. 2925.)

(District Court of Appeal, Third District, California. Nov. 27, 1925.)

Appeal by plaintiff from a judgment of the Superior Court of Butte County, H. D. Gregory, Judge, of dismissal in an action for abatement of nuisance. Reversed.

William E. Rothe, Dist. Atty., of Chico, and Clinton W. Johnson, Deputy Dist. Atty., of Oroville, for the People.

Bond & Deirup, of Chico, for respondents.

PER CURIAM. This is an appeal from a judgment of dismissal entered upon the sustaining of a demurrer to the complaint. The questions presented by the appeal are in all respects the same as those considered by this court in the case of *People v. Burkett et al.*, 242 P. 1073, in the opinion therein this day filed. For the reasons stated in that opinion, the judgment is reversed, and the trial court is directed to overrule the demurrer.

75 Cal. App. 789

PEOPLE, Plaintiff and Appellant, v. L. D. MACY, F. M. Thatcher, Carl Sigman, F. Yarbrough, Walter Padget, John Doe, Jane Doe, Richard Roe, and Jane Roe, Defendants and Respondents. (Civ. 2926.)

(District Court of Appeal, Third District, California. Nov. 27, 1925.)

Appeal by plaintiff from a judgment of the Superior Court of Butte County, H. D. Gregory, Judge, of dismissal in an action for abatement of nuisance. Reversed.

William E. Rothe, Dist. Atty., of Chico, and Clinton W. Johnson, Deputy Dist. Atty., of Oroville, for the People.

Bond & Deirup, of Chico, for respondents.

PER CURIAM. This is an appeal from a judgment of dismissal, entered upon the sustaining of demurrers to the complaint. The questions presented by the appeal are in all respects the same as those considered by this court in the opinion this day filed in the case of *People v. Burkett et al.*, 242 P. 1073. For the reasons stated in that case, the judgment is reversed, and the trial court is directed to overrule the demurrers.

75 Cal. App. 462

KING v. TARABINO. (Civ. 5262.)

(District Court of Appeal, First District, Division 2, California. Dec. 8, 1925. Hearing Denied by Supreme Court Feb. 4, 1926.)

1. Trial $\hookrightarrow$ 59(2)—Admission of proof out of order held not error.

In action on altered check, admission of check in evidence before defendant had made any showing *held* not error, and not determination of plaintiff's right to recover; the order of proof, in view of Code Civ. Proc. §§ 607, 2042, being within discretion of court.

2. Trial $\hookrightarrow$ 234(7)—Instructions relative to burden of proof held proper.

In action to recover on altered check, instructions that burden of proof was on plaintiff to show consideration *held* proper, although such consideration is presumed in case of unaltered instruments.

3. Trial $\hookrightarrow$ 242—Instructions relative to presumptions held not confusing.

In action to recover on altered check, instructions relative to presumptions *held* not confusing.

4. Trial $\hookrightarrow$ 243—Instructions relative to presumptions held not conflicting.

In action to recover on altered check, instructions that there were no presumptions in favor of integrity of altered check *held* not to conflict with other instructions defining and relative to presumptions.

5. Bills and notes $\hookrightarrow$ 538(3)—Instructions relative to consideration supporting subsequent promise held not to conflict with statute.

In action to recover on altered check, where no evidence was introduced that brought case within provisions of Civ. Code, §§ 3094, 3095, relating to validity of check regardless of date inserted by maker, instruction that services as nurse would not constitute consideration to support subsequent promise to pay excessive amount therefor were not in conflict with such code provisions.

6. Bills and notes $\hookrightarrow$ 538(3)—Instruction relating to consideration for altered check held not confusing.

In action to recover on altered check, instruction relative to possibility of services as consideration for such check *held* not confusing.

7. Trial $\hookrightarrow$ 193(2)—Instruction relative to consideration of altered check held not expression of opinion on question of fact.

In action to recover on altered check, instruction relative to plaintiff's services as consideration for such check *held* not an expression of opinion by court on question of fact.

8. Trial $\hookrightarrow$ 260(1)—Refusal of instruction held not error, when subject-matter covered by other instructions.

Refusal of instruction *held* not error, when subject-matter was covered by other instructions.

9. Appeal and error $\hookrightarrow$ 758(3)—Appellate court will not make comparison of pleadings and evidence, where brief of party complaining of error does not do so.

Where appellant's brief, in violation of rules and statute, does not make comparison of allegations of pleadings or the calls of a question as compared with allegations of pleadings or elements of an objection as compared with terms of question objected to, appellate court will not make the comparison.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by E. M. King against Rosa Tarabino, administratrix with the will annexed of the estate of John Tarabino, deceased, substituted for Barney Tarabino, deceased, formerly executor of such estate. Judgment for defendant, and plaintiff appeals. Affirmed.

Kimball Fletcher, of Los Angeles, for appellant.

Arthur W. Eckman and Wm. B. Himrod, both of Los Angeles, for respondent.

STURTEVANT, J. This is the second appeal in the above-entitled action. The decision on the first appeal (53 Cal. App. 157, 199 P. 890) sets forth all of the facts, and there is no necessity for repeating the facts in detail.

The plaintiff sought to recover on a check which had certain alterations on the face thereof. On the first appeal it was held that the plaintiff must first assume the burden of accounting for the alterations. When the case was on trial the second time, each party offered the testimony of certain witnesses as experts on the subject of the alterations. Thereafter the court instructed the jury and gave to the jury a general verdict and a number of special verdicts. The jury returned a general verdict and special verdicts in favor of the defendant, and a judgment was entered in accordance therewith. From that judgment the plaintiff has appealed.

[1] The appellant contends that she made out a complete case, and that the respondent did not make out any defense, and therefore the verdict was contrary to the evidence. In making this contention the appellant cites and relies upon *Thompson v. Thompson*, 140 Cal. 545, 74 P. 21. That case is not in point, because the writing involved in that case was entirely regular on its face. In connection with this point the appellant seems to contend that, because the check was received in evidence, that fact was determinative of the litigation. Of course, that is not the rule. To state such a proposition is to say that under certain circumstances a defendant is not to be heard at all. When the trial court admitted the check in evidence, the ruling of the trial court was in effect to say that the appellant had introduced some evidence tending to support her

contention. In this connection we understand the appellant to take the position that the respondent should have made its showing before the check was received in evidence; or, in other words, that in a case such as the instant case the ruling admitting the check in evidence should occur as the very last step in the proceedings in the introduction of evidence in the trial court. The appellant cites and relies in this behalf on what is said in *Manuel v. Flynn*, 5 Cal. App. 319, 326, 90 P. 463. There is some language in that case tending to support the contention of the appellant, but there is nothing in that case to the effect that the trial judge may not for special reasons otherwise direct the order of proof, or that it is error for the trial court to receive certain proof out of order. Code Civ. Proc., §§ 607, 2042.

The appellant makes several points regarding the giving and refusing of instructions. As printed in the transcript instructions requested but not given are set forth consecutively, and for the purposes of this decision we have lettered the same a, b, c, etc. The instructions given by the trial court are set forth consecutively, but are not numbered, and for the purposes of this decision we have numbered the same 1, 2, 3, etc. Commencing with No. 15, the instructions given include the following:

"(15) The alteration of the signature 'Owen Apartments, by John Tarabino' by a crossing out of the words 'Owen Apartments' is a material alteration of the signature, and consequently the plaintiff under the law must prove by a preponderance of all the evidence that the alteration was made with the knowledge and consent of the said John Tarabino, before plaintiff can recover.

"(16) Section 1700 of the Civil Code of the state of California provides as follows: 'The intentional destruction, cancellation, or material alteration of a written contract, by a party entitled to any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor, against parties who do not consent to the act,' which is but the statutory declaration of the common law that any material alteration of a written instrument made after its execution by a party claiming thereunder or with his privity, without the authority or consent of the other party, or parties, to the instrument, invalidates the instrument in the hands of the party responsible for the alteration, unless the maker subsequently ratified the alteration.

"(17) You are instructed that the check sued upon in this action shows upon its face that it was altered after its signing in that some person, or persons, after John Tarabino wrote at the bottom of the paper 'Owen Apartments by John Tarabino,' expunged the first line of the said signature, leaving standing only the words 'By John Tarabino,' and which alteration would be a material alteration under the law, unless it was assented to or ratified by him.

"(18) Therefore, before you can find a verdict for the plaintiff in this case, you must find, by the preponderance of the evidence, as the same is defined in these instructions, that said

alteration of said check was made by, or with the knowledge and consent of, John Tarabino, or was subsequently ratified by him.

"(19) You are instructed that, if, at the close of all the evidence in this case, the evidence is evenly balanced as to whether or not the striking out of the words 'Owen Apartments' from the signature on said check was done with the knowledge, or authorization, or consent, or was subsequently ratified by John Tarabino, then and in that event the plaintiff has not proved by a preponderance of the evidence the truth of such fact, and, therefore, your verdict should be for the defendant.

"(20) In other words, as to any question in this case, the burden of proof of which the court has instructed you is upon the plaintiff, should you feel, at the close of the case, that the evidence respecting the point, is evenly balanced, then the proposition has not been proven by a preponderance of the evidence, and your verdict should be for the defendant.

"(21) You are instructed that the delivery of the instrument sued upon in this action and the consideration therefor are denied by the defendant under oath. This places upon the plaintiff the burden of proof by a preponderance of the evidence that the instrument in controversy, in its altered form as alleged in the plaintiff's complaint, and as appears as to the date and signature, was delivered to the plaintiff by the decedent, John Tarabino, in his lifetime; and this burden must be sustained by the plaintiff, either by direct or indirect evidence, or by presumptive evidence, or by both. If you find from a preponderance of the evidence that the plaintiff has proven by such evidence that the said instrument, in its form, as alleged in her complaint, and as appears in the date and signature, was delivered to the plaintiff by said decedent, John Tarabino, and that said delivery was for valuable consideration, then and in that case your verdict should be for the plaintiff, otherwise for the defendant.

"(22) It is a presumption of law in this state that a person is the owner of property from exercising acts of ownership over it, and, also, that a thing which a person possesses is owned by him.

"(23) A presumption of law is a deduction which the law expressly directs to be made from particular facts. It can be founded only upon a fact or facts legally proved, and not upon another presumption or upon a mere inference of fact.

"(24) The foregoing presumptions are disputable, that is to say, they are satisfactory, if uncontradicted, and, unless so contradicted, the jury is bound to find in accordance with the presumption. But they may be controverted by other evidence, direct or indirect. When such a presumption is so controverted by other evidence, direct or indirect, it is to be regarded as evidence in the case giving rise to a conflict of evidence, and it is then for the jury to resolve the conflict and determine whether it will find in accordance with the presumption, or in accordance with the other evidence.

"(25) It is for the jury to say whether or not, from a preponderance of all the evidence, there was any consideration of any character or kind for the making, signing, and delivery of the check in question by said John Tarabino to the plaintiff, if you find that said John Tarabino made, signed, and delivered said check to

plaintiff in the form in which it has been presented in evidence and to the jury. In other words, if you find from a preponderance of the evidence that the check, in its present form, was delivered by John Tarabino, it will then be for you to find from the evidence whether it was delivered for a valuable consideration, or whether it was delivered as a gift.

"(26) You are instructed, as a matter of law, that, unless a check is supported by a valuable consideration, it is revoked by the death of the maker before its payment, and, therefore, even though you should believe, in this case, from a preponderance of the evidence, that the alterations upon the check in question were made by, or with the knowledge and consent of John Tarabino, or were subsequently ratified by him, yet your verdict cannot be for the plaintiff, unless the plaintiff has proven by a preponderance of the evidence that there was a valuable consideration for the giving of the check to her by John Tarabino, and, unless the plaintiff has established this latter proposition, your verdict must be for the defendant.

"(27) As already stated to you in these instructions, the check sued on in this case appears to have been materially altered after signing. You are instructed that there are no presumptions in favor of the integrity of such an altered instrument, and that the burden is on plaintiff to prove by a preponderance of the evidence in the case that such check was delivered to her by John Tarabino in its present condition, or that John Tarabino authorized or directed plaintiff to write her name in said check as payee, together with the words \$5,000, in words and figures, and the date, August 13, 1918, or that he assented to or ratified the same. You are further instructed that there is no presumption due to the mere possession of said check that the same was given for a valuable consideration, and the burden is upon plaintiff to prove by preponderance of all the evidence on that point that there was a valuable consideration for said check.

"(28) You are instructed that any services rendered John Tarabino by E. M. King, as nurse or otherwise, if said service was rendered gratuitously, would not constitute a valuable consideration. If such services were rendered, and were not gratuitous, they still would not constitute such a valuable consideration as would support a subsequent promise to pay an amount so greatly in excess of their value as to be wholly disproportionate thereto.

"(29) Some testimony has been admitted in evidence relative to an engagement of marriage between plaintiff and defendant, John Tarabino. Such an engagement, if it existed, would not constitute a valuable consideration to support the check sued on. Where a check is given solely upon the consideration of love and affection, or gratitude and esteem, the death of the maker of such check before it is presented to the bank for payment revokes such check and renders it void.

"(30) It is the duty of the jurors to deliberate and consult with a view of reaching an agreement, if they can do so, without violence to their individual judgment, upon the evidence and under instructions of the court. Each juror must decide the case for himself or herself, but no juror should defer to the opinion of a majority of the jurors if he or she is convinced that a contrary view is proper under the law and evidence in this case.

"In other words, no juror should bow to the will of the majority merely because it is a majority opinion, but should arrive at his or her conclusion from a careful consideration of all the evidence and the instructions in the case."

It will be noted at once that the trial judge meticulously distinguished (1) an unaltered check from (2) a check altered before execution, and (3) from a check altered after execution.

[2] The appellant contends that instructions numbered 20, 21, 26, and 27 conflict with the doctrine stated in *Thompson v. Thompson*, supra, and *Pacific Improvement Co. v. Maxwell*, 26 Cal. App. 265, 146 P. 900. The cases cited deal with unaltered instruments. There is nothing in the instructions complained of which is at variance with the cases cited.

[3] The appellant complains of instructions numbered 22, 23, and 24, claiming that they were confusing. The point is not elucidated by argument. We have carefully read the instructions, and find no error.

[4] The appellant also objects to instruction No. 27, and asserts that it nullified the instructions referred to in the preceding paragraph. In support of the contention she cites *Bagley v. McMickle*, 9 Cal. 430. A most cursory reading of the instructions discloses that one does not conflict with the other, and we find nothing in the case cited which contains anything to support the argument of the appellant.

[5] The appellant asserts that instruction No. 28 conflicts with the provisions of sections 3094 and 3095 of the Civil Code. The point is without merit. Moreover, there was no evidence introduced at the trial that brought the case within the provision of either of the code sections cited.

The appellant cites instruction No. 26, and then she cites the rule that the burden of showing a want of consideration to support an unaltered written instrument rests on the party who would defeat the written instrument. The vice in the contention is that the court in the instruction in question was addressing itself to the law applicable to an altered written instrument.

[6, 7] The appellant complains of instruction No. 28, and asserts that it was confusing, or otherwise it indicated the expression of an opinion by the court on a question of fact. It is not vulnerable to either attack.

[8] The appellant claims that she was seriously prejudiced by the refusal of the trial court to give the instruction lettered (a). There is nothing in the claim because the subject-matter was fully covered by instructions numbers 12, 13, and 14.

The appellant complains because the trial court refused to give the requested instruction lettered (b). The subject-matter of that requested instruction was the disputable presumptions defined in section 1963, Code of

Civil Procedure. The instructions which the court did give and which we have quoted above fully cover the subject-matter. The appellant has not called to our attention any particular in which they do not.

[9] The appellant makes the claim that the trial court erred in ruling on the admission of evidence. She divides this claim into five divisions. The form of the first division is similar to that of each of the other divisions. The first division is as follows:

"In view of the allegations of the answer, it was error to sustain the objections assigned as objections 6 and 7."

A brief made up in the foregoing form does not comply with the calls of the statute or the rules of this court, and is not fair to the opposing party. An appellate court will not undertake to make a comparison of the allegations of the pleadings one with the other, the calls of a question as compared with the allegations of the pleadings, and the elements of an objection as compared with the terms of the question objected to, when the party complaining of error neglects to do so in the first instance.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

75 Cal. App. 471

PEOPLE v. MAIN. (Cr. 1219.)

(District Court of Appeal, Second District, Division 2, California. Dec. 8, 1925. Hearing Denied by Supreme Court Feb. 4, 1926.)

1. Indictment and information $\S$ 111(1)—Indictment for selling securities without license need not negative exception of privately owned stock.

An indictment for selling securities without a permit or license, in violation of the Corporate Securities Act, need not negative exception embracing sale of privately owned stock; not bringing the seller within the classification of a dealer or broker.

2. Criminal law $\S$ 31—Estoppel, when applicable in criminal prosecutions, is same in principle as in civil actions.

Estoppel is infrequently invoked in criminal prosecution, but, where applicable, it does not differ in principle from the same rule when used in a civil action.

3. Criminal law $\S$ 31—Essentials of "estoppel by misrepresentation" stated.

To constitute estoppel by misrepresentation, in criminal prosecutions, as in civil actions, the estoppel assertor must be a person to whom, mediate or immediately, the representation was made, and he must, on the faith of

the misrepresentation, have changed his position prejudicially.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Estoppel in Pais.]

4. Licenses $\S$ 42(4)—Evidence held insufficient to show company, securities of which accused sold, was a corporation.

In a prosecution under the Corporate Securities Act for selling securities in a company alleged to be a corporation, without having obtained a license or permit, evidence held insufficient to show that the company was a corporation.

5. Licenses $\S$ 42(2)—State held not entitled to rely on asserted estoppel to deny corporate existence of company, securities of which accused was alleged to have sold without license.

In prosecution under Corporate Securities Act for selling stock of alleged corporation, without license, the state held not entitled to assert that defendant was estopped to deny corporate existence of the company, but was required to prove such corporate existence, notwithstanding Pen. Code, $\S$ 1102, since injury to, and change of position by, the prosecuting witness, was immaterial, even conceding that the state might assert estoppel in witness' behalf.

6. Licenses $\S$ 42(4)—Use in contracts of word "company" and name of a certain company held not to show company was corporation; "capital stock."

In a prosecution under Corporate Securities Act for selling capital stock of alleged corporation, without license, the use, in contracts introduced by accused, and purporting to be purchase contracts of "capital stock" in a company, of the words "company" and of a name designating a certain oil company, held not to show that the company was a corporation, in view of section 2 of the act; meaning of the phrase "capital stock" not being limited to shares in a corporation.

7. Criminal law $\S$ 317—No presumption arose against accused from his failure to introduce more evidence than he did.

No presumption arose against accused from his failure to introduce more evidence than he did.

8. Licenses $\S$ 42(6)—Absence of proof that company, shares in capital stock of which were contracted to be sold by accused, was corporation having capital stock, held to require reversal.

In a prosecution under the Corporate Securities Act for having sold and issued shares of capital stock, in a company which was alleged to be a corporation, without having obtained a license or permit, absence of proof within Civ. Code, $\S$ 297, or proof establishing a corporation de facto, that the company designated was a corporation having capital stock, held fatal.

Appeal from Superior Court, Los Angeles County; Charles S. Hardy, Judge.

F. L. Main was convicted of violating the Corporate Securities Act, and he appeals. Reversed.

Anderson & Anderson, T. E. Parke, and B. V. Elconin, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

CRAIG, J. The defendant and appellant was charged by indictment in the county of Los Angeles with having violated the Corporate Securities Act (St. 1917, p. 673). It was alleged in four counts thereof that on the respective dates therein mentioned he sold and issued shares of the capital stock of a corporation which had not obtained a permit to issue or sell its stock, and in a fifth count that, without first having obtained a permit or license so to do, from the commissioner of corporations, he engaged in the business of selling shares of the stock of the same corporation on the dates specified in the first four counts. General and special demurrers were interposed, which were overruled, and the defendant was convicted by a jury upon each of said counts. Motion for a new trial was thereafter presented and overruled, and this is an appeal from the judgment and the ruling upon said motion.

[1] The charging part of the first four counts of the indictment, to which exception was taken by demurrer, and which constitutes the basis of attack here, alleged that "the said F. L. Main did then and there willfully, unlawfully, knowingly, and feloniously, and for a valuable consideration, sell and issue, and aid and abet some person or persons to complainant unknown in selling and issuing to one Carrie Bowman" certain shares of the capital stock of the Southern Oregon Oil & Gas Company, a corporation. It is said that, inasmuch as none of the counts alleged that the stock was not the privately owned property of the defendant, each count failed to charge a public offense; that he might lawfully sell his own stock, and that in this respect the alleged sales would fall within an exception to the penal provisions of the act. It is doubtless true that the statute in question does not attempt to prohibit one from selling his privately owned corporate securities without a permit or license, provided his transactions do not bring him within the classification of "dealer" or "broker." In *re Lamb*, 61 Cal. App. 321, 215 P. 109. However, the indictment need not negative such exception, for it formed no part of the definition of the offense. *People v. Jevne*, 179 Cal. 621, 178 P. 517; *People v. Cencevich*, 64 Cal. App. 39, 44, 220 P. 448. Another ground of demurrer, that the indictment failed to state by whom the stock was owned, or that it was not owned by the defendant, was directed at the fifth count; and in connection with both

grounds it is insisted that there was no evidence tending to show the facts as to which the indictment is said to be silent. The principles above stated apply to these criticisms, and we think that further discussion of the matter is not necessary.

[2] The most serious point raised is that there is an entire lack of proof to support the allegation that the Southern Oregon Oil & Gas Company was a corporation having a capital stock. The indictment alleged in that behalf that "the Southern Oregon Oil & Gas Company was then and there a corporation having a capital stock"; that it had no permit to issue, nor did the defendant have a permit to sell, such stock; that said stock was a security"; and that "the crime of violation of the corporate securities act, a felony, was committed by the said F. L. Main," in that he did willfully, unlawfully, knowingly, and feloniously, for a valuable consideration sell and issue shares of the capital stock of said corporation.

"The 'securities' which may not be issued or sold without the permission of the corporation commissioner are the 'shares, or other interests or rights, into which the * * * property of companies * * * or rights of * * * members thereof are divided, * * * and all certificates and other instruments issued by them or their authority, evidencing or representing such shares, interests or rights'; also 'any instrument issued or offered to the public by any company' evidencing any right to participate in the profits or earnings or the distributions of assets of any business carried on for profit by the company." In *re Lamb*, 61 Cal. App. 321, 331, 215 P. 109, 113.

The evidence offered by the people to prove the existence of the corporation was the testimony of witnesses that the defendant represented it to have been incorporated, and exhibited prospectuses, printed subscription contracts, and purported stock certificates, which were introduced at the trial, and that he had in his possession a book of printed stock certificates, all of which bore the name of the purported corporation. It is urged by the prosecution that, in view of the evidence referred to above, had this been a civil action, the defendant would have been estopped to deny that the Southern Oregon Oil & Gas Company was a corporation, and further proof of that allegation would have been unnecessary.

Comparatively few criminal cases are to be found in the books where the facts create a situation permitting the application of the doctrine of estoppel. However, we are referred to several embezzlement cases where estoppel has been invoked against a defendant. In both *Ex parte Hedley*, 31 Cal. 108, and *People v. Treadwell*, 69 Cal. 226, 10 P. 502, the defendants were held estopped to deny that the relationship of principal and agent existed between them and the persons whose principals they had respectively held

themselves out to represent, and thus secured the money in question. In *People v. Leonard*, 106 Cal. 302, 39 P. 617, the defendant was not allowed to deny that the corporation whose agent he had admittedly been was such corporation. Other cases to the same or similar import might be mentioned. In *People v. Royce*, 106 Cal. 173, 37 P. 630, 39 P. 524, language is contained in the opinion to the effect that the defendant, having received a draft, a part of the proceeds of which he was charged with having embezzled, could not be permitted to say that he was not authorized to receive the money as treasurer of a certain association, or that the association was not entitled to it, or that the draft was not a valid one. While these and a few other examples are to be found in which the rule of estoppel has been invoked against a defendant in a criminal action, the extreme infrequency of such instances suggests caution in extending its application. We are accustomed, in criminal cases, to regard the presumption of innocence as universally placing the burden of proof upon the people to establish every essential element of the offense charged, beyond a reasonable doubt. In none of the opinions which we have examined upholding the application of the rule of estoppel is any reference made to the presumption of innocence or the fact that a plea of not guilty is in itself a denial of every element involved in the charge to which that plea is entered. In fact, in none of these decisions is there to be found more than the statement of a conclusion that under the circumstances considered the defendant could not be heard to deny the fact as to which he was held estopped, with the further intimation, in certain instances, that to hold otherwise would be inequitable and place a premium on dishonesty.

[3] It is true that the rules of evidence are generally the same in criminal and civil cases. Pen. Code, § 1102. Undoubtedly, wherever the doctrine of estoppel is applicable in a criminal case, it does not differ in principle from the same rule when used in a civil action. Also, whether the estoppel rests in judgment, deed, contract, or in pais, the rule and the reason for it are the same. *Allen v. Hance*, 161 Cal. 189, 118 P. 527. If the defendant is to be held estopped in the instant case to deny the corporate existence of the Southern Oregon Oil & Gas Company, the type of the estoppel would necessarily be by misrepresentation. It is elementary that among the essentials of this class of estoppel (as well as of all others for that matter) are: The estoppel asserter must be a person to whom, mediately or immediately, the representation was made; also the estoppel asserter must, on the faith of the misrepresentation, have changed his position prejudicially. *Ewart on Estoppel*, p. 10. In none of these decisions in the embezzlement cases

above referred to or others of a similar nature which we have examined is any attempt made to explain upon what theory the state is held to be authorized to assert an estoppel against a defendant when these essentials are taken into account. Hence, in reviewing these authorities, it is impossible to do more than speculate as to the reasoning which may have been applied therein. Of course, in a criminal case, the prosecuting witness is only a witness and not a party to the proceeding. The action is one in which the people of the state are plaintiff, and no one else. If, instead of being a criminal prosecution, the same transaction were before the court in a suit by the complaining witness to recover damages for conversion, the plaintiff, having been the one to whom the representations had been made, and who had changed his position prejudicially on the faith of them, would clearly have the right to assert the estoppel. It would seem that, if the state is to be allowed the same right in an embezzlement case, it must be on the theory that in that behalf and for that limited purpose it is, so to speak, subrogated to the rights of the person who would be the estoppel asserter in a civil action involving the same alleged wrong. It is plain that the state could not qualify as an estoppel asserter, based upon any claim of its own against the defendant; the representations were not made to it, nor has it parted with anything or in any way changed its position prejudicially by reason of the deceit which was practiced. Some individual, usually the complaining witness, would be damaged if the estoppel were not maintained, and if it were a civil action in which his rights were involved. The state having taken up his cause, and in a sense having assumed to vindicate the wrong done him, may reasonably say to the defendant, in the language of Lord Mansfield: "No; it shall be as you represented it to be. No man shall set up his own iniquity as a defense, any more than as a cause of action." And it is true that, while in a criminal action the people constitute the plaintiff, punishment for the offense through a criminal prosecution is one form of redress granted to the individual for the vindication of a wrong. Hence a person injured, though not strictly a party to the action, is so far interested in it as that the state, in punishing the wrongdoer, may assert an estoppel in his behalf, where it is necessary or proper to provide that form of vindication.

[4, 5] But while these considerations might uphold the use of an estoppel as against the defendant in a prosecution for embezzlement, obtaining money under false pretenses, or similar offenses, they furnish no support for the same procedure in the instant case. Here the person to whom the representations were made is entirely disinterested in the outcome. She did change her position by reason of them, but, so far as the evidence discloses,

not to her prejudice. Indeed, evidence to show that she was damaged, if such were the case, would be irrelevant and immaterial. No wrong done to her is the subject of vindication in this action. Whether the defendant is permitted to deny the corporate existence of the Southern Oregon Oil & Gas Company, or is estopped to do so, is a matter of complete unconcern to her. Her interest is as casual as that of a bystander who witnesses a robbery. It follows that the embezzlement and other cases to which we have referred furnish no support for the contention that the state is in a position to assert an estoppel against this defendant.

Unlike these cases, the instant prosecution is one which in no way involves the redress of a wrong done to any individual. The offense committed by the defendant, if any there be, is strictly *malum prohibitum*, and wrong only because it violates a statute intended to regulate the sale of securities; it is a wrong primarily and exclusively against the state. The outstanding facts in the offense are (1) that the Southern Oregon Oil & Gas Company was a corporation; (2) that the defendant sold securities of the Southern Oregon Oil & Gas Company, a corporation; (3) that at the time of making such sale he had secured no license so to do as required by law; and (4) that at the time of making such sale the corporation had not obtained a permit from the commissioner of corporations of this state to issue or sell its capital stock. Each of these is an integral part of the corpus delicti, without proof of which the state would necessarily have failed to make out a case. If invoked here, as urged by the respondent, estoppel would deny the defendant the right to prove that what he sold were not securities. It would prevent him from disproving the existence of an essential element of the offense in question, to wit, the corporate existence of the Southern Oregon Oil & Gas Company, and thus bar him from showing that he had not violated the act under which he was charged. Indeed, it would result, not only in convicting him upon his extrajudicial statements alone, but in denying him the right to show, though able to do so to the point of demonstration, his complete innocence of any offense charged against him. Obviously, unless the Southern Oregon Oil & Gas Company was a corporation, proof of the other facts would fall. The other evidence, even remotely bearing upon the subject, was that of a witness who testified that he was told by Main that O'Connor was field manager, and that he "supposed" some other men whom he saw at the well were working for the company. It is apparent that this adds nothing to the people's case in this behalf. We think that, having alleged it, the people were obliged to prove the corporate existence of the company, and could not rely for that purpose upon any asserted estoppel.

[6] We have considered all of the evidence produced by the people having a tendency to prove that the Southern Oregon Oil & Gas Company was a corporation. Reference is now made to certain exhibits introduced by the defendant in connection with the cross-examination of the people's witnesses. These exhibits purport to be purchase contracts. They are identical, except for the figures referring to the number of shares purchased. Defendant's Exhibit A is as follows:

"Purchase Contract.

"Dated April 19, 1920, at El Monte, Calif.

"To F. L. Main of New York City, N. Y.—I hereby contract for and agree to purchase from you 300 shares of the issued capital stock of the Southern Oregon Oil & Gas Company at \$100/100 per share and pay for same as follows: Cash.

"Name: Carrie Bowman.

"Address: El Monte, Cal.

"Banking Reference ———.

"Accepted: F. L. Main, by ———."

This evidence cannot aid the people. The use of the name "Southern Oregon Oil & Gas Company" is insufficient to prove that it is a corporation. *Briggs v. McCullough*, 36 Cal. 542; *People v. Cherniak*, 216 Ill. App. 423. Nor do the words contained in these exhibits, "shares of the issued capital stock," amount to an admission that the company is a corporation. While the term "capital stock" is often used in the sense of the amount derived from the issuance of shares in a corporation, still its signification is by no means limited to that definition. On the contrary, it has been defined to be "money invested in business operations, whether that business is conducted by a single individual, partnership, corporation, or a government." 9 C. J., p. 1280. It has been said to be "the amount fixed upon by the partners or associates as their stake in the concern" (*Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412); also as the fund or property belonging to a firm or corporation and used to carry on its business (*Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220). Section 2 of the act known as the Corporate Securities Act provides that "the word 'company' includes all domestic and foreign, private corporations, associations, joint stock companies, and partnerships, of every kind, and also trustees, * * *" and adds thereto certain exceptions. This law clearly recognizes that any of the various entities just enumerated may issue securities, and gives the corporation commissioner jurisdiction over the sale thereof in this state—and this concerning foreign as well as domestic organizations.

In *Re Girard*, 186 Cal. 718, 200 P. 593, the defendants were prosecuted for a violation of the Corporate Securities Act because they were alleged to have sold unit shares in a common-law trust company, organized in pursuance of a declaration of trust with-

out having secured a permit from the corporation commissioner. The complaint in that action alleged that the defendants "did * * * execute and sell shares, interests, and rights into which the capital stock and property of said company and the rights of members and holders thereof were divided." Again, the same complaint charged that neither the defendants nor the company in question had obtained a permit from the corporation commissioner to issue or sell any securities of the company or "any shares, interests, or rights into which the capital stock or property of said company and the rights of stockholders and members thereof were divided." Here we have a practical construction of the term "capital stock," in a prosecution under the same act as that in the instant case, using it in the sense of the fund or property belonging to a common-law trust company. If joint-stock companies and similar concerns have capital stock, of course they may issue certificates to purchasers of interests or shares therein. Therefore, as we have said, the fact that the words "company" and "shares of the issued capital stock" are employed in the exhibits introduced by the defendant does not constitute an admission that the legal entity, shares in whose capital stock were contracted to be sold, is a corporation.

[7, 8] But it may be said that, if estoppel is not applicable, at least the fact of the corporate character of the Southern Oregon Oil & Gas Company may be presumed, even though the presumption be a rebuttable one, and that, although the defendant might overcome it by proof to the contrary, if he does not do so, the fact is sufficiently established. The specific charge laid against him was that he sold and issued shares of the capital stock of a company that was "then and there a corporation." The defendant introduced no evidence upon the trial, except three exhibits of the nature mentioned herein, and no presumption arose against him from his failure to do so. *People v. Streuber*, 121 Cal. 431, 53 P. 918; *People v. Emmons*, 13 Cal. App. 487, 110 P. 151. The burden rested with the people to prove every fact essential to a conviction, beyond a reasonable doubt. *People v. Ribolsi*, 89 Cal. 492, 500, 26 P. 1082; *People v. Gordon*, 88 Cal. 422, 26 P. 502. Hence we must decide what character of proof is requisite to sustain this burden, and whether or not that which was offered measures up to the required standard. In proof of the existence of a domestic corporation, a copy of its articles of incorporation, filed as required by the statutes, and certified by the secretary of state, or by the county clerk of the county wherein the original articles shall have been filed, must be received as prima facie evidence of the facts therein stated. Civ. Code, § 297. It has been held in criminal cases that parol proof of a de facto corporation is competent and

sufficient, but that it must be proved, like character, by reputation, and not by the direct statement of a witness. *People v. Dole*, 122 Cal. 486, 497, 55 P. 581, 68 Am. St. Rep. 50. In *People v. Ah Sam*, 41 Cal. 645, the defendant was charged with having possessed, with felonious intent, certain blank and unfinished bank bills of a foreign banking corporation, which were false, forged, and counterfeit. It was there held that the undoubted rule in civil cases, where the fact of the legal existence of the corporation, was in issue is that proof of a foreign corporation can only be made in the same manner as any foreign law or statute is proven, but that in a criminal case, involving crimes such as forgery of bank paper, since the existence and character of a bank is generally well known where its bills are current, proof by reputation in such matters is not liable to lead to error. In the absence of proof that this company was a corporation having a capital stock, the people's case was incomplete, for each count contained the allegation that it was such a corporation. Therefore the motion for new trial should have been granted.

The remaining grounds assigned for reversal involve the giving and the refusal of instructions. One requested instruction, which was refused, contained matters expressly appearing in a given instruction to which appellant objects, and the other instructions complained of followed the allegations of the information. We find no error committed in the giving or refusing of instructions, and, in view of the opinion above expressed, it is unnecessary to consider other points raised.

The judgment and order denying the motion for new trial are reversed.

FINLAYSON, P. J. I concur in the judgment, and, in the main, with what is said by Mr. Justice CRAIG, but upon the question of estoppel I wish to add the following:

To determine whether the doctrine of estoppel can be invoked by the people in support of the issue respecting the corporate existence of the Southern Oregon Oil & Gas Company, it should first be ascertained, if possible, what is the underlying principle which has induced the courts to sanction the application of that doctrine in criminal cases. Unless we can discover the fundamental reason upon which rests the doctrine of estoppel in criminal cases, we are without chart to guide or compass to locate the boundary which separates the cases where that doctrine is properly applicable from those where it is not. In none of the decisions brought to my attention was any attempt made to set forth the philosophical basis or rationale of the rule which sanctions the application of the doctrine of estoppel in criminal prosecutions. In many of the decisions the courts, without attempting to probe to

the bottom in search for the reason upon which the rule rests, have given unquestioning assent to a dictum of Mr. Bishop, and have let it go at that. See *Ex parte Hedley*, 31 Cal. 113, for the language of Bishop.

An analysis of the criminal actions in which estoppel has been held to be applicable discloses that, as between the prosecuting witness and the accused, the former was vested with some sort of private right, that this right was the result of acts of estoppel on the part of the defendant, and that violence had been done to that right by the criminal act which the accused committed against the peace and dignity of the state—his act of criminality being at once both an injury to the wronged individual, furnishing the basis for a civil liability, and an injury to the public, for which a penal liability attached.

Almost all of the criminal actions in which the doctrine of estoppel has been held applicable are cases of embezzlement. In that class of cases it has been held that, in prosecutions against an agent or servant for embezzling the money or property of his principal or employer, if the accused has received the money or other thing of value in the assumed exercise of authority as such agent or servant, he is estopped to deny the authority when prosecuted for the embezzlement. *Ex parte Hedley*, supra; *People v. Treadwell*, 69 Cal. 226, 10 P. 502; *People v. Gallagher*, 100 Cal. 471, 35 P. 80; *People v. Leonard*, 106 Cal. 302, 39 P. 617. It also has been held in embezzlement cases that an agent who has treated his principal as the owner of the property is estopped to deny the latter's ownership (*State v. Whitworth*, 30 Wash. 47, 70 P. 254); also that one entrusted with money or other thing of value is estopped to claim that his principal obtained it illegally, or that he could not lawfully possess it under the statute (*People v. Royce*, 106 Cal. 173, 186, 187, 37 P. 630, 39 P. 524). See *Sebree v. Commonwealth*, 190 Ky. 164, 227 S. W. 152, and cases there cited. It seems clear that in each of these classes of cases the act of estoppel related only to the private right of a private individual, usually the complaining witness. Take for example those embezzlement prosecutions in which it is held that an agent who has treated his principal as the owner of the property is estopped to deny the latter's ownership or his lawful right of possession. It is manifest that in that class of cases the principal has a private right of property which he could successfully assert in any civil action which might be brought by him against his unfaithful agent. The same is true of that other class of cases where it is held that the accused is estopped to deny that he received the money or property in the course of his employment, if he received it in the assumed exercise of authority as an employee or agent of the prosecuting witness. In that

class of cases the complaining witness has a valuable private right, based on the acts of estoppel of the one assuming to exercise the authority; that is to say, in any civil action brought by him he would have the right to claim, as against the one assuming to act as his agent or employee, that the latter received the money or thing of value in the due course of his employment, and that therefore the self-assumed agent or employee is responsible to him for all the legal consequences which naturally flow from such assumption of authority. "The word rights, is generic, common, embracing *whatever may be lawfully claimed*." *Lonas v. State*, 3 Heisk. 306. (Italics mine.) In *White v. Commissioners of Multnomah*, 13 Or. 317, 10 P. 484, 57 Am. Rep. 20, it is said that "a 'right' has been defined by Mr. Justice Holmes to be the legal consequence which attaches to certain facts." Under these definitions, it is clear that in all the cases mentioned by me as examples of the applicability of the doctrine of estoppel in criminal prosecutions, the complaining witness was vested with some sort of a private right arising out of the acts of estoppel, and that this right had been violated by the criminal act committed by the accused.

It cannot be that estoppel is invokable by the people as the direct or primary beneficiary thereof. It is a fundamental principle of estoppel that it operates only between parties to the transaction and their privies. A stranger, who is not a party nor a privy, can neither be bound nor aided. 21 C. J. 1180; *Pomeroy, Eq. Juris*, (4th Ed.) vol. 2, § 813. See *Figg v. Handley*, 52 Cal. 244. In the classes of criminal prosecutions where acts of estoppel may be proved against the defendant, such, for example, as the embezzlement cases cited supra, the state, proceeding in its sovereign capacity to punish for an infraction of its criminal laws, is a total stranger to the transaction out of which the estoppel arose. The acts of estoppel did not directly affect any public right; i. e., any right of the sovereign state as distinguished from the private right of the complaining witness, who, by reason of the acts of estoppel, could lawfully claim, in any civil action which he might bring, that certain legal consequences flowed from the estoppel. Nor could it be said in any of those cases that the state was in privity with the complaining witness whose private right attached by reason of the acts of estoppel. A crime has been defined as "a public wrong, in that it affects public rights and is an injury to the whole community, considered as a community, in its social aggregate capacity." 16 C. J. 54. It is an act committed against the public and not against an individual merely. The guilty party is prosecuted in the interest of the state and not in the interest of the party injured. 7 Cal. Jur. 840. True, the same act may constitute both an injury to an

individual, furnishing the basis for a civil action by him, and an injury to the public, for which a penal liability arises. But when the penal liability is enforced in the interest of the people by criminal proceedings, the only right the injury to which is considered is that public right which is due the whole community, considered as a community, in its social aggregate capacity. For this reason it is impossible for the people to be in privity with the individual whose private right was violated by the wrongful act of the accused. Equally obvious is it that the people do not "represent" the private right of the individual in the sense that it is a right to which the people have succeeded.

For the foregoing reasons I think it clear that the sole basis for the application of the doctrine of estoppel in criminal cases is the existence in some individual of a private right, depending for its existence upon the acts of estoppel, which right was invaded by the accused when he committed the criminal act against the state. In the ordinary criminal prosecution for embezzlement, where the complaining witness actually owns the money or property embezzled, or actually has some qualified ownership thereof with the right of possession and control, the prosecution, to make out a case against the accused must of course prove such ownership in the prosecuting witness. In a case where the private individual injured by the act of embezzlement does not actually own the money or other thing of value, or has not an actual qualified interest therein, but has nevertheless the right to claim ownership as between himself and the accused, based upon the latter's acts of estoppel, he has a certain kind of private right—a right which, in a civil action by him against his unfaithful agent, would constitute the basis for appropriate relief against the wrongdoer. This private right, notwithstanding it rests entirely upon estoppel, may be proved by the prosecution in a criminal action against the wrongdoer for the same reason and for the same purpose that the prosecution may prove ownership in the complaining witness where the latter is in fact the rightful owner. But whether the people prove an actual ownership, as is ordinarily the case, or prove that the accused is estopped to deny ownership, in either event the prosecution does no more than prove the existence of a private right in the complaining witness—a private right which the accused has injured by an act which constitutes at once an injury to the public and an injury to the individual who has been harmed in his private property right. And so, where the accused, by his assumption of authority, has estopped himself to deny that he received the money or property in the course of his employment, evidence of the acts of estoppel is admissible, not upon the theory that the estoppel inures to the people as the direct and immediate

beneficiary thereof, but upon the theory that, as between the complaining witness and the accused, the acts of estoppel in effect establish a fact, namely, the relation of principal and agent, which fact is one that appertains to a private right which the accused has criminally violated. "Every fact," says the court in *White v. Commissioners of Multnomah*, supra, "which forms one of the group of facts of which the right is the legal consequence, appertains to the substance of the right." And so, in every other instance in which the doctrine of estoppel has been applied in a criminal action, it will, I believe, be found that the application of the doctrine was but a means of proving the existence of some private right in the complaining witness which had been injured by the criminal act of the accused, even though that right be one which exists only as between the complaining witness and the defendant.

It seems clear to me that the admissibility of acts of estoppel in criminal cases can be justified only upon some such theory as that which I have attempted to outline. In a vigorous dissenting opinion in *State v. Dawe*, 31 Idaho, 796, 177 P. 393, it is said by Mr. Justice Morgan that "the application of the doctrine of estoppel in criminal cases is of doubtful origin and worse than doubtful soundness." Unless I thought that the application of the doctrine could be justified upon some such theory as that which I have sought to expound, I should feel constrained to agree with the learned author of that dissent. The application of the doctrine of estoppel in criminal cases certainly would be of "worse than doubtful soundness" if it were made to rest upon the notion that the estoppel is invokable by the people as its direct and immediate beneficiary. If that were the theory upon which it rested, it would do violence to the fundamental rule that estoppel operates only between parties and their privies.

If the foregoing be a correct exposition of the underlying theory upon which rests the doctrine of estoppel in criminal cases, then that doctrine is not applicable in the instant case. Here the criminal act with which appellant is charged did no injury to the complaining witness or to any of her private rights. The injury was solely to society in the aggregate. It is this which differentiates the present case from those relied upon by the Attorney General. I therefore concur in the judgment of reversal.

WORKS, J. I concur in the judgment and in the opinion of Mr. Justice CRAIG, with this exception: I do not concur in what he says upon the subject of estoppel. I think it inexpedient to join in a quest for the reasons upon which the Supreme Court, in company with other tribunals, has applied the doctrine of estoppel in criminal cases, for I do not think such a search is necessary to a de-

cision of the present action. Upon the question of estoppel, I think no more than this need be said: The doctrine has been applied in no criminal case except where the defendant was sought to be punished for a wrongful invasion of the private property right of an individual, which invasion might have been the subject of a civil action by the individual, and in which he might have invoked the estoppel allowed to be asserted in the criminal case. The prosecution here seeks to punish appellant for acts and omissions which did not themselves invade the property right of any individual. There is no estoppel involved in the specific charges here made which any individual could invoke. It seems to me that these are sufficient reasons for the assertion that the criminal cases in which the doctrine has been applied are not authority for its application in the present instance. Laying aside the compulsion of precedents, I can perceive no ground for its application here, and respondent has shown us none.

75 Cal. App. 488

SADDLER v. CALIFORNIA BANK.
(Civ. 4826.)

(District Court of Appeal, Second District, Division 1, California. Dec. 9, 1925. Rehearing Denied by Supreme Court Feb. 5, 1926.)

1. Banks and banking ⚡161(2)—Principal selecting bank as collecting agent is bound by reasonable usage prevailing among banks at place where collection is made.

A principal who selects a bank as his collecting agent, in the absence of special direction, is bound by any reasonable usage prevailing and established among the banks at the place where the collection is made, without regard to his knowledge of such custom.

2. Banks and banking ⚡161(2)—Knowledge on part of customer as to existence of reasonable usage among banks to collect items is conclusively implied.

Knowledge on the part of a customer as to any reasonable usage prevailing and established among banks for the collection of items, at the place of collection, is conclusively implied.

3. Banks and banking ⚡161(2)—Presumption held not to support finding defendant bank credited as cash draft drawn on another bank, in view of custom.

Mere silence on part of bank on entering the amount of a draft on another bank in depositor's book did not raise an inference that the bank credited the amount as cash, in view of a custom that the credit of such entry was conditional on collection.

4. Banks and banking ⚡171(6)—Bank held not liable to depositor for amount of bank draft which it never collected.

Defendant bank, accepting from plaintiff customer for deposit a draft drawn on a bank in Texas, and entering a credit in plaintiff's passbook representing amount of the draft, forwarding it to its collecting agent, from which it received a conditional credit, but never receiving the money by reason of the insolvency of the payee bank and the negligence of an intermediate collecting bank, held not liable to plaintiff for amount of entry notwithstanding defendant's failure to accept debit of item charged back to it by its initial collecting bank, and notwithstanding it credited interest on the entry to plaintiff and paid an installment thereof.

5. Judgment ⚡273(5)—Judgment entered in name of plaintiff after her death without substitution of administrator as party plaintiff held not void.

Where the case was tried and the cause submitted for decision before plaintiff's death, but no decision was rendered until after her death, a judgment thereafter entered in the name of plaintiff nunc pro tunc as of a date antedating her death, and without substitution of the administrator of her estate, held not void.

Appeal from Superior Court, Los Angeles County; John Perry Wood, Judge.

Action by Emilie E. Saddler against the California Bank. Judgment for plaintiff, and defendant appeals. Reversed.

Hearing denied by Supreme Court; Curtis, J., being disqualified, not participating.

Goudge, Robinson & Hughes, of Los Angeles, for appellant.

George H. Wilson and J. W. Hocker, both of Los Angeles, for respondent.

CONREY, P. J. On and before February 19, 1921, the plaintiff had in the defendant bank an interest-bearing account, known as a special ordinary account, subject to check. Her business in connection with that account was conducted by George H. Wilson, her attorney in fact. On the above-stated date Wilson deposited for her in defendant bank a cashier's check, made to her order by the First National Bank of Desdemona, Tex., in the sum of \$3,640, and the bank credited that amount on her passbook. On October 6, 1921 (said deposited amount not having been theretofore withdrawn), plaintiff presented to defendant bank her check for the sum of \$3,653.03, being the said sum of \$3,640, together with accrued unpaid interest thereon. The bank refused payment of this check. Thereafter the plaintiff commenced, and prosecuted to judgment, her action to recover the amount so demanded. Defendant appeals from the judgment.

It appears from the findings of the court that on receiving the cashier's check, defendant indorsed the same and delivered it

to the Commercial National Bank of Los Angeles, Cal., for credit, and received from said bank a credit therefor in the sum of \$3,640; that the Commercial National Bank indorsed said check and forwarded it to the City National Bank of Galveston, Tex., for credit; that the City National Bank of Galveston, Tex., indorsed the check and transmitted it to the Federal Reserve Bank of Dallas, Tex., which bank, on the 26th day of February, 1921, forwarded the cashier's check, together with other items, by mail, direct to the First National Bank of Desdemona, Tex., the payor of the item, and requested a draft in payment thereof; that the Desdemona bank thereupon forwarded to said Federal Reserve Bank, as requested, a draft for the full amount of the remittance, said draft being drawn on a bank at Fort Worth, Tex.; that before this draft on the Fort Worth bank was honored, the First National Bank of Desdemona, Tex., closed, and payment of the draft on Fort Worth was refused by the Fort Worth bank; that the Federal Reserve Bank of Dallas, Tex., has filed its claim against the receiver of the First National Bank of Desdemona, Tex., for the full amount of the draft received by it from the First National Bank of Desdemona, Tex., and said claim has been allowed to said Federal Reserve Bank.

The findings further state that the plaintiff's passbook and the deposit slip used in the making of the deposit of this item contained provisions that the bank in accepting drafts, etc., for collection or credit, does so solely for the depositor, and shall not be liable for default of any bank or agent to which the draft, etc., may be sent, nor until the proceeds in actual money or solvent credits shall come into its possession, and that under these conditions items previously credited may be charged back to the depositor's account; that there is a custom among banks in Los Angeles that in receiving drafts, etc., on points outside of Los Angeles, the deposit bank shall transmit the same in the usual manner for collection to such bank or person as it may deem reliable, and that such deposit bank shall not be liable for default of any bank or agent to whom the draft, etc., may be sent, until the proceeds in actual money or solvent credits shall come into its possession; that neither the plaintiff nor her attorney in fact, who made the deposit, had read or knew the contents of the provisions in the passbook and on the deposit slip, and that they had no knowledge of said custom; that the defendant carried the item on its books to the credit of plaintiff, and rendered her monthly statements showing such credit from February, 1921, to October, 1921, and allowed and paid to plaintiff interest thereon at the rate of 3 per cent. per annum. The court further finds that at the time of making the deposit nothing was said to plaintiff by the defendant's officers

or agents regarding the conditions under which said deposit was received or the terms under which it was accepted, and that the same was accepted by defendant, California Bank, the same as accepting that much cash, and the defendant bank immediately delivered it to the Commercial National Bank, a solvent banking house, and received from it credit therefor, and has that credit at the time of the trial of this action.

The action came to trial on the 25th day of April, 1922, whereupon the evidence was received and the case submitted for decision. Prior to any decision, and on June 28, 1922, plaintiff died. Thereafter the court rendered its decision, and judgment was entered on January 30, 1923, *nunc pro tunc*, as of June 20, 1922. An administrator of the estate of plaintiff was appointed on January 19, 1923, but in this action no substitution of party plaintiff was made.

[1, 2] We shall first consider the point noted as point IV in appellant's brief, which is that the universal custom among banks in Los Angeles in accepting checks for deposit payable elsewhere is that credit is given subject only to final payment, and that this custom must conclusively be deemed to have been known to the plaintiff. We think that this point is correctly stated and is definitely supported by authority of the decisions in this state.

"The rule prevailing in California has been stated to be that 'a principal who selects a bank as his collecting agent, thus availing himself of the facilities which it holds out, in the absence of special direction, is bound by any reasonable usage prevailing and established among the banks at the place where the collection is made, without regard to his knowledge of its existence. Knowledge on the part of the customer is implied conclusively.' * * * The same rule prevails in many other jurisdictions." *Lucke v. First National Bank of Marysville*, 193 Cal. 184, 190, 223 P. 547, 550.

See, also, *Nicoletti v. Bank of Los Banos*, 190 Cal. 637, 641, 214 P. 51, 27 A. L. R. 1479.

The law being as above stated, the finding to the effect that the plaintiff had not, and that her attorney in fact had not, any knowledge of said custom among banks of Los Angeles, becomes immaterial, and it is not necessary to closely examine appellant's claim that said finding is not sustained by the evidence.

[3, 4] The finding that the amount of the cashier's check was accepted by defendant bank as "that much cash" is not sustained by the evidence, unless it can be sustained as an inference from the fact that at the time of making the deposit nothing was said to plaintiff by the defendant's officers or agents regarding the conditions under which the deposit was received, or the terms under which it was accepted. But in view of the custom to which we have referred, that inference from the mere silence of the defendant is

without foundation. On the contrary, the only legitimate inference from the facts directly proved is that a conditional credit only was given for the amount of the item, the credit being conditioned upon the final payment of the check. This conclusion is reinforced by the fact that provisions which were in accord with said custom were printed in the passbook, and upon the deposit slip which accompanied the deposit of the cashier's check, as well as upon previous deposit slips which had been used by the plaintiff in connection with her said account. In view of the fact that our decision herein rests principally upon said established custom of banks, we need not enter into a discussion of the decisions which bear upon the further point made by appellant, that said printed provisions thus constituted a binding contract between the depositor and the bank.

Respondent points out that appellant credited interest on the disputed balance, and actually paid an installment thereof. But the evidence also, without conflict, shows that the account, when the deposit was made, had placed on it the notation, "hold eight days," and that information of nonpayment of the check was promptly given to respondent, and that at all times thereafter respondent was informed that appellant denied its liability for said check.

It may be conceded that the Federal Reserve Bank of Dallas, Tex., should have sent said cashier's check to a bank in Desdemona other than the payee bank, with instructions to demand actual money from the payee, and that said Federal Reserve Bank was negligent in sending the cashier's check directly to the payee bank, as well as in requesting payment by draft. We are not now concerned with the liability of the Federal Reserve Bank for such negligence. For the purpose of the present action it is sufficient that the money called for by the cashier's check has not been paid by the payee or by said Federal Reserve Bank, and that the money has not been received by the defendant. The credit received by defendant from the Commercial National Bank of Los Angeles is conditional in its nature and remains unsettled. This being so, the condition upon which any liability of defendant bank to the plaintiff for the amount of the deposited cashier's check could arise is thus far a nonexistent condition. That the credit received by defendant from the Commercial National Bank was given

as a tentative one, taking its form as a matter of bookkeeping, is shown by the fact that the transaction was subject to an agreement between the said two banks, which agreement is contained upon the face of the deposit slip deposited by defendant with the Commercial National Bank on February 21, 1921, for items which included said cashier's check. This agreement provided that the Commercial National Bank "reserves the right to forward at depositor's * * * checks, drafts, etc., deposited for credit or collection, to collection agents of its selection who may or may not be the payee * * * thereof and the bank is not liable for the neglect, delay or default of such agents. No responsibility is assumed until final payment is received." Such final payment has never been received by the Commercial National Bank, and it is established without question that that bank, by reason of the nonpayment of the cashier's check, on April 4, 1921, charged back to defendant the amount thereof. The fact that defendant bank has declined to accept the debit of the item without return of the cashier's check or its amount is consistent with its defense, and merely shows a continued effort of defendant to complete the collection.

[5] Appellant's contention that the judgment as entered is void because entered in the name of the plaintiff after her death, and without substitution of the administrator as party plaintiff, appears to be without merit. In *Estate of Pillsbury*, 175 Cal. 454, 460, 166 P. 11, 3 A. L. R. 1396, it was held that in a case wherein an action against the defendant was tried and the trial concluded two days before his death, and the judgment against deceased was entered two days after his death, and thereafter the court, being advised of the death, entered the same judgment nunc pro tunc as of the day of the submission of the cause for determination, the court had power to enter a valid nunc pro tunc judgment, and that the same was valid. We therefore are of the opinion that, for the purpose of entry of judgment, on the facts shown by this record, a substitution of the administrator of plaintiff's estate was not necessary.

For the reasons hereinabove stated, the judgment is reversed.

We concur: HAHN, Justice pro tem.; CURTIS, J.

75 Cal. App. 494

PEOPLE v. MAGNI (Cr. 1281.)

(District Court of Appeal, First District, Division 2, California. Dec. 10, 1925.)

Criminal law  **730(3)—Conduct of district attorney in cross-examining accused and act of court in reprimanding accused's counsel held error not cured by admonition to jury.**

Conduct and remarks of district attorney in cross-examining accused, over objections, as to whether he was out on parole or bail, and action of trial court in reprimanding accused's counsel instead of district attorney, *held* error, which was not cured by admonishing jury to disregard excluded evidence, and that remarks of counsel were not evidence.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Tony Magni was convicted of assault, with intent to commit murder, and he appeals. Reversed, and new trial granted.

Roy C. Lewis, of San Rafael, for appellant.
U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant from a judgment of conviction of a felony, to wit, assault with a deadly weapon, with intent to commit murder. The principal point urged for reversal is that the district attorney was guilty of misconduct in the trial of the case; such claim being predicated upon an incident which occurred during defendant's cross-examination, and which appears in the record thus:

"Q. (By district attorney): Have you ever been convicted of a felony? A. Yes sir.

"Q. Are you now discharged after serving your term, or out on parole?

"Mr. Lewis (counsel for defendant) Just a moment. We object to that as immaterial, irrelevant, and incompetent, assign it as misconduct on the part of the district attorney—attempting to put before the jury matters he knows to be not competent evidence. There is only one question—

"The Court (interrupting): Now, without any argument, Mr. Lewis, if you will make the objection.

"Mr. Lewis: I made the objection.

"The Court: The objection is this is incompetent, irrelevant, and immaterial?

"Mr. Lewis: Yes.

"The Court: I will sustain the objection.

"Mr. Lewis: I want the record to show I assign it as misconduct on the part of the district attorney, unfair practice.

"Mr. Greer: Q. You have been out since you were arrested on this charge; you have been out on bail, and while out on bail isn't it a fact you took a shot at a man?

"Mr. Lewis: We object to that as incompetent, irrelevant and immaterial, improper question to be asked by the district attorney.

"Mr. Greer: I think that is a fact.

"The Court: I do not know whether it is or not. What is the object of it?

"Mr. Greer: Well, the object was, I was going to ask afterwards if since he was out on bail he had been in trouble and taken a shot at a fellow.

"Mr. Lewis: Before the question is answered I am going to assign it as misconduct, just done for the purpose of trying to prejudice the witness before the jury.

"Mr. Greer: The court asked what the purpose of it was.

"Mr. Lewis: Is it—

"The Court (interrupting): Are you through?

"Mr. Lewis: No; I am waiting for the district attorney to ask some more questions which he knows and which I know are not admissible in evidence, and the district attorney knows are not admissible in evidence.

"The Court: What are you getting so excited about?

"Mr. Lewis: I have a right to assign it as misconduct.

"The Court: Sit down.

"Mr. Lewis: I have a right to object to this.

"The Court: I will find you guilty of contempt of court, and assess you \$50 fine.

"Mr. Lewis: Very well.

"The Court: And there will probably be something to follow.

"Mr. Lewis: I believe I am an attorney in this court and have a right to be heard in this court.

"The Court: You will be heard, but I will conduct this case.

"Mr. Lewis: No; but I have a right to assign misconduct.

"The Court: You have it, but you are not arguing—

"Mr. Lewis (interrupting).

"The Court: I will continue this case, and fine you for contempt.

"Mr. Lewis: Very well; do it because I will go to jail.

"The Court: You will remain in the courtroom when this case is concluded.

"Mr. Lewis: I will do that.

"The Court: Now to resume the case: Ladies and gentlemen of the jury, you are admonished at this time that remarks of counsel are not argument—or, at least, are not evidence in the case. The only evidence in the case is the sworn testimony of the witnesses. Remarks of counsel are not to be taken by you as evidence in the case. The court will rule on all objections that are made, and, if evidence is offered and ruled out, you will entirely disregard it.

"Mr. Greer: That is all. No further questions.

"Mr. Lewis: What was the ruling to the question in reference to his being out on bail? May I ask the court's ruling on that?

"The Court: Yes, if it is ruled on. (Record read.)

"Mr. Greer: I withdraw the question.

"Mr. Lewis: At this time, if the court please, I ask the court to admonish the jury to disregard it.

"The Court: Mr. Lewis, I have already ruled on that, and I will not rule again, and I take it you are asking for something which is already in the record, and I think you understand that quite fully.

"Mr. Lewis: I did not understand your honor had instructed the jury it had been over-

ruled or sustained. I did not understand it to be that way—misconduct on the part of counsel in open court.

"The Court: There is no need for any argument. You have the ruling and you have your remedy."

We think the admonition given by the court to the jury and above quoted was scarcely sufficient to correct the injustice that had been done the defendant before the jury, both by the questions and remarks of the district attorney and the action of the court in reprimanding defendant's counsel instead of the district attorney, who was clearly in error.

We may say that it is clear from the record that all parties concerned were trying to do their duty as they saw it, and it is possible that the manner of defendant's counsel in making his objections may have been affected by the excitement of the trial, and he may have contributed, thus, indirectly, to the unfortunate situation which arose. However, the cold printed page of the transcript does not reveal this, and the Attorney General has caused the appeal to be submitted merely upon the brief of the appellant, being unable to defend against the assignments of error.

The record reveals a sharp conflict of evidence, and an examination of the entire transcript does not convince us that the same verdict would have been reached without the weight of the objectionable incidents above set forth.

The judgment is reversed and a new trial granted.

We concur: NOURSE, J.; STURTEVANT, J.

75 Cal. App. 539

RUDD v. MEANS. (Civ. 5314.)

(District Court of Appeal, First District, Division 1, California. Dec. 11, 1925.)

Assault and battery ⚡35—Evidence held to support award of damages for aiding another to assault plaintiff.

Evidence held to support findings and award to minor for assault and injury instigated, aided and abetted by defendant.

Appeal from Superior Court, Los Angeles County; Thomas O. Toland, Judge.

Action by George Rudd, an infant, by H. E. Rudd, his guardian ad litem, against E. H. Means. Judgment for plaintiff, and defendant appeals. Affirmed.

Porter C. Blackburn, of Los Angeles, for appellant.

McGovey & Klein, of Los Angeles, for respondent.

TYLER, P. J. Action for damages for personal injuries. Plaintiff, an infant, by his guardian ad litem, alleges, in substance, that on the 12th day of March, 1922, defendant ordered and directed his servant, one Greenfield, to inflict bodily injury upon him; that, acting under this direction, said Greenfield did violently assault and beat the plaintiff; that by reason of said beating plaintiff suffered severe bruises upon his head, nose, and body, which caused great pain and agony. Damages were claimed in the sum of \$1,000 for the injuries suffered, and exemplary damages in a like amount were prayed for.

Trial was had without a jury. The court found that defendant maliciously aided, abetted, and encouraged Greenfield to inflict bodily injury upon plaintiff, and, by reason of this malicious aiding and abetting, plaintiff was violently assaulted and beaten upon the face and jaw without just cause or provocation, in consequence of which he suffered pain and agony and was damaged in the sum of \$200. Judgment was accordingly entered for this amount.

As grounds for reversal, it is claimed that the evidence fails to support the findings. There is no merit in this contention.

There is evidence in the record to show that defendant took Greenfield to the place where the injuries were suffered by plaintiff and that he ordered and directed Greenfield to inflict the beating which caused the injuries complained of.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

75 Cal. App. 537

EASTMAN v. MEANS. (Civ. 5313.)

(District Court of Appeal, First District, Division 1, California. Dec. 11, 1925.)

Evidence ⚡148—Telephone conversations properly admitted, in view of testimony prima facie proof of identity of defendant as person addressed.

In action for personal injuries to minor, testimony by father and mother as to telephone conversations with defendant held properly admitted on proof that witnesses and defendant were residents of same city, that person called at defendant's residence, was addressed by defendant's name, and his answers to inquiries of witnesses referred to transaction involved.

Appeal from Superior Court, Los Angeles County; Thomas O. Toland, Judge.

Action by Charles Eastman, an infant, by T. L. Eastman, his guardian ad litem, against E. H. Means. Judgment for plaintiff, and defendant appeals. Affirmed.

Porter C. Blackburn, of Los Angeles, for appellant.

McGovney & Klein, of Los Angeles, for respondent.

CASHIN, J. An action to recover damages for injuries which, according to the findings of the trial court, were willfully inflicted by appellant upon respondent, the latter being a minor. Judgment was entered against appellant and the appeal taken therefrom.

As a ground for reversal it is contended that the court erred in permitting the father and the mother of the minor to testify that following the injuries alleged certain conversations were had by them by means of the telephone, which, if the person with whom they conversed was appellant, were admissible as evidence of admissions then made by the latter.

The witnesses mentioned and appellant were all residents of the city of Los Angeles, and it appears from the testimony that the person with whom the conversations were had answered a telephone call to the residence of appellant, was addressed by the name of appellant, and that the answers to the inquiries of the witnesses referred to the transaction involved in the action. This testimony was sufficient prima facie to prove the identity of appellant with the person addressed, and was properly admitted. *Union Construction Co. v. Western Union Telegraph Co.*, 163 Cal. 298, 307, 125 P. 242. In addition to the foregoing, appellant, while a witness on his own behalf, admitted the fact of the conversations.

No error being shown, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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YOAKAM v. HOGAN. (S. F. 11011.)

(Supreme Court of California. Jan. 16, 1926.)

1. Appeal and error ⚡933(4)—Sufficiency of evidence cannot be considered, where order granting new trial was general.

In view of Code Civ. Proc. § 657, where order granting new trial did not specify it was granted because of insufficiency of evidence, Supreme Court will presume order was not based on that ground, and is precluded from considering sufficiency of evidence, unless it is insufficient in law and without material conflict.

2. Appeal and error ⚡867(3)—Insufficiency of pleadings cannot be considered on appeal from order granting new trial.

Insufficiency of pleadings cannot be considered on appeal from order granting new trial.

3. Vendor and purchaser ⚡349—Damages growing out of delay in performance held sufficiently pleaded.

Where plaintiff bought house from defendant, who failed to have certain agreed work done on it within stipulated time, and complaint alleged loss of use of premises with rental value thereof during period of delay, plaintiff sufficiently pleaded damages growing out of delay in performance.

4. Damages ⚡39—Loss of rents, though element of damage, should be specially pleaded.

While claim for damages based on loss of rents should be specially pleaded, such loss is proper element of damage when caused by delay in performance by contractor.

5. Evidence ⚡113(8)—Evidence of cost held relevant on question of value.

Where vendor failed to furnish certain articles he had agreed to put in house, and purchaser supplied them, in action to recover value thereof, evidence of cost of procuring them was relevant on question of such value, and admissible.

6. Vendor and purchaser ⚡343(1)—Vendor held liable for value of undelivered furnishings.

Where vendor failed to carry out contract to deliver certain furnishings, he became liable to purchaser in damages for value thereof.

7. Evidence ⚡213(1)—Evidence of compromise held incompetent, though brought out by proper questions on cross-examination.

In action for damages, where answers to questions, proper on cross-examination, and asked of defendant's witness on cross-examination, tended to show offer of defendant to compromise, such evidence would be as incompetent as if adduced directly by plaintiff.

8. New trial $\Leftrightarrow$ 41(2)—Admission of evidence held not to result in miscarriage of justice.

Where, in action for damages, testimony of defendant's witness on cross-examination did not show any offer by defendant to allow judgment to be taken against him or to compromise claim, but showed that he rejected proposed offer of plaintiff, and court instructed that any evidence of compromise should be disregarded in arriving at damages, *held* no evidence of compromise was admitted which would result in miscarriage of justice.

9. Appeal and error $\Leftrightarrow$ 1052(8)—Evidence of compromise could not cause miscarriage of justice, where verdict was supported by uncontradicted evidence of damage.

Where evidence of damage was uncontradicted and sufficient to sustain jury's verdict, admission of incompetent testimony as to offer of compromise between parties could not have resulted in miscarriage of justice.

10. Trial $\Leftrightarrow$ 296(2)—Demand for performance of contract to supply furnishings held not condition precedent to purchaser's right to sue.

In action against vendor for failure to supply certain furnishings in house, instruction to determine all damage proximately caused by defendant's failure to perform within agreed time, if he had failed to perform, was proper, where other instructions charged that plaintiff could not recover, if he caused delay or prevented performance; demand for performance not being condition precedent to plaintiff's right to sue.

11. Vendor and purchaser $\Leftrightarrow$ 350—Evidence in action against vendor for failure to supply furnishings held sufficient in law.

Evidence in action against vendor for failure to supply certain furnishings in house *held* sufficient in law to warrant verdict for damages.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Warren V. Tryon, Judge.

Action by Jasper A. Yoakam against Walter H. Hogan. Verdict for plaintiff, and defendant's motion for new trial was granted. From the order granting such motion, plaintiff appeals. Reversed.

James F. Brennan, of San Francisco (Alfred S. Humphreys, of San Francisco, of counsel), for appellant.

H. M. Anthony, of San Francisco, for respondent.

WASTE, C. J. In this action for damages for breach of contract relating to exchange of properties, the jury returned a verdict for the plaintiff in the sum of \$5,000. A motion by defendant for a new trial upon the grounds: (1) Insufficiency of the evidence to justify the verdict; (2) that the verdict is against law; and (3) errors of law occurring at the trial and excepted to by defendant, was granted. The order was general, and did not specify as a ground thereof the insufficiency of the

evidence to sustain the verdict. Plaintiff appeals from such order.

The parties during the month of August, 1921, agreed to an exchange of real property, consisting of a ranch in Butte county owned by plaintiff, and two parcels of improved property in the city of San Francisco belonging to defendant, one situated at the corner of Larkin and O'Farrell streets, and the other at the corner of Waller and Stanyan streets. The parcel last mentioned is in part designed for use as a hotel or rooming house, and also includes flats with storerooms on the first floor of the building. Deeds were exchanged, followed by a delivery to plaintiff of possession of the parcel of San Francisco property first herein mentioned. As a part of the same transaction, and supported by the same consideration, an agreement in writing was entered into dated August 12, 1921, by which defendant undertook to alter and to paint and tint portions of the hotel building, and further to place in the rooms thereof certain furniture, household furnishings, and utensils, as specified in the agreement within 60 days from its date, all without expense to plaintiff. The hotel being at the time partially furnished, it was provided in the agreement that "all surplus carpets, beds, and bureaus and chairs now in said building to be retained or disposed of by said Hogan (the defendant) for his own benefit and account." It was alleged by plaintiff that defendant failed to complete the alterations, painting, and tinting mentioned and to furnish the personal property as provided; that plaintiff was prevented from taking possession of the hotel building until February 17, 1922, when he went into possession, notifying defendant that, owing to the delay, he elected to terminate defendant's right to perform, and, as grounds for the recovery of damages, a loss of rents from the property during the period between the expiration of the time fixed by the contract for performance and the taking of possession, alleged to have been of the value of \$1,010 per month, together with the cost of completing the work unperformed and the value of the personal property undelivered.

Defendant denied the allegations of the complaint with the exception of the rental value, which he admitted was the sum of \$600 per month, and claimed by appropriate pleading damages due to the alleged withholding by plaintiff of possession of the ranch mentioned, the conversion by the latter of the surplus carpets, beds, etc., in the hotel, and for extra work alleged to have been performed by him in the building.

It appears from the testimony of appellant that respondent failed to furnish a substantial portion of the articles called for by the contract; that a sum exceeding \$3,000 was expended by the former in the purchase

thereof and in completing the alterations, and, as shown by the warehouse receipt in evidence, respondent, in an attempt to deliver after the notice referred to, stored for the benefit of appellant a miscellaneous assortment of furnishings, to that extent negating his contention of an actual and complete performance by delivery on the premises. In addition to the foregoing is the testimony of appellant mentioned above as to the loss of rents; the whole showing an aggregate loss of more than the amount of the verdict.

[1] Respondent, in support of the order appealed from, contends that the trial court erred in certain of its rulings and instructions, and that the verdict was contrary to the evidence. As the order granting the motion for a new trial was general, and did not specify that it was granted because of the insufficiency of the evidence, it will be presumed on this appeal that the order was not based on that ground. Code Civ. Proc. § 657. We are precluded by the Code provision from considering the question whether or not the evidence is sufficient to sustain the verdict, unless it is insufficient in law, and without material conflict in any material point. *Biaggi v. Ramont*, 189 Cal. 675, 677, 209 P. 892.

[2-4] It is urged that the complaint fails to state a cause of action and is insufficient to support a verdict for damages growing out of delay in performance. The question of the insufficiency of the pleadings cannot be considered on an appeal from an order granting a new trial (*Clark v. Torchiana*, 19 Cal. App. 786, 127 P. 831; *Crescent, etc., Co. v. United Upholsters' Union*, 153 Cal. 433, 95 P. 871), but it appears that plaintiff sufficiently pleaded the damages sustained by him. The complaint alleged the loss of the use of the premises with the rental value thereof during the period of delay; and, while a claim for damages based upon a loss of rents should be specially pleaded (*Tally v. Ganahl*, 151 Cal. 418, 90 P. 1049), such loss is a proper element of damages when caused by delay in performance by a contractor (*Tally v. Ganahl*, supra; *Bird v. American Surety Co.*, 175 Cal. 625, 166 P. 1009). The trial proceeded on the theory that the question whether the premises could have been leased for the monthly rental alleged had the contract been performed was an issue in the case, and appellant testified upon this subject without objection.

[5, 6] It is further alleged that the court erred in permitting the appellant to testify as to the cost of procuring the articles agreed to be furnished by respondent. Evidence of cost has been held to be relevant on the question of the value, and the testimony was properly admitted. *Angell v. Hopkins*, 79 Cal. 181, 21 P. 729; *Greenebaum v. Taylor*, 102 Cal. 624, 36 P. 957; *Levy v. Scott*, 115 Cal. 39, 46 P. 892; *Union Hollywood, etc., Co. v. Los Angeles*, 184 Cal. 535, 538, 195 P.

55; *Travis Glass Co. v. Ibbetson*, 186 Cal. 724, 200 P. 595. When respondent failed to carry out his contract to deliver the furnishings, he became liable to plaintiff in damages for the value of the property. *Cummings v. Dudley*, 60 Cal. 383, 385, 44 Am. Rep. 58.

[7-9] Respondent contends that the trial court was justified in granting a new trial because it erroneously permitted evidence of an offer of compromise to go before the jury. A witness for respondent was asked on cross-examination if he had not stated to appellant that he would advise respondent to pay a sum mentioned in settlement of the controversy, and whether the witness had not himself offered such sum to appellant for the same purpose. The witness answered the last question in the negative, but, in response to the first stated, that, though he had endeavored to effect a settlement, no amount was mentioned by him, but that appellant had suggested the sum of \$4,850 as the amount he would be willing to accept, and that the suggestion was submitted to the respondent and rejected. This testimony was admitted without objection. The respondent asked that the answers be stricken out. The court denied the motion, but instructed the jury "that anything in the nature of a compromise shall not in any way interfere with your right to arrive at a verdict as to the damages in the case." While the questions may have been proper as cross-examination, if it can be said that the answers tended to show an offer on the part of the defendant to compromise, the evidence would be as incompetent as if adduced directly by the appellant. The question is whether the answer, permitted to go to the jury, justified the implied conclusion of the trial court that an error was committed which resulted in a miscarriage of justice. We do not see how it could. The testimony of the witness did not show any offer on the part of the defendant to allow judgment to be taken against him, or to compromise the claim, but, on the contrary, the testimony was that the defendant rejected the purported offer made by the plaintiff. But, assuming that the testimony may have left an impression that the respondent was seeking to compromise his differences with the appellant, and that the instruction of the court did not remove the impression that the answer might properly be considered as evidence of the fact and the amount of damage, the record shows that respondent offered no evidence in contradiction of the testimony of appellant as to the value of the personal property undelivered, or the work claimed by the latter to have been unperformed, nor of the loss caused by the delay; the evidence adduced by the respondent being directed to the questions whether the agreement had been substantially performed and the delay excusable. The evidence of damage, being uncontradicted, was, entirely aside from the incompetent

testimony, sufficient to sustain the verdict of the jury, and it cannot reasonably be said that its admission resulted in a miscarriage of justice.

[10] Respondent complains that the court erred in instructing the jury that, if it found that respondent failed without fault on the part of appellant to perform the agreement within the time limited by the contract, it would be its duty to ascertain the damage, if any, suffered by the latter, and to determine the amount which would compensate him for all detriment proximately caused by such failure, in that the instruction ignores respondent's defenses that no demand for performance was made; that the delay was caused by extra work done at the instance of appellant and the latter's indecision as to whether the building should be altered for use as a hotel or apartment house. While these matters were not pleaded as a waiver of performance or as an excuse for delay (*Herdal v. Sheehy*, 173 Cal. 163, 159 P. 422; *Estate of Warner*, 158 Cal. 441, 111 P. 352), the answer consisting of denials and affirmative allegations of full performance, there is evidence in the record tending to show an interference by appellant with the conduct of the work on the building; and the court instructed the jury that, if it found that the delay was caused by the fault of appellant, or that the latter prevented performance, he could not recover. These instructions fully covered the defenses based upon the evidence mentioned; a demand for performance not being a condition precedent to appellant's right to sue. *O'Connor v. Dingley*, 26 Cal. 11; *Marshall v. Ferguson*, 23 Cal. 65.

[11] Other contentions of respondent in justification of the order granting a new trial do not require consideration. We are satisfied that the evidence in the case was sufficient in law, and without conflict on the material issues of the case. No errors have been pointed out that warranted setting aside the verdict.

The order granting the new trial is reversed.

We concur: SHENK, J.; RICHARDS, J.; CURTIS, J.; SEAWELL, J.; LENNON, J.; LAWLOR, J.

75 Cal. App. 614

MILLER v. MILLER. (Civ. 5339.)

(District Court of Appeal, First District, Division 2. California. Dec. 16, 1925. Hearing Denied by Supreme Court Feb. 11, 1926.)

1. Appeal and error ⇨302(5)—Objection that court erred in denying defendant's motion for new trial, because findings were incomplete, and that court failed to find on material issues, not considered on appeal.

Objection that court erred in denying defendant's motion for new trial, because find-

ings were incomplete, and that court failed to find on material issues, cannot be considered on appeal, where defendant did not point out in what respect findings were incomplete, or what material issues had not been covered by findings made, or wherein any of claimed defects have been to his prejudice.

2. Husband and wife ⇨297—Allegation of cruelty in cross-complaint held not supported.

In action for separate maintenance, evidence held not to support defendant's allegation of cruelty in his cross-complaint.

3. Appeal and error ⇨1011(1)—Finding of trial court on conflicting evidence is conclusive.

Finding of trial court on conflicting evidence is conclusive on appeal.

4. Appeal and error ⇨197(3)—Objection that trial court was without jurisdiction to award plaintiff one-half community property, in that issue was not raised by pleadings, held unavailable on appeal.

In action for separate maintenance, objection that trial court was without jurisdiction to award plaintiff one-half community property, in that no such issue was made in the pleadings, held unavailable on appeal, where allegations in pleadings were sufficient to confer on court jurisdiction of subject-matter, and trial was had on theory that issue was properly before court, and all evidence on subject of community property was received without objection.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Action for separate maintenance by Ruby T. Miller against Herbert L. Miller, in which defendant filed cross-complaint for divorce. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Judgment and order affirmed.

August L. Fourtner and J. J. Lermen, both of San Francisco, for appellant.

Philip M. Carey, of Oakland (Chas. D. Woehr, of Oakland, of counsel), for respondent.

NOURSE, J. Plaintiff sued for separate maintenance, setting forth two causes of action, one based upon the defendant's desertion, and the other based upon the defendant's cruelty. The defendant answered and filed a cross-complaint for divorce, charging the plaintiff with cruelty. The trial court found in favor of the plaintiff upon her first cause of action—desertion—and awarded her alimony in the sum of \$1,000 a year, and also awarded to her a one-half interest in the community property. At the same time the defendant was denied any relief upon his cross-complaint. He now appeals from the judgment and from the order denying his motion for a new trial, and the appeal is presented upon a record prepared under the provisions of section 953a of the Code of Civil Procedure.

[1] The first point raised by the appellant is that the trial court erred in denying his motion for a new trial, because the findings were incomplete, and because the trial court failed to find on material issues. This is all that is said in regard to the point raised. The appellant has not pointed out in what respect the findings are incomplete or what material issues have not been covered by the findings made, or wherein any of these claimed defects have been to his prejudice. Objections raised in this manner do not require consideration. *People v. McLean*, 135 Cal. 306, 309, 67 P. 770; *People v. Cebulla*, 137 Cal. 314, 315, 70 P. 181.

[2] The second point raised is that the evidence does not support the finding of the trial court adverse to the appellant's allegations of cruelty found in his cross-complaint. The appellant alleged that, during the entire married life of the parties, respondent had inflicted upon him great mental pain and suffering due to certain specified acts of alleged misconduct. The bulk of the evidence offered in support of these allegations covered quarrels between the parties occurring some 9 or 10 years prior to the trial of the action and all prior to two distinct acts of reconciliation and forgiveness on the part of both parties. Those acts, which were specified in the cross-complaint as having occurred within the statutory period, were either unsupported by any competent evidence or were of such a trivial character as to have been entirely overlooked during the course of the trial. In addition to this, all the testimony covering these specifications of cruelty was in wide conflict with the accusations on the part of the husband, being either positively denied or explained away by the testimony offered by the wife. For these reasons the finding of the trial court is not subject to attack on this appeal.

[3] The appellant argues that the judgment awarding the respondent maintenance is error, because the appellant's separation from his wife was caused by her cruelty and misconduct, and that therefore the desertion which is the basis of the award of maintenance is chargeable to her. This point is covered by what has just been said regarding the allegations of cruelty on the part of the wife. The whole argument is based upon the theory that the separation occurred through the fault of the wife, and that the appellant was really forced to leave the home because of her cruelty. But the trial court found adversely to appellant upon this issue, and, as we have said, the evidence being conflicting, that finding is conclusive.

[4] When the cause came on for oral argument in this court, the appellant for the first time raised the point that no issue had been made in the pleadings as to a division between the parties of the community property, and that the trial court was therefore with-

out jurisdiction to award to the respondent one-half of this community property. It appears, however, that in the original complaint the respondent set forth the existence of community property and prayed for a specific sum as maintenance and for such other relief as may seem just and equitable. In his answer, the appellant admitted the ownership of the community property, and in his cross-complaint went into greater detail as to the description of this property. The facts regarding the community property were found by the trial court in accordance with the allegations which the appellant himself had set up. The trial was had upon the theory that the issue was properly before the court and all evidence on the subject of community property was received without objection from either side. The allegations in the pleadings were sufficient to confer upon the court jurisdiction of the subject-matter, and, though the descriptions of the property were not as complete as might have been required in face of a special demurrer, they were sufficient, particularly in view of the fact that no objection was made to the reception of the evidence, to support the finding and award of the trial court.

Judgment and order affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

75 Cal. App. 565

PEOPLE v. WALDEN et al. (Cr. 1227.)

(District Court of Appeal, Second District, Division 1, California. Dec. 14, 1925.)

1. Criminal law §622(1)—Court not required to order separate trial on mere request of defendant.

Under Pen. Code, § 1098, providing that defendants jointly charged shall be tried jointly, court in its discretion may order a separate trial, but is not required to do so on mere request of defendant.

2. Criminal law §622(2)—No abuse of discretion in denying defendant separate trial from that of his wife.

In prosecution for arson, court did not abuse its discretion in denying defendant a separate trial from that of his wife, merely because Pen. Code, § 1322, prohibits husband or wife from being a competent witness for or against the other, except with consent of both.

3. Arson §37(1)—Evidence held to sustain conviction.

In prosecution for arson, evidence held to sustain conviction against one defendant, but insufficient as to other.

4. Criminal law §1144(16)—Jury presumed to have obeyed court's proper instruction.

Where jury was properly instructed that it must not consider statement of defendant's wife implicating him in burning of a house as evi-

dence against defendant, it will be presumed that jury obeyed that instruction.

5. Criminal law — 552(1)—Flight alone is not evidence of consciousness of guilt.

Flight, without some other incriminating evidence, is not evidence of consciousness of guilt.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Clarence B. Walden and Martin Colson were convicted of arson, and they appeal. Conviction reversed as to defendant Walden, and affirmed as to defendant Colson.

Stanley Visel, of Los Angeles, for appellant Walden.

Cooper, Collings & Shreve, of Los Angeles, for appellant Colson.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

CONREY, P. J. Appellants Walden and Colson, together with Walden's wife, Edna Frances Walden, were jointly charged with the crime of arson, committed by willfully, etc., setting fire to and burning a dwelling house owned by Sophie Gwertz.

Walden asked that he be granted a separate trial from that of his wife. This request was denied. His motion was based upon an affidavit which stated that he and Mrs. Walden were husband and wife, and "by reason thereof and section 1322 of the Penal Code," alleged:

That "unless he is granted a separate trial from that of the codefendant, Edna Frances Walden, he cannot have a fair and impartial trial, and he will be prejudiced therein and will suffer a substantial injustice by reason thereof."

Said section 1322 is the section under which, in a case of this kind, neither husband nor wife would be a competent witness for or against the other, except with the consent of both.

[1, 2] On the subject of separate trials of defendants in criminal actions the rule now prevailing in this state requires that defendants jointly charged shall be tried jointly, "unless the court orders separate trials." Pen. Code, § 1098. The court in its discretion may order a separate trial, but is not bound or required to do so upon the mere request of any defendant. *People v. Anderson*, 59 Cal. App. 408, 431, 211 P. 254. This is in accordance with the common law. *United States v. Marchant*, 12 Wheat. 480, 6 L. Ed. 700; *People v. Perry* (Cal. Sup.) 234 P. 890. Assuming that in some case there might be such an abuse of discretion, in denying a separate trial, as would call for reversal of a judgment of conviction, it does not appear herein that, upon the facts which were placed

before the court in support of the motion of appellant Walden, there was any error in the court's order.

Each of the two appellants contends that as to him the evidence is insufficient to sustain the verdict. The house that was burned, together with the land on which it was situated, had been sold by one Mrs. Cummings to the Waldens for \$2,300, of which, at the time of the fire, they had paid \$630. In the meantime the Waldens had sold the property to Mrs. Sophie Gwertz at the agreed price of \$3,000, of which she had paid approximately \$600. At the time of the fire there was a \$3,000 insurance policy on the house, which was issued to Mrs. Cummings with an attached "contract of sale clause" in favor of C. B. and E. F. Walden, covering their interest in the property under their contract with Mrs. Cummings.

[3] There is an abundance of testimony about the circumstances of the fire showing that it was of incendiary origin. The evidence is likewise amply sufficient to sustain the verdict against defendant Colson. There was introduced in evidence a statement which appears to have been freely and voluntarily made by Colson to the county fire warden. In that statement Colson described in much detail how he had entered the house with a pass-key, where he assembled various combustible materials and set fire to the house. He said that he did it "to secure the love of of a girl," Mrs. Walden; that he thought she might leave her husband, and especially if the husband did not have anything at all; that he thought that if he did this they might separate and he would get the girl. There are, in the evidence, some facts, concerning the friendly relations between the Waldens and Colson which tend to support this theory of Colson's motives.

[4, 5] Concerning Clarence B. Walden, a very different case is presented. There was introduced in evidence a statement made by Mrs. Walden, to some extent implicating her husband in the burning of the house. The jury was properly instructed that it must not consider that statement as evidence against her husband. It will be presumed that the jury obeyed that instruction. Defendants Walden were living in the house in question, as tenants of their vendee, Mrs. Gwertz, at the time of the fire. According to uncontradicted testimony, the Waldens left home in their automobile after noon in the day preceding the night of the fire, and did not return to the neighborhood of their home until after the fire had occurred; also there was introduced in evidence a statement made by appellant Walden, wherein he told the assistant fire warden, Kennedy, about the places where he and his wife had been during the afternoon and night. According to Kennedy's testimony, Walden said:

That "going home they got to within a block of the house when he saw it in flames. He said he turned around and beat it to Bakersfield. I asked him why, when he saw his house burning, why he did not go to find out the cause, or try to put it out. He said he was afraid on account of his bad record that he would be suspected. He said he went to protect his wife."

This is the only competent evidence in the record which can be said to be evidence tending to connect appellant Walden with the burning of the house. It shows flight under circumstances which might be taken as evidence of consciousness of guilt, if there had been any other incriminating evidence against him, but, taken alone, it is not sufficient even for that purpose. There is no evidence that at that time Walden knew that anybody had set fire to the house; in other words, there is no evidence that he knew that a crime had been committed or that he was likely to be accused thereof.

The judgment against appellant Colson and the order denying his motion for a new trial are affirmed. The judgment against appellant Walden and the order denying his motion for a new trial are reversed.

We concur: HAHN, Justice pro tem.;
CURTIS, J.

75 Cal. App. 606

JONES, Sheriff, v. BUSICK, Judge.
(Civ. 3039.)

(District Court of Appeal, Third District, California. Dec. 15, 1925.)

Appeal and error  612(1)—**Absence of reporter held to justify court in refusing to certify transcript.**

Where shorthand reporter was not present during partial hearing on petition for writ of mandate, on appeal under alternative method provided by Code Civ. Proc. § 953a, court was not authorized to certify to correctness of transcript, absence of reporter, who was only one designated by law to make it up, preventing it from being "full, true, and fair transcript" as provided.

Application by Ellis W. Jones, Sheriff, for writ of mandate, to be directed to Charles O. Busick, Judge of the Superior Court of Sacramento County, to require respondent to certify reporter's transcript on appeal. Writ denied.

Ralph H. Lewis and Berkeley B. Blake, both of Sacramento, for petitioner.

Thomas B. Leeper, of Sacramento, for respondent.

PLUMMER, J. This is an application by the petitioner, Ellis W. Jones, for a writ of mandate, requiring the respondent, as judge

of the superior court of the county of Sacramento, to certify a reporter's transcript of the proceedings had in a certain cause entitled Catherine M. Johnston v. Ellis W. Jones, tried before the respondent as a judge of the superior court of said Sacramento county.

The record before us shows that in a certain mandamus proceeding, wherein Catherine M. Johnston was the petitioner and Ellis W. Jones the respondent, a writ of mandate was issued by the respondent in this action, Hon. Chas. O. Busick, as judge of the Superior court of Sacramento county, commanding the said Ellis W. Jones, as sheriff of the county of Sacramento, to release certain property from the levy of an attachment theretofore levied upon by the said sheriff under attachment proceedings taken and had in the superior court of Sacramento county. After the granting of the writ of mandate herein first referred to, the respondent in that action and the petitioner in this gave notice of an appeal under the alternative method provided for by section 953a of the Code of Civil Procedure. The clerk prepared the papers constituting the judgment roll, and the shorthand reporter transcribed the phonographic notes taken by him during the course of the trial. Upon presentation of the reporter's notes, as typewritten, the respondent declined to certify to the correctness of the same, on the ground that they were not complete, that a portion of the trial of this cause was had in the absence of a phonographic reporter, and that, in such cases, section 953a did not apply, and the only method by which a record could be made up, and alleged errors, if any, presented on appeal, was by a bill of exceptions.

The record, as presented to us by the petition and affidavits submitted upon this application, shows that on the 22d day of August, 1925, a partial hearing was had on the petition for a writ of mandate filed for the purpose of requiring the sheriff to release certain attached property. The affidavits are to the effect that the verified petition was offered in evidence; that certain oral stipulations were entered into in open court in relation thereto, and that these stipulations were to some extent subsequently modified; that the cause was partially argued, and then continued until the 24th day of August, 1925, with permission to the respondent to file an answer. Upon the 24th day of August, 1925, when the cause was called for hearing, the respondent filed both a demurrer and answer, and the trial was proceeded with until a final determination. No reporter was present on the 22d day of August, but a reporter was present and took stenographic notes of the partial trial had on the 24th day of August, 1925. The reporter's notes, as typewritten, included only that

which took place on the said 24th day of August.

It is contended, on the part of the petitioner herein, that nothing took place on the 22d day of August which should have been set forth in the reporter's notes, that the petition for a writ of mandate in the case of *Johnston v. Jones* is a part of the clerk's record, and does not need to be set forth in the reporter's notes, that the stipulations entered into and made in open court were not entered in the minutes kept by the clerk, and that the subsequent hearing had on the 24th day of August constituted all there was of the trial. This position is controverted by the respondent. It is for this very reason, and to avoid such controversies, that, when an appeal is taken by the alternative method, the presence of a reporter is necessary to take stenographic notes of all the proceedings had in the cause. The third paragraph of section 953a expressly provides that the notes, as typewritten, shall contain a—

"full, true and fair transcript of the proceedings had at the trial, the testimony offered or taken, evidence offered or received, instructions, acts or statements of the court, also all objections and exceptions of counsel and matters to which the same relate."

It has been frequently held that the shorthand reporter is the only one designated by law to make up such transcript, and, where there is no reporter present to take down the proceedings, the trial judge is not authorized to certify to the correctness of the transcript. The following cases are decisive of this question: *Martin v. Pac. Gas & Elec. Co.* (Cal. Sup.) 234 P. 321; *Bush v. Allen*, 172 Cal. 102, 155 P. 456; *Totten v. Barlow*, 165 Cal. 378, 132 P. 749; *Allen v. Conrey*, 22 Cal. App. 409, 134 P. 730; *Koeberle v. Coit*, 46 Cal. App. 642, 189 P. 727. The case of *Pierce v. Works*, 171 Cal. 684, 154 P. 852, does not involve the question of any proceeding or trial had during the absence of a phonographic reporter, and therefore is inapplicable to the case at bar.

Writ denied.

We concur: FINCH, P. J.; HART, J.

75 Cal. App. 585

CASWELL v. BAKER & CO., Inc.
(Civ. 2933.)

(District Court of Appeal, Third District, California. Dec. 14, 1925. Hearing Denied by Supreme Court Feb. 11, 1926.)

1. Appeal and error ⇨994(3)—Courts of appeal bound by determination of trial court as to credibility of witnesses, if there is nothing inherently improbable in testimony.

Courts of appeal are bound by determination of trial court as to credibility of witnesses, if

there is nothing inherently improbable in the witnesses' testimony and nothing showing that it cannot be true.

2. Warehousemen ⇨34(7)—Testimony held to show wrongful issuance of warehouse receipt for beans deposited by tenant claiming share.

In action for conversion of beans, testimony held to support plaintiff's contention that tenant had deposited beans with warehouse company with directions that plaintiff was to have share, and that warehouse company had wrongfully issued warehouse receipts for the full amount.

3. Warehousemen ⇨25(8)—Statute excusing refusal to deliver goods until validity of adverse claims determined does not apply to dispute between claimant and warehouseman as to title.

Warehouse Act, § 18, excusing warehouseman for liability for refusing to deliver goods pending determination of adverse claims, does not apply to controversy wherein warehouseman asserts claim of title adverse to that of claimant.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by C. H. Caswell against Baker & Co., Inc. From a judgment for plaintiff, defendant appeals. Affirmed.

Dennett & Zion, of Modesto, for appellant.
T. B. Scott, of Modesto, for respondent.

PLUMMER, J. Plaintiff had judgment in an action for the value of 192 sacks of beans alleged to have been converted by the defendant Baker & Co., from which judgment the defendant appeals.

[1] Both the appellant and the respondent set forth a résumé of the testimony in the briefs submitted on this appeal. After setting forth the testimony, appellant makes this statement:

"With these facts in mind, it is the contention of the defendant that no credence can be placed upon his (plaintiff's) testimony as to what he did, or where he did it, and that such testimony should be given no credence in the consideration by the court as to whether he is entitled to relief."

It is almost commonplace for us to state that with the credibility of witnesses courts of appeal have nothing to do. The trial court has the witnesses before it, and if the trial court accepts the testimony of a witness and there is nothing inherently improbable in the witnesses' testimony, or nothing showing that it cannot be true, courts of appeal are bound by the determination of the trial court.

The testimony set forth in the transcript shows that during the year 1922 one McBride was a tenant of the plaintiff Caswell; that during the year 1922 McBride farmed lands belonging to Caswell and raised thereon 537 sacks of cleaned beans; that McBride farmed Caswell's land upon shares; McBride's por-

tion of the beans numbered 345 sacks, Caswell's portion 192 sacks; that after the beans were harvested, McBride employed a truckman to haul the beans and deliver the same at a warehouse belonging to the defendant; that immediately after the beans had all been hauled and delivered to the warehouse belonging to the defendant, McBride called at the warehouse, had a conversation with Mrs. Kelly, a bookkeeper of the defendant, asked for a piece of paper that he might figure out the number of sacks belonging to himself and the number of sacks belonging to Caswell, and at that time stated that Caswell owned a certain portion of the beans just delivered; that McBride was informed by Mrs. Kelly that the fairest way to divide the beans would be to wait until they had been cleaned; that upon the receipt of the beans by Baker & Co. tags were issued therefor for the several sacks of beans, the heading of which tags, after giving the date, read as follows: "Received from McBride for account of M. B. & G. Co." Then follows a detailed statement of the number of bags and gross weight of beans received. These tags were delivered to McBride. McBride testified that he did not examine these tags and that he never gave directions to any one that the tags should be made out in favor of M. B. & G. Co., which the testimony shows to be the letters used to indicate Modesto Bean & Grain Company; that shortly after the beans had been recleaned McBride, in company with an official of the Modesto Bean & Grain Company, went to the office of the defendant and had a warehouse certificate for 345 sacks of beans issued in favor of the Modesto Bean & Grain Company; McBride testified that he never gave any agent or official of the defendant any directions to issue any warehouse certificate to any one covering the remaining 192 sacks of beans. The record shows that Baker & Co. did issue warehouse receipts or certificates in favor of the Modesto Bean & Grain Company covering the 192 sacks of McBride beans which McBride and Caswell testified belonged to Caswell as his share of the beans raised upon the Caswell ranch. Some time after certificates had been thus issued covering all the beans delivered at the warehouse of Baker & Co. by McBride, the Modesto Bean & Grain Company, discovered that it had to its credit 192 sacks of beans deposited by McBride with Baker & Co. that the Modesto Bean & Grain Company had not purchased and thereupon wrote the following letter:

"Dec. 28, 1922.

"Baker & Company, Modesto, Cal.—Dear Sir: There are 192 sacks of the McBride Blackeyes, a portion of lot No. 6571 which belong to C. H. Caswell. The Modesto Bean & Grain Company never had any title to these beans. About November 12th when we learned the fact that we had not purchased these beans, we set aside lot No. 6692 W-R No. 800—192 sacks for Mr.

Caswell. Please deliver these beans or their equivalent to Mr. Caswell, and oblige.

"Modesto Bean & Grain Co.,

"By P. S. Bomberger, President.

"Carbon copy sent to Mr. Caswell.

"O. K. W. T. Scoon, Trustee."

On the right-hand side: "O. K. JWH."

[2] It further appears from the transcript that at the time of the writing of this letter by the president of the Modesto Bean & Grain Company to Baker & Co. that the bean company was in financial difficulties and at the same time owed Baker & Co. a considerable sum of money, and that at the time of the writing of this letter the defendant had in its possession 551 sacks of beans inclusive of the 192 sacks of beans which Baker & Co. had been directed to transfer to the account of Caswell on the ground that the bean company had not purchased the same. It further appears from the transcript that under these circumstances and the financial difficulties in which the Modesto Bean & Grain Company was laboring as a debtor of Baker & Co., Baker & Co. took the 551 sacks of beans before referred to, sold the same as its own, giving credit to the bean company for the 551 sacks of beans above mentioned. In the latter part of December the plaintiff called upon the defendant and demanded his 192 sacks of beans. These beans the defendant refused to deliver, alleging that they were covered by outstanding warehouse receipts. Warehouse receipts, however, had been returned by the Modesto Bean & Grain Company sufficient to cover the quantity of beans to which the plaintiff alleged he was entitled, though it would appear that they were not the identical beans, as the letter quoted calls for the identical beans or their equivalent. Some days after the refusal of the defendant to deliver the beans claimed by the plaintiff, this action was begun. The appellant, among other things, urges that the testimony is contrary to the findings made by the trial court. This claim, however, is supported only upon the theory that the defendant's version of the transaction, or rather that the version of the transaction as testified to by the defendant's witnesses, is correct, but, as we have said, there is testimony supporting the plaintiff's contention that the beans were deposited with the defendant; that the defendant was informed that Caswell was entitled to a share of the beans; that directions were never given by McBride or the plaintiff to issue a warehouse certificate to the Modesto Bean & Grain Company for any greater number than 345 sacks of said beans; that the warehouse certificates issued in favor of the bean company covering the remainder of said beans were made without any directions being given therefor, either by McBride, the plaintiff, or the bean company, and that the bean company notified the defendant of the mistake; that the defendant

thereafter sold the beans and credited the Modesto Bean & Grain Company for the amount thereof on the claim or account that the defendant held against the said bean company. There is testimony also to the effect showing the value of the beans at the time of the alleged conversion was equal to the judgment rendered by the trial court.

The appellant makes the further contention that the cause of action, if any, which the plaintiff had, was barred by the provisions of section 18 of the act of the Legislature, approved March 19, 1909 (St. 1909, p. 440), and the amendments thereto. That section reads as follows:

"If some one other than the depositor or person claiming under him has a claim to the title or possession of the goods, and the warehouseman has information of such claim, the warehouseman shall be excused from liability for refusing to deliver the goods, either to the depositor or person claiming under him or to the adverse claimant, until the warehouseman has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead. If such adverse claimant shall not bring suit and serve summons on the warehouseman within forty-eight hours after the service of notice of his adverse claim, such failure shall act as a complete abandonment of such adverse claim."

[3] In deciding this contention, which was argued in the court below, the learned trial judge used the following language, which we adopt as correct:

"The first point to be considered is whether the provisions of section 18 of the Warehouse Act are applicable to the case under consideration. This section is quoted in full in the briefs submitted by the attorneys for both parties, and it is not necessary to incorporate it herein. I think from a reading of this section that it is not applicable to the situation which is now before the court in the pending case. In the pending case, the warehouseman, himself, is making a claim to the grain deposited or stored as against a depositor. I think the section must be construed to mean that where two or more persons other than the warehouseman have a claim to the articles stored that the warehouseman would then have the right to insist that this section of the Warehouse Act be complied with. But where the situation is such that a direct suit in conversion is brought against the warehouseman himself, charging the warehouseman with conversion, it cannot be argued that this section is applicable. The dispute here is between the defendant and the plaintiff; no one other than Caswell and Baker & Co. are making claims to this property. McBride makes no claim to the property in question, neither does the Modesto Bean & Grain Company; in fact, all the parties who might claim title that the property was the property of the plaintiff, other than the defendant, warehouseman. It seems to me that the slightest analysis of the section in question would lead one irresistibly to the conclusion that this section was only meant to apply where two or more persons other than

the warehouseman were making claims to property deposited and held under warehouse receipt."

We think the judgment of the trial court should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

75 Cal. App. 437

GILBERT v. SHERROD et al. (Civ. 5275.)

(District Court of Appeal, First District, Division 2, California. Dec. 5, 1925.)

1. Appeal and error $\S$ 82(1), 873(1)—Order striking cross-complaint, filed after final judgment, is appealable, and, where no appeal taken, order cannot be held improper.

A motion striking a purported cross-complaint, filed after notice of motion for new trial, is an order made after final judgment, and is appealable, so that, where no appeal was taken, the order cannot be held to have been improperly rendered.

2. Appeal and error $\S$ 544(1)—Order striking cross-complaint, being made after final judgment, can be considered only when presented on bill of exceptions, in absence of which order cannot be held improper.

A motion striking purported cross-complaint, filed after notice of motion for new trial, being an order made after final judgment, can be considered on appeal only when presented on bill of exceptions, and where no bill was settled or printed in transcript, the order cannot be held to be improper.

3. Pleading $\S$ 352—Cross-complaint, filed after final judgment without authority of court, held properly stricken.

Where purported cross-complaint was filed after the entry of final judgment, without authority of court, as required by Code Civ. Proc. $\S$ 442, it was properly stricken.

4. Appeal and error $\S$ 706(3)—Denial of new trial not subject to review, where none of papers on which motion was based were presented in bill of exceptions.

Where none of the papers upon which motion for a new trial was based were presented in a bill of exceptions, ruling denying a new trial is not subject to review.

5. Ejectment $\S$ 112—Claim presenting no issue under the pleadings is not ground for new trial.

Claim by defendants in ejectment suit that, if plaintiffs had complied with certain conditions suggested by them, defendants would have been able to raise sufficient money to pay off indebtedness and prevent foreclosure of trust deed under which plaintiffs obtained title, not presenting any issue under the pleadings, is not ground for a new trial.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action in ejectment by Charles L. Gilbert against William H. Sherrod and wife and

another. Judgment for plaintiff, and defendants named appeal. Affirmed.

James E. Fenton, James W. Bell, C. C. Mishler, and John F. Keogh, all of Los Angeles, for appellants.

Julius V. Patrosso, of Los Angeles, for respondent.

NOURSE, J. Plaintiff sued in ejectment to recover possession of certain real property in the city of Los Angeles. Judgment went for the plaintiff, and defendants William H. Sherrod and Mildred H. Sherrod appeal on the judgment roll.

The complaint and answers are in the usual form in actions of this nature. The complaint was filed on July 8, 1922. The action was tried on August 25, 1922, and judgment was entered in favor of the plaintiff on September 13, 1922. On September 22d the defendants gave notice of their intention to move for a new trial, and on October 2d filed affidavits to be used on this motion, together with a pleading designated as a cross-complaint in equity. This pleading was, on motion of the plaintiff, stricken from the files on October 18th. Defendant's motion for a new trial was apparently denied, though this does not appear in the transcript. The notice of appeal recites that the appeal is taken by the defendant William H. Sherrod and his wife from the judgment and from the order overruling their motion for a new trial. No bill of exceptions was settled, but the transcript contains a number of affidavits and other papers, followed by the clerk's certificate that they are true copies of the documents on file.

On this appeal the appellants urge two grounds for a reversal: That the order striking their cross-complaint from the files was improper, and that the trial court erred in denying their motion for a new trial. The arguments advanced by the appellants in their brief are specious and insincere and do not merit consideration.

[1-5] The answers to both grounds are simple, and do not require elaboration. First: (a) The motion striking the purported cross-complaint from the files is an order made after final judgment. It is an appealable order. No appeal was taken from it. (b) Being an order made after final judgment, it could be considered on appeal only when presented on a bill of exceptions. No bill was settled or printed in the transcript. (c) Section 442, Code of Civil Procedure, authorizes the filing of a cross-complaint at the time of answering or subsequently thereto by permission of the court. The purported cross-complaint having been filed after the entry of final judgment and without permission of the court, it was properly stricken from the files. Second: (a) As none of the papers upon which the motion for a new trial was based has been presented in a bill of excep-

tions, the ruling of the trial court in denying a new trial is not subject to review. *Linthorpe v. San Francisco Gas & Electric Co.*, 156 Cal. 58, 67, 103 P. 320, 19 Ann. Cas. 1230. (b) The only reason urged by appellants for a new trial was that, if respondent had complied with certain conditions suggested by appellants, they (the appellants) would have been able to raise sufficient money to pay off the indebtedness and thus prevent a foreclosure of the trust deed under which respondent obtained title. As this was not an issue under any conception of the pleadings, it was not a ground for a new trial.

Judgment and order affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

75 Cal. App. 434

PEOPLE v. WALSH et al. (Cr. 1131.)

(District Court of Appeal, First District, Division 2, California. Dec. 5, 1925. Hearing Denied by Supreme Court Feb. 1, 1926.)

1. Criminal law $\S$ 232—Defendant held not to have been denied counsel at preliminary hearing so as to justify setting aside of information.

Where defendant, charged with burglary, was represented by counsel at first hearing, and given opportunity of accepting other counsel after reasonable continuance had been granted, the information will not be set aside on ground that committing magistrate had denied defendant right of counsel at preliminary hearing.

2. Burglary $\S$ 19, 24—Information need not state time or details of burglary.

Information, charging burglary, need not state whether burglary had been committed in daytime or nighttime, or detail facts of larceny intended to be committed by defendant when he made the entry.

3. Indictment and Information $\S$ 59—Information not defective for failing to specify degree of burglary.

An information, charging burglary, is not defective in failing to specify degree of burglary alleged to have been committed.

4. Criminal law $\S$ 622(2)—Trial court held not to have abused its discretion in refusing a separate trial.

In prosecution for burglary against two defendants, trial court, in denying motion for separate trial did not abuse discretion given it in such matter by Pen. Code, $\S$ 1098.

5. Criminal law $\S$ 1134(3)—Grounds for impeaching verdict, frequently found insufficient, not considered, where conviction based on unimpeached testimony.

Where record showed that defendant charged with burglary was fairly tried and convicted on evidence which was not impeached or questioned on appeal, other grounds tending to impeach the verdict, which have been frequently held insufficient, will not be considered.

Appeal from Superior Court, Alameda County; H. D. Burroughs, Judge.

Thomas Walsh was convicted of burglary, and he appeals. Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

NOURSE, J. The defendant and appellant was tried on an information charging him jointly with one Dorney with the commission of the crime of burglary. The two defendants were tried together, and the trial resulted in a verdict of guilty as to the defendant Walsh and in a disagreement as to the defendant Dorney. The defendant Walsh has appealed from the judgment following the verdict and from the order denying him a new trial. The appeal is presented on a record prepared under section 953a, Code of Civil Procedure.

It would serve no purpose to outline the facts of the case, as it is conceded that there was sufficient competent evidence before the jury to support the verdict of guilty. The grounds urged by the appellant for a reversal cover assignments of error which are claimed to have occurred during the course of the trial. These grounds will be considered in the order presented.

[1] First. It is claimed that the trial court erred in denying appellant's motion to set aside the information on the ground that the committing magistrate had denied appellant the right of counsel at the preliminary hearing. Appellant cites *People v. Napthaly*, 105 Cal. 641, 39 P. 29, but the case is inapplicable because the appellant here was represented by counsel at the first hearing and was given the opportunity of accepting other counsel after a reasonable continuance had been granted by the committing magistrate. The case on the facts is similar to the case of *People v. Caballero*, 41 Cal. App. 146, 149, 182 P. 321, and the rule in that case supports the action of the trial court in denying appellant's motion.

[2, 3] Second. The appellant urges that the trial court erred in overruling his demurrer to the information. The point raised was that the information was insufficient because it did not state whether the alleged burglary had been committed in the daytime or in the nighttime, and because it failed to detail the facts of the larceny which it alleged the appellant intended to commit when he made the entry. On each ground the point has been ruled adversely to appellant. *People v. Jefferson*, 52 Cal. 452, 454; *People v. Smith*, 86 Cal. 238, 240, 24 P. 988. It is also argued that the information was defective in that it did not specify the degree of burglary which the appellant was charged to have committed, but this point has been

covered by *People v. Jefferson*, supra, where an information in similar form was held sufficient.

[4] The appellant complains of the action of the trial court in denying his motion for a separate trial. It seems unnecessary to do more than to refer to section 1098 of the Penal Code, which expressly provides the procedure to be taken when two defendants are jointly charged with the same crime. By the terms of that section such parties must be tried jointly, unless the trial court in its discretion grants a separate trial. We see no abuse of this discretion on the part of the trial court in denying appellant's motion for a separate trial.

[5] Other grounds urged on the appeal relate to the efforts of the appellant to impeach the verdict of the jury on various grounds which have time and again been held insufficient, and we deem it unnecessary to discuss these points, inasmuch as an examination of the record discloses that the appellant was fairly tried and convicted upon evidence which was not impeached and which has not been questioned on this appeal.

Judgment and order affirmed.

We concur: **LANGDON, P. J.; STURTEVANT, J.**

75 Cal. App. 497

In re MORTON (Civ. 5254.)

(District Court of Appeal, Second District, Division 1, California. Dec. 10, 1925.)

1. Attorney and client §61—On showing of good conduct for seven years, after disbarment, petitioner held entitled to reinstatement.

On showing that during seven successive years, after disbarment, petitioner has lived a clean, sober, and honorable life, and has gained confidence and approval of the bench and bar of another state, there being no opposition from the bar association, petitioner is entitled to be reinstated as an attorney at law.

2. Attorney and client §61—Mere sentimental belief that punishment has been sufficient does not justify restoration to the bar.

A mere sentimental belief that erring lawyer has been punished enough will not justify his restoration to the bar; the question being whether applicant, notwithstanding former delinquency, is now fit to be admitted to practice of law, and whether there is reasonable grounds to believe that fitness will permanently abide in him.

3. Attorney and client §61—Reinstatement after disbarment should be difficult.

Reinstatement after disbarment should be difficult, rather than easy, to obtain.

In the matter of the application of **W. Ona Morton** for reinstatement as an attorney at law. Application granted.

Wm. J. Clark, of Los Angeles, for applicant.

CONREY, P. J. By judgment of the superior court of Los Angeles county, entered in the year 1918, the petitioner was deprived of his license to practice law in the state of California. The facts, as found by the court in that proceeding, are set forth in a decision of the Supreme Court. *In re Morton*, 179 Cal. 510, 177 P. 453.

[1] Petitioner alleges that during the succeeding seven years he has lived a "clean, sober, and honorable life," and has gained the confidence of all of the members of the bench and bar in the Texas counties where he has been practicing for some years under a license obtained prior to his former residence in California, although the fact of his disbarment in California was well known in Texas. These allegations are strongly supported by letters which bear the signatures of numerous lawyers, including some of the district judges and some of the justices of the Court of Appeals of the state of Texas.

Ample notice of the present application has been given to the Los Angeles Bar Association which prosecuted the disbarment proceeding against Mr. Morton. The Bar Association presents no opposition to the reinstatement. On the contrary, the justices are directly informed by the president of the association that its trustees have considered the matter and have determined that no objection should be made. We take this as a definite decision that no objection ought to be made.

[2, 3] The principles which should control in a matter of this nature are quite clear. A mere sentimental belief that the erring lawyer "has been punished enough" will not justify his restoration to the bar. In *re O'Connell*, 64 Cal. App. 673, 222 P. 625. The real question is: Notwithstanding his former delinquency, is the applicant now fit to be admitted to the practice of the law, and is there reasonable ground to believe that this fitness will permanently abide in him? As was said in *O'Connell's Case*, *supra*:

"In proceedings of this character the court owes a solemn duty to the community and to the legal profession which must be performed without regard to feelings of sympathy for the applicant."

In other words, reinstatement after disbarment should be difficult, rather than easy, to obtain.

But the law does not intend that the obtaining of such an order shall be practically impossible. In the instant case, the court finds in favor of the application.

It is ordered that W. Ona Morton be and he is hereby restored to the rights and privileges of an attorney and counselor at law, and is

authorized to practice in all of the courts of this state.

We concur: HOUSER, J.; CURTIS, J.

75 Cal. App. 554

IN re NEWELL'S ESTATE.

NEWELL v. NEWELL.

(Civ. 5414.)

(District Court of Appeal, First District, Division 2, California. Dec. 12, 1925. Hearing Denied by Supreme Court Feb. 8, 1926.)

1. Wills $\S$ 360—Failure to actually offer will in evidence not objectionable under circumstances.

In probating will, failure of proponent to formally state that he offered will in evidence and to read will held not open to objection by contestant on appeal, where no motion, objection, or exception called attention of trial court to the omission, and both court and counsel assumed that will was in evidence.

2. Wills $\S$ 302(1)—Proponent's testimony held not to identify different will from that probated.

Proponent's testimony identifying will held not to identify a different will from that probated, because he testified that will stated it was his only will, when no such statement was in will probated, other testimony showing this statement was made by testator.

3. Appeal and error $\S$ 204(7)—Testimony received without objection held not subject to contention that witness was not qualified.

In probating will, testimony of proponent that will was in handwriting of deceased held not reversible error on ground that witness was not qualified, where no objection was made to its reception.

4. Evidence $\S$ 563—Banker held qualified as handwriting expert.

A banker of 23 years' experience, although testifying that he was not an expert in handwriting and had never testified as an expert theretofore and did not personally know handwriting of testator, held qualified as expert to compare handwriting, in view of Code Civ. Proc. $\S$ 1944.

5. Wills $\S$ 386—Appellate court cannot disturb findings of trial court supported by testimony.

In probate of will, where there is direct testimony that deceased signed will, court, on appeal, under Code Civ. Proc. $\S$ 953a, cannot disturb findings of trial court to that effect, and therefore will not order exhibits certified to it in order to make handwriting comparison.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Application by Joseph L. Newell for the probate of the will of Sem Newell, deceased. From a decree in favor of proponent, Francis E. Newell, contestant, appeals. Affirmed.

E. J. Dole, of Petaluma, for appellant.

L. E. Fulwider, of Santa Rosa, for respondent.

STURTEVANT, J. This is a proceeding to contest a will before probate. The proceeding was heard before the trial court sitting without a jury. The trial court made findings in favor of the proponent, and thereafter ordered judgment in accordance therewith. From that judgment the contestant has appealed under section 953a of the Code of Civil Procedure.

[1] The first point made by the appellant is "that no will was before the court as evidence; no will was introduced in evidence; no will was offered in evidence; and no will was even marked for identification; that there is an entire absence of even a prima facie case warranting the admission of the will to probate." The point rests upon the fact that the proponent did not formally state that he offered the will in evidence, and he did not formally read the will; nevertheless we think that the record is not vulnerable to the attack made by the appellant. The appellant does not call to our attention any objection, motion, or exception showing that the point was in any way called to the attention of the trial court. On the calling of the case the proponent commenced to introduce a prima facie case proving his petition for the probate of the will. He called as a witness the proponent, and, having elicited other jurisdictional facts, the attorney for the proponent asked the witness:

"Did your father leave a will? A. He did.

"Q. I will show you this, and ask you if that will is entirely written, dated and signed by the hand of your father? (Showing.) A. The will is written entirely and dated by my father, and states it is his only will."

On cross-examination the attorney for the contestant propounded the question:

"Now you said in your examination by Mr. Fulwider that when your father made the will he stated that it was his only will and the last handwriting he would ever do. A. That is right.

"Q. Were you present when he was writing this? A. No, sir; he told me about it the day after he made it.

"Q. How do you place the time as the day after it was made? A. Because he said: 'I made my will yesterday before noon, and I placed it in the Bible, and I want no man to move it; it is in a place where it should be held inviolate until I am dead.'

"Q. And is that where you found it? A. Yes, sir.

"Q. After his death? A. While he was unconscious.

"Q. You got it before he died, though? A. I got it to make a copy of it, and placed it in the same place it was, so if it was removed I would know what the will was, and it would be a protection to me.

"Q. Then you had a copy of the will before he died? A. Yes; after he was unconscious.

"Q. Where is that copy you made? A. Mr. Fulwider has it.

"Q. I would like to see that. (Mr. Hall examines paper.) Where did you make this copy? A. I made it on the same desk which contains the book he wrote it on.

"Q. When did you make this copy? A. Well; I made it in the kitchen, or the bedroom which was formerly the kitchen, where he laid."

Later the contestant offered the copy in evidence. The court ordered it received and considered read. The copy so received is as follows:

"Copy.

May 9th, 1919.

"In the name of God, amen this is my last Will will I hereby leave all my real and personal property to my son J. L. Newell if he should die before I do then it shall go to my brother's children share and share alike \$5 goes to my son F. E. Newell Signed by Father.

"Copied by J. L. Newell."

Indorsed in ink: "Copy of Will."

The clerk's transcript sets forth the petition for probate of will, and shows that the same was filed April 21, 1924. And immediately following the same transcript contains the will, and shows it was filed April 21, 1924. We have carefully examined the record, and do not find any place in which the appellant claimed that the copy received in evidence was not a true and correct copy. The witness in the chair in numerous places testified that it was. As the witness was leaving the stand the trial court asked the attorney for the proponent if that was his prima facie case. After a discussion, in which the attorney for the proponent, the attorney for the contestant, and the trial court participated, regarding the evidence as to proof of notice, etc., the attorney for the proponent stated: "That is our prima facie showing. The Court: You may proceed then." Thereupon the contestant proceeded to introduce proof of the allegations contained in the written contest. From that point on to the end of the case each attorney at different times referred to the will and asked questions of various witnesses in the same manner and to the same extent as though the original will had been formally read in evidence. Furthermore, after the contestant had introduced his evidence and after the proponent had introduced his evidence and had rested, the contestant called as a witness Mr. R. A. Belden, and after propounding questions and developing the facts that Mr. Belden was a banker of 23 years' experience and had acted in every capacity of the banking business, and had occasion, as a banker, to compare signatures of various parties, the contestant then propounded the following question:

"Q. I show you here a document which is Contestant's Exhibit 1. That is the original will as filed in the clerk's office—that is the original will—and I show you here on page 227 a signature, and ask you to compare them."

Now, as a matter of fact, Contestant's Exhibit 1 was not and did not purport to be the will or a copy of the will, but it was an agreement of hire dated March 19, 1920, as appears on page 16 of the transcript. Be that as it may, the record fully discloses that both attorneys and the trial court were laboring under the impression that the will had been formally admitted in evidence, and each was fully informed as to what was meant by the expression "the will." No one at any time in any place contended or suggested that there were two or more papers purporting to be wills. Under these circumstances we think that the first point made by the appellant is entirely without merit.

[2] The second point made by the appellant is, "So far as there was any identification of a will, it was a different document from that admitted to probate." Supporting this point appellant first quotes the will, then he quotes that part of the testimony printed above where the witness made the answer, "The will is written entirely and dated by my father and states it is his only will." Counsel then argues that, as the will on its face does not show that it is the only will of the decedent, therefore the will admitted to probate was a different will from the will mentioned by the proponent. Whatever there is in the point is quickly dispelled when one picks up the record and reads the further testimony given by the proponent. Immediately following the answer cited by the appellant the contestant interrupted:

"Mr. Hall: That is the only will? A. In other words, he stated it was the last handwriting that he would ever do.

"Mr. Donohue: I did not get that. A. He stated at the time he told me he made the will that it was the last handwriting he would ever do."

At the time of the trial the appellant did not misunderstand the witness because in cross-examination appellant's counsel propounded the question:

"Now, you said in your examination by Mr. Fulwider that when your father made the will he stated that it was his only will, and the last writing he would ever do? A. That is right.

"Q. Were you present when he was writing this? A. No, sir; he told me about it the day after he made it."

[3. 4] The last point made by the appellant in his opening brief is, "That the proponent did not sustain the burden of proof to support the finding that the will admitted to probate was the will of the deceased." Under this point the appellant makes two contentions. He contends that the evidence does not show that the proponent was qualified to state whether the writing on the face of the will was the handwriting of the deceased. A sufficient answer to that contention is that when the question was propounded to the witness as to whose writing it was the witness

was allowed to answer without any objection whatsoever. As supporting the testimony given by the proponent he called as witnesses Joseph G. Morrow and Joseph A. Lombardi. In reply to questions propounded by the proponent, Mr. Morrow testified that:

"I am connected with the First National Bank of Santa Rosa and have been for about 23 years. During that time I have had considerable opportunity from time to time to judge of handwriting and compare signatures. It is a portion of my duties in the banking business to compare handwritings and to compare signatures and to decide from time to time whether signatures are what they purport to be."

And then, in reply to questions propounded by the contestant, the witness testified:

"Almost daily I have been called upon to examine handwritings in the bank. In the legitimate conduct of the affairs of the bank business I compare the handwriting of our customers with checks that they draw. I do not pretend to be an expert. I never testified as an expert on handwriting. I do not profess to be an expert. I am not an expert. I am not familiar with Sem Newell's signature."

Thereupon the contestant objected to the witness testifying as to the signature of Sem Newell because the witness was not qualified. The trial court remarked:

"Personally, I think I would rather trust the testimony of a banker than the testimony of an expert, for the reason that the banker makes it his business in life to compare signatures in paying out money, he depends on that knowledge, and I should think their evidence would be very valuable. * * * Moreover it has been the custom in our state to accept the testimony of banking men as a class, not only in this court, but in every court of this state. I think he is qualified to testify."

Many courts of last resort agree with the trial judge and the reason for his conclusion. Digesting those decisions, Professor Jones says:

"Courts will take notice that certain pursuits are so intimately connected with others as to give those following one of such pursuits unusual facilities for becoming acquainted with the other; and if the occupation and experience of the witness have been such as to give him the requisite means of knowledge of the subject, he may be competent as an expert, although engaged in some other occupation or even if he has abandoned the business to which the inquiry relates. * * * In order that a witness should be competent as an expert in respect to handwriting, it is not necessary that he should belong to any particular calling or profession. It is only necessary that the business opportunities and intelligence of the witness should be such as to enable him to have reasonable skill in judging of handwriting. While it is not necessary that the witness should have made the comparison of handwriting a specialty, it should appear that he has been engaged in some business which calls for frequent comparisons, and that he has in fact been in the habit for a

length of time of making such comparisons." Jones on Evidence (3d Ed.) pp. 556, 861, 862.

It seems clear therefore that, although Mr. Morrow did not know that he was a writing expert, nevertheless, under the law, he was fully qualified as such. What has been said regarding Mr. Morrow applies equally to Mr. Lombardi. The trial court did not err in receiving their testimony. Code Civ. Proc. § 1944.

[5] In concluding his reply brief the appellant states that if we disagree with him in the legal proposition that no prima facie case had been made, that then this court order certified up to this court Contestant's Exhibits 3, 4, 5, and 6, exemplars of handwriting, and then that this court make the comparison. We would make the order if by so doing it would be of any benefit to the appellant. But it would not be. The question of determining who wrote the signature "Sem Newell" to the will was a question of fact. The very first witness on the stand testified that Sem Newell wrote it. There was therefore evidence in the record in favor of the respondent and against the contestant. The trial court made its finding in favor of the respondent. If all of the exhibits were before this court and this court reached a different conclusion it would have no power to disturb the finding made by the trial court under the circumstances enumerated.

The judgment appealed from is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

75 Cal. App. 561

PEOPLE v. GRIFFIN. (Cr. 1264.)

(District Court of Appeal, First District, Division 2, California. Dec. 14, 1925.)

1. Robbery —24(3)—Evidence of identification sufficiently positive to warrant defendant's conviction for robbery.

Evidence of identification held sufficiently positive to warrant defendant's conviction for robbery.

2. Robbery —23(1)—Testimony identifying defendant as person taking out safety deposit boxes held admissible, though incidentally revealing defendant had assumed different names.

Testimony of bank employees, who identified defendant as person who had taken out safety deposit boxes under different names and who had signed certain entry slips with such names, held admissible, notwithstanding that it incidentally revealed that defendant had assumed different names, where purpose of testimony was to connect defendant with such signatures and then to use them for comparison with signatures of man who placed automobile in garage which had been identified, as one used in perpetrating a robbery.

3. Robbery —24(1)—Evidence held to sustain conviction for robbery.

In prosecution for robbery, evidence held to sustain conviction.

4. Criminal law —740—Court not required to submit question of defendant's sanity to special jury, where no doubt in court's mind on that issue.

Court was not required to submit question of defendant's sanity to a special jury, where at no time during trial was there any doubt in mind of court as to sanity of defendant.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Thomas Griffin was convicted of robbery, and he appeals. Affirmed.

Nathan C. Coghlan, of San Francisco (James A. Himmel, of San Francisco, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

LANGDON, P. J. The defendant was convicted of robbery and appeals from the judgment. The crime with which he was charged was robbing a bank at Clovis, Fresno county, Cal., on February 5, 1924, of approximately \$28,000. The robbery occurred as follows: A man entered the bank and presented a \$20 bill to Thomas Howison, an employee of the bank, and asked for small change. While the change was being counted out, the second robber entered the bank and, pointing a revolver at Howison, commanded him to throw up his hands. Howison's hands were then tied with a rope and he was locked in a vault, which was looted. The vice president of the bank, Mr. R. R. Rayburn, returned from his luncheon before the robbers left the bank. A revolver was pointed at him and he was ordered to stand behind some filing cases. He stepped behind the cases until the robbers left the bank and then ran to the front door in time to see an automobile speeding away. He ran down the street calling to bystanders to stop the automobile, but the men escaped.

At the trial, Rayburn identified the defendant as the man who had pointed the revolver at him. Howison was not able to positively identify the defendant as one of the men who participated in the robbery, but stated that he resembled the man who had asked for the change. He stated that he had not noticed this man particularly because there was nothing to arouse suspicion when he entered, and later Howison's attention was upon the man who held the revolver and commanded him to throw up his hands and afterwards led him into the vault.

[1] Appellant contends that the identification is not sufficiently positive to warrant the conviction. With this contention we do not agree. The identification was positive by the witness Rayburn, even though Howison hes-

itated to be absolutely positive. Furthermore, there is a long and convincing chain of circumstantial evidence before the court, to all of which appellant is strenuously objecting upon appeal.

[2] Rayburn testified that as he approached the bank returning from his luncheon on the day in question, he observed an automobile parked parallel with the curb in the vicinity of the bank. The engine was running and the automobile was distinguishable by the facts that it had recently been repainted and the rear window in the top had been removed, leaving a rather large opening. Rayburn and other persons testified that such an automobile was speeding through the streets of Clovis immediately after the robbery; that two men were in it at the time and one of them was in the rear seat throwing something out of this unusually large opening in the rear. Two witnesses testified that shortly after the robbery occurred and over the course the automobile was driven immediately after the robbery they found numerous "roofing tacks," some of which were admitted in evidence. This automobile was found later in a garage in Fresno and identified and in the back part of it were found a number of roofing tacks corresponding to the tacks found upon the highway. At the time the automobile was driven into this garage, the person who drove it in signed the register: "T. T. Jones." A number of exemplars of defendant's handwriting were admitted in evidence, and two expert witnesses testified that the person who wrote the name "T. T. Jones" upon the garage register was the same person who wrote the handwriting exemplars referred to. Photographs of all these exhibits appear in the record, and it needs no expert to see immediately the strikingly similar characteristics of them all. Some of the evidence objected to upon appeal was introduced to lay a foundation for the introduction of these handwriting exemplars and was clearly admissible for that purpose. It consisted of testimony of employees of banks at Vacaville and Oakland, Cal., who identified defendant as the person who had taken out safe deposit boxes under the names of Tom Ray and T. J. Ryan and who had signed certain entry slips with these names. The slips were then introduced as exemplars of his handwriting. The testimony objected to was not offered to show that defendant had assumed different names, as appellant contends. Incidentally, that was revealed; but the purpose of the testimony was to connect defendant with the signatures and then to use the signatures for comparison with the signatures of the man who placed this automobile in the garage at Fresno which had been identified as the automobile used in perpetrating the robbery.

Defendant was further connected with the possession of this automobile by the following facts to which objection is made as having been improperly admitted: The automobile was identified as having been stolen from a street in Fresno a short time before the robbery was committed. At the time it was stolen it was painted blue and there was a plate-glass window in the rear of the top. It was also equipped with a number of accessories, including two extra tires, an emergency kit consisting of three cans, one for oil, one for gasoline, and one for water, and four rods which were used to support the side curtains of the automobile and other articles. Most of this equipment had been removed from the automobile when it was recovered from the garage in Fresno, and some of it was found in a garage adjoining a house which the defendant had occupied a few days prior to the robbery and was identified by the owner as having been in the automobile at the time it was stolen. In this same garage were found several cans of paint, partially used, and paint brushes which had also been used. The paint in the cans was the same as that applied to the automobile after it was stolen. The owner of the house and garage testified that these articles were not on the premises when the defendant took possession of them. A few days after the robbery defendant left this house without notifying the owner that he intended to vacate it.

[3] There are other facts and circumstances in the record tending to prove the guilt of the defendant, but it is unnecessary to set them all out here; those facts which we have recited abundantly support the verdict of the jury.

[4] It is contended the court erred in refusing to submit the question of defendant's sanity to a special jury. In passing upon this motion, the trial court said that at no time during the trial had there been any doubt in the mind of the court as to the sanity of the defendant. It follows that the motion was properly denied. *People v. Stock*, 19 Cal. App. 748, 750, 127 P. 798; *People v. Hettick*, 126 Cal. 425, 426, 58 P. 918.

The other objections made are so lacking in merit as to require no discussion. In conclusion we may add that the record before us is unusually free from error. It is a lengthy record, and, after a careful reading of it, we are of the opinion that great care was used in the preparation and handling of this case and in gathering the evidence and that there is no reasonable doubt of the guilt of the defendant.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

75 Cal. App. 459

PEOPLE v. CHAND. (Cr. 867.)

(District Court of Appeal, Third District, California. Dec. 7, 1925.)

1. Perjury ⚡32(6)—Evidence in previous civil action held material.

In prosecution for perjury, where accused had been plaintiff in civil action, in which issue was whether certain money was received by defendant therein as purchase price of certain property, *held*, evidence of delivery of bill of sale to accused was material to issues in such case, since it would tend to show money was received as purchase price of the property.

2. Perjury ⚡11(8)—Relevant testimony having any probative force is "material to issue."

To constitute perjury, testimony need not be directly and immediately material, but it is sufficient that it be so connected with a fact directly in issue that it has a legitimate tendency to prove or disprove it.

3. Perjury ⚡11(8)—Witness who falsifies in giving any relevant testimony commits perjury.

Any testimony which is relevant in trial of given case is so far material to the issue as to render witness who knowingly and willfully falsifies in giving it guilty of crime of perjury.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Kishan Chand was convicted of the crime of perjury, and he appeals. Affirmed.

Honey & Lawson, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the crime of perjury. This appeal is from the judgment.

The information charges that the defendant, in a civil action in which he was plaintiff and Joseph Taylor was defendant, gave false testimony as follows:

"Q. Mr. Chand, at the time you gave to Mr. Taylor the two drafts that you testified about, did you receive from him another paper? A. No, sir; nothing.

"Q. Isn't it a fact that he gave you a bill of sale? A. No, sir; never.

"Q. Isn't it a fact that Mr. Taylor, in his office, gave you a bill of sale? A. Never; he took me to his back room and received two drafts, one \$500 and the other \$400, and got me to indorse.

"Q. And you testified that you did not receive any bill of sale? A. Nothing, sir; and nobody was there, and he received the two drafts in his back room.

"Q. Do you know a man by the name of J. C. Williams? A. I never been acquainted with him.

"Q. Don't you know, as a matter of fact, that you took Mr. Williams to the office of Mr. Taylor, the defendant, and you instructed him to

make the bill of sale in Mr. Williams name? A. I never been acquainted with that party."

The complaint and answer in the civil action were introduced in evidence. The defendant stipulated that "they are the complaint and answer in that action," and that, at the trial thereof, the defendant herein was duly sworn as a witness and gave the testimony set out in the information.

The complaint so introduced alleged that the defendant in that action was indebted to the plaintiff therein "for money had and received from said plaintiff in the sum of \$1,075 to and for the use of plaintiff." The answer denied the allegations of the complaint and alleged that:

"As agent and broker for one Marie Smith, defendant * * * sold to plaintiff for the agreed price of \$1,000 the contents, that is to say, furnishings then and there in and upon the premises then and there owned by the said Marie Smith, and known as the Queen rooming house * * * in the city of Stockton. * * * At the time and place of the making of the said sale, as alleged, plaintiff made a deposit * * * in the sum of \$200. * * * On September 8, 1924, the balance of the purchase money in the sum of \$800 was paid to defendant by plaintiff, and an additional sum of \$75 was paid at the same place and time by plaintiff to defendant as an adjustment on rentals due from tenants of the 'Queen.' At the said time and place * * * defendant delivered to plaintiff a bill of sale, covering the property just purchased, signed by the said Marie Smith, of the said premises to plaintiff; that defendant at all times acted for and on behalf of his principal, the said Marie Smith, in the said transaction, and not for plaintiff."

[1] It is not contended that the evidence herein is insufficient to show that the testimony admittedly given by defendant is false, but appellant urges that there is no evidence tending to show that such testimony was material in the trial of the civil action. Appellant says:

"There is nothing in the record which would disclose whether or not a demurrer had ever been interposed or sustained to the answer; no showing as to whether or not a motion to strike the answer or a portion of it from the files had been made or granted; no showing that the trial was had upon the issues raised by the affirmative matter set forth in the answer."

[2] The defendant's stipulation that the complaint and answer admitted in evidence "are the complaint and answer in that action" clearly relates to the complaint and answer upon which the action was tried. Had a demurrer to the answer been sustained or any part thereof stricken out, or had the answer been superseded by a subsequent pleading, then such answer would not have been the "answer in that action" at the time the stipulation was made. The answer admitted the receipt by the defendant in that

action of the amount of money alleged in the complaint therein. The issue in the action was whether such money was received by defendant for the use of the plaintiff or in payment of the purchase price of the personal property described in the answer. Evidence of the delivery to and acceptance by the plaintiff in that action of a bill of sale of such personal property at the time the money was delivered to the defendant therein would certainly tend to show that the money was given in payment of the purchase price of the property, and not for the use of the plaintiff as alleged in the complaint. The testimony set out in the information therefore was material to the issues raised by the pleadings in the civil action.

"The matter sworn to need not be directly and immediately material. It is sufficient if it be so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove such fact by giving weight or probability to the testimony of a witness testifying thereto, or otherwise." 22 Am. & Eng. Ency. of Law, 687; *People v. Patterson*, 64 Cal. App. 223, 229, 221 P. 394; *People v. Phillips*, 56 Cal. App. 291, 293, 205 P. 40; *In re Braynard*, 52 Cal. App. 631, 634, 199 P. 576.

[3] "Any testimony which is relevant in the trial of a given case is so far material to the issue as to render a witness who knowingly and willfully falsifies in giving it guilty of the crime of perjury." *State v. Miller*, 26 R. I. 282, 286, 58 A. 882, 884 (3 Ann. Cas. 943).

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

75 Cal. App. 421

PEOPLE v. SHEIK. (Cr. 1199.)

(District Court of Appeal, Second District, Division 1, California. Dec. 4, 1925.)

1. Criminal law §200(8) — Though misrepresentations made to several persons at same time, conviction may be had on as many counts as there were persons defrauded on different dates.

One making misrepresentations at same time to several persons, to whom he subsequently sold corporate stock on different dates, may be convicted of obtaining property or money by false pretenses on as many counts as there were individuals defrauded.

2. Criminal law §881(2) — One shown to have obtained bank checks by false pretenses cannot complain of conviction for obtaining "money and property"; "property."

One generally charged with obtaining "money and property" by false pretenses, and in detail with obtaining "property," to wit, bank checks, which the evidence shows were cashed and money obtained, cannot complain of conviction for obtaining "money and property" for

lack of conformity, within Pen. Code, § 1162, on ground that property and not money was obtained, particularly in view of Civ. Code, § 14, and Pen. Code, § 7, declaring that word "property" includes property real and personal, and that personal property includes money.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property.]

3. Criminal law §875(1) — Validity of verdict is not affected because more words were used than necessary to express meaning intended.

Validity of verdict is not affected because more words were used than were necessary to express meaning intended.

4. Criminal law §829(1) — Refusal to give requested instruction covered by others given held not error.

Refusal to give requested instruction covered by others given held not error.

5. Criminal law §1169(2) — Admission of evidence without proper foundation held harmless error.

Error in admitting, without proper foundation, records of corporation held harmless where later evidence fully established authenticity of such records.

6. Criminal law §1169(2) — Erroneous admission of evidence establishing particular date held harmless.

Erroneous admission in evidence of certain records, from which a date material to inquiry was supplied, held not prejudicial, where same date was established through other sources.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

J. A. Sheik was convicted of obtaining money and property by false pretenses, and he appeals. Affirmed.

Perky & McConnell, of Long Beach, and Clarence S. Hill, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Erwin W. Widney, Deputy Atty. Gen., and John L. Flynn, of Los Angeles, for the People.

HOUSER, J. Defendant was convicted and sentenced on each of six separate counts of an indictment, wherein he was charged with the crime of obtaining property, or money and property by false pretenses. As to the last three of such counts, the trial court ordered that execution of the sentence be suspended. Defendant appeals from the entire judgment and from the order denying his motion for a new trial.

The transaction out of which the prosecution of defendant arose concerned the sale of stock in a mining company. In brief, defendant was charged with having made false representations with reference to several separate features connected with the matter, including statements that the corporation whose stock was being sold was under the di-

rect supervision of the Corporation Commission; that no commission or bonus of any kind was being paid to any person for the sale of the stock; that defendant had invested \$25,000 of his own money in the stock of the company; and that at the time defendant made the sale of the stock to the several persons named in the indictment \$1,000,000 worth of ore was "blocked out" or "in sight."

It is first contended by appellant that the verdict by the jury was contrary to the law and the evidence, in that there was no evidence as to the falsity of the alleged misrepresentations. The evidence received at the trial was voluminous, and it would serve no useful purpose to review the testimony of the several witnesses in order that the alleged misrepresentations might be shown to have been actually made and to have been relied upon by the purchasers of the stock as the inducing cause of their purchase of the same. Suffice it to say that, after a careful reading of those portions of the record to which attention has been directed, this court is convinced that the record, while not demonstrative in its nature, is ample in every respect to warrant the conclusion that, as to each count of the indictment, at least one of such misrepresentations was made by the defendant with the intention and purpose that the persons to whom such misrepresentations were alleged to have been made should act upon them, and by reason thereof be defrauded thereby, and that such design was actually accomplished.

[1] Appellant's next two specifications of error in effect are, that because practically all the misrepresentations were made at the same time and to all the several persons to whom defendant sold the stock, although at different dates, the right did not exist to prosecute defendant under as many counts as there were individuals defrauded, but that there could be but one information or one indictment for one alleged criminal act.

In the case of *People v. Brannon* (Cal. App.) 233 P. 88, the point thus presented by appellant is fully considered and the authorities reviewed, with the conclusion that (syllabus) "where two or more persons are injured by a single criminal act, there are as many separate and distinct offenses as there were persons injured by the unlawful act." To the same effect is the case of *People v. Majors*, 65 Cal. 138, 3 P. 597, 52 Am. Rep. 295. It would follow that appellant's point is not well taken.

[2] It is urged by appellant that no judgment of conviction can be rendered "unless the jury expressly finds against the defendant upon the issue or judgment is given against him on a special verdict." In this connection appellant directs attention to the fact that, although the general charge is that defendant obtained "money and property by false pretenses," etc., the details of the accusation against defendant are, in substance,

that he obtained "property" by false pretenses, and that the verdict is that he was guilty of obtaining "money and property" thereby, as charged in the indictment.

On the first count of the indictment defendant was charged simply with obtaining "property" by false pretense. As to such count no complaint is made. It is therefore apparent that, at least so far as the first count is concerned, appellant's point is untenable. As to the remaining counts of the indictment, the allegation and the evidence agree in showing that what was actually obtained by defendant consisted of bank checks.

In the case of *People v. Tilley*, 135 Cal. 61, 67 P. 42, the court gave consideration to a question similar to that suggested by appellant herein. It was there said:

"Further, the form of the verdict is to be regarded as immaterial, provided the intention to convict of the crime charged be unmistakably expressed. *People v. McCarty*, 48 Cal. 559; *People v. Swenson*, 49 Cal. 390, 391; *People v. Holmes*, 118 Cal. 448 [50 P. 675]. On the other hand, it is expressly provided that 'No judgment of conviction can be given, unless the jury expressly find against the defendant upon the issue.' Pen. Code, § 1162. Hence there is no room for inference outside the words of the verdict. These must express the intention unequivocally; otherwise, the verdict must be regarded as insufficient. *People v. Ah Gow*, 53 Cal. 628. And, a fortiori, it must be so regarded, if it be susceptible of a different construction than that of guilty of the crime charged."

While the details of the allegation contained in each of the several counts of the indictment to which exception is taken in substance are that the defendant fraudulently obtained a bank check, the evidence shows, not only the truth of the allegation in that regard, but as well that the check was cashed, and that the person giving the check lost the money represented thereby. It must therefore be said that the defendant was guilty, not only of fraudulently obtaining property, but that he was guilty, also, of likewise obtaining money, as distinguished from property. Moreover, according to section 14 of the Civil Code and section 7 of the Penal Code:

"The word 'property' includes property real and personal. * * * The words 'personal property' include money, goods, chattels, things in action, and evidences of debt."

Considering that the word "property," according to the Code sections just quoted, includes "money," the effect of the criticized verdicts would be that they contained merely a repetition in their language in that the verdicts would then be read that the defendant was guilty of "obtaining money (property) and property by false pretenses," etc.

In the case of *People v. Holmes*, 118 Cal. 444, 50 P. 675, the jury returned a verdict as follows:

"Second. We find a verdict of 'guilty' against all the others named in the indictment, * * * and find a verdict of 'involuntary manslaughter,' 'not a felony,' as charged and laid down by the court under the head of involuntary manslaughter, and pray the extreme mercy of the court in its sentence and punishment, and so say we all."

In that case it was held that, in view of fact that the verdict clearly showed an intention to convict the defendants rather than to acquit them of the charge, the words "not a felony," which were inserted in the verdict, should be rejected as so much surplusage, and the general verdict of guilty of involuntary manslaughter should stand.

[3] In the instant case the intention of the jury in rendering its verdict is unmistakable. It undoubtedly meant to find the defendant guilty in accordance with the charge which had been preferred against him. That in legal conception of the terms employed in its verdict there was a surplusage of words, or, to state the thought otherwise, that more words were used than were necessary to express the meaning which was intended to be conveyed, cannot affect the validity of the verdict.

In this connection it is urged that the defendant cannot be tried for an offense other than that charged against him in the indictment or the information. It need only be said that defendant was charged generally with the crime of obtaining "money and property by false pretenses," that he was tried upon such charge, and that the language of the verdict by the jury is in exact accordance therewith. Defendant could have been neither misled nor injured in any manner by any technical difference which may exist between the language of the details of the accusation as set forth in the indictment and the language contained in the verdict returned by the jury. In such circumstances, to award a new trial to the defendant because of the alleged error to which reference has been had would amount to nothing less than a travesty on justice.

[4] Defendant's next specification of error, in substance, is that the trial court failed to advise the jury that, in order to support a conviction of the offense of obtaining money or property under false pretenses, the evidence must show and the jury must find that the false pretense relied upon was a material cause in inducing the complaining witness to part with his money or property. While the exact rule of law to which appellant refers was not given to the jury in a single instruction, it appears that when the entire body of instructions is taken into consideration the principle was adequately covered; which fact constitutes a complete answer to the alleged error of which appellant complains.

[5] It is next contended by appellant that the rights of the defendant were prejudicial-

ly affected because the trial court permitted the prosecution, over defendant's objection, to introduce in evidence the contents of certain records of a corporation without first having laid a proper foundation for the introduction thereof. Although it be conceded that a sufficient foundation was wanting at the time the records were offered in evidence, the error, if any, was later cured by other evidence which fully covered any objection that might have been available to the defendant as to the custody or the authenticity of such records. The original error therefore was harmless, and cannot avail the defendant at this time.

[6] The same thing is true in principle as to the last alleged error of which appellant complains. It had to do with what is claimed was the erroneous admission in evidence of certain records from which was supplied a date which was material to the inquiry. The identical matter having been established by and through other proper sources, the assumed fact that in the first instance the evidence of the date was improperly admitted became immaterial.

No prejudicial error appearing to have been committed by the trial court, it is ordered that the judgment and the order denying the motion for a new trial be and the same are affirmed.

We concur: CONREY, P. J.; CURTIS, J.

75 Cal. App. 609

**CALIFORNIA CREDIT & COLLECTION
CORPORATION v. BRANDLIN**
(Civ. 2836.)

(District Court of Appeal, Third District, California, Dec. 15, 1925.)

1. Trial $\S$ 252(15)—Instruction submitting issue of want of consideration of note sued on held unauthorized by evidence.

In suit on note given for stock not shown to be worthless in company not shown to be unable to deliver it, the subscription agreement and note being presumptive evidence of consideration, instruction to find for defendant, if there was no consideration, was error.

2. Trial $\S$ 251(7)—Instruction authorizing verdict for defendant for misrepresentations proved over plaintiff's objections, but not alleged in the answer, held error.

In suit on note, instruction authorizing a verdict for defendant on ground of misrepresentations proved over plaintiff's objection, but not alleged in answer as a defense, was error.

3. Trial $\S$ 251(7)—Instruction to find for defendant in suit on note given for stock, if promise to repurchase stock was fraudulent, held erroneous, where answer did not allege promise to be fraudulent.

Oral statement by seller's agents that company would repurchase stock sold was a mere promise, and, where answer in action on note did not allege it to be fraudulent or not intended

to be performed, an instruction to find for defendant, if promise to repurchase was false, and induced execution of note, was erroneous.

4. Corporations ⇨82—Promise to repurchase stock by corporation, if in writing, is enforceable.

Promise by corporation to repurchase stock sold by it, if made a part of written contract, or contained in separate writing, is enforceable.

5. Evidence ⇨441(9) — Oral statements of agent held not to vary or add to terms of subscription contract, prohibiting change by agent.

Under a subscription contract, providing that no agent has power to change or alter its terms, mere oral statements of an agent that company would repurchase stock, if purchaser desired to sell, cannot vary or add to the terms of the contract.

6. Corporations ⇨92—That company retained stock to secure payment held not to defeat recovery on note.

Where subscription contract provided that no stock was to issue until fully paid for, and permit to sell stock required certificates to be retained as pledge for payment of notes, fact that corporation retained stock to secure payment did not defeat recovery on note.

7. Trial ⇨253(7)—In suit on note, instruction to find for defendant, if company failed or refused to deliver stock, held erroneous, in view of agreement and evidence to the contrary.

In suit on note given for stock under subscription contract, whereby corporation had a right to retain certificate of stock until paid for, an instruction to find for defendant if company failed or refused to deliver the stock held erroneous, in view of evidence raising inference that company was ready and willing to deliver the stock on payment therefor.

Appeal from Superior Court, Napa County; J. B. Landis, Judge.

Action on promissory notes by the California Credit & Collection Corporation against Henry Brandlin. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

J. R. Cunyningham and Daly B. Robnett, both of San Francisco, for appellants.

Nathan F. Coombs and Frank L. Coombs, both of Napa, for respondent.

FINCH, P. J. This action is prosecuted for the recovery of the amount of three promissory notes given by the defendant to the Virden Packing Company, and by it assigned after maturity to the plaintiff. The defendant purchased five shares of the capital stock of the packing company for \$500; paying \$125 in cash, and giving the three promissory notes upon which the suit is based for the remainder of the purchase price. The complaint is in the usual form, and the answer admits the execution and delivery of the promissory notes, but alleges that the defendant was induced to make the purchase

of the stock and give the notes by certain representations made by the agents of the packing company. Most of these alleged representations are mere promises, and it is not alleged that such promises were made fraudulently or without intent to perform the same. More material misrepresentations of fact, which were not alleged, were proved at the trial, and, at the close of the evidence, counsel for defendant moved the court for leave to amend the answer by alleging such misrepresentations. The court did not pass upon the motion, but proceeded at once to instruct the jury. Proof of the misrepresentations which were not alleged was made over the strenuous objections of plaintiff's counsel, and, therefore, it cannot be said that the case was tried by consent upon the theory that those misrepresentations were in issue. The judgment must be reversed on the ground that the court gave certain erroneous instructions, and, since the defendant will doubtless amend his answer before again going to trial, and the evidence at the next trial may be different from that in the record, it is deemed unnecessary to give further consideration to the pleadings or the evidence, except the parts thereof to which the erroneous instructions relate.

[1-6] The instructions hereinafter quoted were given:

"You are instructed that, * * * if you find there was no consideration given by the Virden Packing Company, you will render a verdict for the defendant."

The evidence shows that the notes were given in consideration of the sale to defendant of five shares of the capital stock of the company. There is no evidence that the stock is worthless or that the company is not ready and able to deliver it upon payment of the purchase price, and the written agreement and notes are presumptive evidence of a consideration. There is nothing in the record, therefore, upon which to base a finding of want of consideration.

"If you find that the notes given by the defendant were induced by false and fraudulent representations on the part of the Virden Packing Company, or its agents, the plaintiff in this action is not entitled to collect on the same."

This instruction authorized a verdict for the defendant on the ground of misrepresentations proved over plaintiff's objections but not alleged in the answer as a defense.

"If you find that the Virden Packing Company, through its agents, represented to the defendant that the stock to be given as a consideration for said notes could be turned in at any time to the corporation, and thereby induced the defendant to execute said notes, and that said representations were false and fraudulent, you will render a verdict for the defendant."

Such alleged representation amounted to no more than a promise to repurchase the stock. The answer does not allege that the promise was made fraudulently or without intention to perform. Had the alleged promise been made a part of the written contract, either therein or by a separate writing, it would have been enforceable. *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 129 P. 582, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914B, 1013; *Hulen v. Stuart*, 191 Cal. 562, 217 P. 750. The evidence shows a mere oral statement by the agents that the company would repurchase the stock if defendant desired to sell. The subscription contract signed by the defendant contains the following:

"This subscription contract * * * contains the entire contract between the subscriber and the company and no agent or representative of the company, or any other person, has any power to change or alter the terms of this subscription."

Clearly, the mere oral statements of the agents could not vary or add to the terms of the written contract.

"If you find that the Virden Packing Company retained the shares of capital stock which were the subject of the purchase made by the defendant, and that such retention was for the purpose of holding the same as a lien in order to secure the payment of said notes, then, in that case, the Virden Packing Company could not, either by itself, or through the assignment made to the California Credit and Collection Corporation, maintain this action because in that case it would be required to foreclose said stock and exhaust its remedy in that way before it could ask for a personal judgment against the defendant, and in such case you will find for the defendant."

This instruction, under the facts in evidence, was the equivalent of an instruction to find for the defendant. The subscription contract provides:

"It is expressly agreed that no stock is to be issued until the amount of this subscription and note or notes given therefor are paid in full in cash."

The permit of the commissioner of corporations to sell the capital stock of the corporation, printed on the reverse side of the subscription contract, provides that—

"All certificates issued to subscribers in exchange for cash and promissory notes shall be held by the company as a pledge for the payment of the principal amount of said note or notes and the interest thereon."

Certificates for the shares of stock purchased by defendant were not delivered to him, but were held by the company pursuant to the foregoing provisions of the contract and the permit. The instruction was erroneous. *Bowman v. Sears*, 63 Cal. App. 235,

253, 218 P. 489, and cases there cited; *Stern v. McDonald*, 47 Cal. App. 79, 85, 190 P. 221.

[7] Other instructions were to the effect that, if the company had "failed or refused to deliver said stock, * * * the said action cannot be maintained, and in such case you will find for the defendant." The company had the right to retain the certificates of stock until it received payment therefor, and there is no evidence that it was not at all times able and willing to deliver the same upon receipt of such payment. The defendant testified that he asked the company to repurchase the stock, and that "they said if I would pay for the other three shares which I had not paid up yet, that would keep them from suing me. They kept on saying that they were going to sue me. They told me that that would give me a share and a quarter. That is the amount that I had paid up. I told them that I didn't want to have anything to do with it at all. * * * They said they wouldn't take it back." There is nothing in this to show a refusal or an unwillingness to deliver the stock upon payment therefor, but rather the opposite inference is to be drawn therefrom.

The judgment is reversed, with direction to the trial court to permit the defendant to amend his answer.

We concur: HART, J.; PLUMMER, J.

75 Cal. App. 516

ELDRIDGE v. CLARK & HENERY CONST. CO. (Civ. 2978.)

(District Court of Appeal, Third District, California. Dec. 10, 1925. Rehearing Denied Jan. 9, 1926. Hearing Denied by Supreme Court Feb. 8, 1926.)

1. Municipal corporations — 821(14)—Light at excavation injuring pedestrian held for jury.

In action for injuries sustained when plaintiff fell into excavation for curbing, conflicting evidence as to whether there was light at point on sidewalk where accident occurred was for jury.

2. Municipal corporations — 821(20) — Contributory negligence of pedestrian falling into excavation held for jury.

In action for injuries sustained when plaintiff fell into excavation across sidewalk for curbing, where plaintiff stated she stepped across board lying on walk because it did not look good to her, question of whether plaintiff was guilty of negligence proximately causing her injuries held for jury.

3. Municipal corporations — 805(8)—Pedestrian knowing of torn-up condition of street not charged with knowledge of condition of sidewalk.

Plaintiff suing for injuries sustained in falling into excavation in sidewalk for curbing,

who had knowledge of torn-up condition of street, *held* not thereby, as matter of law, charged with knowledge or notice of like condition of the sidewalk paralleling such street.

4. Trial ⚡110—Good faith or good motive in asking an improper question cannot make it proper one.

The good faith or good motive of counsel in asking an improper question cannot make it a proper question, though it does relieve him from imputation of willful misconduct in attempting to wrongfully influence jury.

5. Appeal and error ⚡1060(1)—Whether examination of jurors as to being stockholders of insurance company insuring defendant is prejudicial, requiring reversal, dependent on particular circumstances.

Examination of jurors by plaintiff, as to whether they held stock in insurance company insuring plaintiff, *held* not prejudicial per se, but whether it was sufficiently prejudicial to require a reversal is dependent upon particular circumstances of case.

6. Appeal and error ⚡1060(4)—Voor dire examination of jurors as to holding stock in insurance company insuring defendant *held* not to require reversal.

In personal injury action, plaintiff's voir dire examination of jurors, as to whether any of them held stock in any insurance company carrying insurance for defendant, *held* not to compel reversal, where amount of damages assessed was not disproportionate to damage done and under evidence defendant's liability was clear.

7. Damages ⚡132(8) — \$1,500 damages for fractured wrist *held* not disproportionate to injuries sustained.

\$1,500 damages for fractured wrist, sustained on falling into excavation for curbing, *held* not disproportionate to injuries sustained, where it appeared that, due to advanced years of plaintiff, wrist would never regain normal strength, and her earning power was therefore lessened, and further it was shown she was unable to work for several weeks after injuries, and endured continuous pain and suffering.

8. Trial ⚡127—Cross-examination of physician, as to employment by and report to insurance company, not reversible error.

In action for personal injuries, cross-examination of physician, who was witness for defense, as to employment by and report to insurance company, *held* not to require a reversal, in view of reasonableness of damages awarded and ample evidence of defendant's negligence as cause of injuries; there being therefore no miscarriage of justice within Const. art. 6, § 4½.

9. Municipal corporations ⚡809(2)—Contractor's failure to maintain lights as required by ordinance negligence.

In action for personal injuries, *held* it was negligence per se for defendant contractor, reconstructing, to fail to place lights at dangerous points as required by ordinance.

10. Municipal corporations ⚡809(2) — Contractor *held* guilty of negligence in failing to maintain light at excavation in sidewalk.

In action for personal injuries sustained on falling into excavation in sidewalk for curbing, *held* that defendant contractor was guilty of gross negligence in failing to maintain a light and proper safeguards to protect those attempting to use sidewalk at that point.

11. Appeal and error ⚡1004(1)—\$1,500 damages would not be disturbed as excessive, in view of defendant's gross negligence.

In action for injuries sustained on falling into excavation for curbing, *held* that \$1,500 damages would not be declared excessive by appellate court, in view of defendant's gross negligence in failing to maintain lights and proper protection at excavation.

12. Damages ⚡128—Jury's determination of damages generally must be accepted as fair adjustment of matter, where not shocking to understanding and not obviously result of passion or prejudice.

Generally, determination of jury of amount which will fairly compensate plaintiff for loss sustained by reason of defendant's tortious breach of duty must be accepted as an honest, intelligent, and fair adjustment of the matter, unless it is so shocking to the understanding as to obviously show passion or prejudice.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Irene Eldridge against the Clark & Henery Construction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Irving D. Gibson, of Sacramento, for appellant.

Martin I. Welsh and Robert H. Schwab, both of Sacramento, for respondent.

HART, J. This is an action for damages for personal injuries. The cause was tried by a jury, and a verdict returned in favor of plaintiff for the sum of \$1,500, and judgment entered accordingly, from which judgment the defendant appeals.

The plaintiff, who at the time she sustained the injuries complained of, and for some time prior thereto, lived separate and apart, though not legally divorced, from her husband, and who was of the age of 59 years, and weighed about 175 pounds, resided at No. 1717½ N street, in the city of Sacramento. She was compelled to earn her own living, and to do this was required to leave her home and do the variety of duties incident to general housework. When thus engaged, she earned 50 cents an hour. For about 6 weeks prior to the date of the accident, she had continuously thus been employed.

The defendant, as its name to some extent implies, is engaged in the business of constructing, reconstructing, paving, and repaving of streets and other public thoroughfares.

At the time of the accident, the defendant was engaged in "reconstructing, repaving, and repairing Seventeenth street and alley, and installing curbing at a place near the northeast corner of said street and alley, between N and O streets, on the line with the easterly sidewalk of said Seventeenth street," in the city of Sacramento. It should be stated that N street runs, practically, in a southerly and northerly direction, while the alley referred to runs likewise in an easterly and westerly direction. The work of improving Seventeenth street, as indicated, had been under way for some days prior to the date of the accident in which plaintiff was injured, and the street was, while undergoing improvement, in a condition in which its general use by the public was not entirely safe or convenient.

On the evening of the 12th day of May, 1923, near the hour of 8 o'clock, the plaintiff left her home, intending to attend a dancing party at Oak Park, in the city of Sacramento. Walking west from her home until she reached the southeast corner of Seventeenth and N streets, she turned at said corner and proceeded south on the east side of Seventeenth street toward P street for the purpose of taking a "P Street" car for Oak Park. As she was in the act of crossing the alley between N and O streets, she stepped into an excavation, which had been dug as a foundation for a concrete curb for the sidewalk on the northeast corner of the alley, and fell violently to the ground, striking on her left arm, with the result that she suffered an impacted fracture of the right wrist and bruises upon her body and right limb. She remained prone upon the ground until, a very short time after she had fallen, one Thomas Hall, who was sitting on the porch of a house situated near the alley, having heard her groaning, stepped to where she was lying and assisted her to her feet.

The above embraces a general statement of the circumstances under which the accident occurred. The complaint sets forth substantially those facts in appropriate language, and the defendant by its answer specifically denies all the material facts thus alleged. The answer also sets up as a special defense contributory negligence on the part of the plaintiff.

Points made for a reversal are: (1) That the evidence shows, as a matter of law, that the plaintiff was guilty of contributory negligence, which proximately caused the accident in which the injuries she received were sustained; (2) that the court erred in its rulings allowing certain testimony to be received, and also in its rulings upon certain questions propounded to the jurors on their voir dire examination; (3) that the verdict is excessive.

The plaintiff, after stating the facts which are comprehended within the above statement, testified that at the time she met with

the mishap the night was very dark; that at the place where the accident occurred the darkness was intensified by the existence of trees standing near said place; that there was no light or barrier at the point on the sidewalk in the alley where the accident occurred; that when she reached the alley she stepped off and into the excavation, and was thereby thrown to the ground as above described. She stated that, although from the time she was assisted to her feet until she returned home that night she suffered severe pain in her arm, she nevertheless, attended the dance at Oak Park; that she complained to friends that she met at the dance that her arm was painning her severely, and that they advised her to have it bandaged with gauze saturated with arnica; that she sent to the drug store for these materials, and she and her friends placed the bandage around her wrist. She stated that even up to that time she did not realize that any bones in her wrist had been fractured, and that while she took part in the dancing it was necessary for her dancing partner to hold her arm at the elbow so that she would be as free from pain as possible. A few days thereafter, she stated, still suffering much pain from her injury, she called on Dr. Cress at the Emergency Hospital in the city of Sacramento, and the doctor expressed the opinion, after an examination of her wrist, that the bones therein had been fractured. Upon the doctor's advice, she had an X-ray picture taken of the injured wrist, and this sustained the opinion of the doctor as to the nature and extent of the injury. The fracture, she stated, seriously diminished her ability to prosecute the occupations in which she had theretofore engaged as means of making her living, and that, even at the time of the trial, the injury had left her wrist and right hand and arm in a condition which made it inconvenient for her to do the amount of labor of the kind to which she was accustomed and which she was able to do prior to the accident. The plaintiff admitted that, prior to the accident, she had a general knowledge that Seventeenth street, where the accident occurred, was in a "torn-up" condition, although, she stated, she seldom crossed Seventeenth street when going to any point from her home, and that it was her best recollection that the last time that she crossed said street was several weeks prior to the accident. She also testified that she did not see any wooden barrier around the curbing where she fell. She said that she did see a board "lying right down where I stepped. I stepped over the board. I did not step on it because it did not look good to me—I stepped over it."

Thomas Hall, who, as above stated, assisted the plaintiff in getting to her feet from the ground where she had fallen, testified: That he was sitting on the steps of a house on the corner of the alley where the accident oc-

curved on the evening that it happened, engaged in conversation with friends. That "there was some noise, something called my attention to a woman down in the alley, I should judge about 3 feet from the curb, where the curb line runs from the property line. I ran to the woman and assisted her to her feet, brought her across to the other side of the alley, asked her if she was hurt. She said something about her arm hurting her. When I arrived where the woman was, she was making a very feeble effort to assist herself to her feet, to get up, and I helped the woman, got her on her feet, and assisted her across the alleyway." He further stated that, after a short interval, she seemed to have recovered from the shock and proceeded down the street. He further testified that he made an inspection of the condition of the alley immediately after he assisted the plaintiff to her feet, and that he saw a board about 2 inches thick and 8 inches wide lying across the sidewalk at the curb, and, as near as he could judge, about 4 feet long. He also stated that he saw no lighted lantern at that point, that it was very dark at that part of the alley, and that the darkness was made the more so by reason of a number of trees with large and heavy branches and foliage at the alley.

Dr. W. W. Cress, city physician of Sacramento, and as such in charge of the Emergency Hospital of said city, who professionally attended the plaintiff, testified that the principal injury suffered by her was that of an impacted fracture of the large bone in the right wrist. He explained that an impacted fracture is where the ends of the bones are driven together, and also stated that such a fracture would be slower to heal with a person of the age of plaintiff than with a younger person. He stated that it was an injury from which much pain would naturally follow; that the plaintiff was attended by him for several weeks, a part of which time was in her visits to the Emergency Hospital, and a part thereof at his own private office, where he treated her in his private and not in his official capacity as city physician. He stated that there was a swelling of the wrist, "injury to the soft part, including the blood vessels and ligaments, tendons, and joint structure. With an elderly person," the doctor continued, "there is much more pain, especially with an impacted fracture so close to the joint." The doctor said that in remedying the fracture there was a very good union of the bone and a very good alignment, but not a perfect alignment. He further stated that she "still has some limitation of motion in the wrist," that the fracture was different from an ordinary one, and that, while she might be able to use the right arm in the performance of labor, she would have to be careful not to overuse it, or, as he stated it, "Up to a certain point she can use it, but beyond that

it would do harm." He further stated that there was a little deformity in the wrist when the plaintiff was discharged by him, which was occasioned by a slight thickness of the wrist joint, which, he further stated, goes with cases of that kind. He stated that the plaintiff made 11 visits to his office, and on the last visit, which was the 30th day of July, 1923, he said to her that there was nothing more that he could do for her at that time. He also stated that he kept her arm in a splint for a period of 6 weeks.

The plaintiff introduced in evidence an ordinance of the city of Sacramento entitled "An ordinance to prevent the obstruction of streets, alleys and public places in the city of Sacramento * * * and fixing a penalty for the violation of the provisions of said ordinance." Section 6 of said ordinance provided that:

"Any person by whom or under whose direction or by whose authority as principal, or as contractor, or employer, any portion of a public street, sidewalk or alley may be made dangerous, shall be wrecked, and so long as the danger may continue, maintain, around or over the place so made dangerous, a good substantial barrier, or walk which said barrier or walk shall be constructed in such a manner that it shall be with the approval of the building inspector; and there shall be maintained during every night from sunset until daylight, a lighted lantern or lanterns, around the place so made dangerous."

It was stipulated by counsel that there was no moon on the evening the accident occurred.

The district manager of defendant testified that a watchman was employed to see that barricades and lights were maintained at nighttime on the street while undergoing improvement; such barricades being kept where there were holes or excavations in the street or alley.

The witness Howe, who was in the employ of defendant at the time of the accident as a nightwatchman at the point where Seventeenth street was being improved, and whose duties were to put out and maintain at nighttime lighted lanterns and barricades at places where there were holes or excavations in the street or alley, testified that just before sunset, on the evening of May 12, 1923, he placed and left a lighted lantern reflecting a red light at the point where plaintiff fell; that the lantern was placed at said point because there existed at that time an excavation across the sidewalk portion of the alley which had been dug for the purpose of constructing a cement foundation for a curb. That lantern, he said, was placed in such a position as that it would or could be seen by any one about to cross the alley. Howe further testified that on his "second round" of inspection, which must have been several hours after he (as he testified) had placed the lighted lantern at the alley, he saw a lady at or near the house standing on the corner of the

alley, and that she then informed him that a short time before a woman passing along the sidewalk had stepped into the excavation and fallen to the ground.

Two physicians, testifying for the defendant, stated that, a few days before the commencement of the trial of this action, they, one at one time and the other on another and different occasion, examined the injured wrist of plaintiff, and found that the injuries she had suffered had been skillfully remedied, and that the wrist was in excellent condition; that there was no evidence that the injuries or the effects thereof were permanent, nor did they discover any reason for believing that the plaintiff was, at the times of their respective examinations, suffering pain from the injuries she received, although she then complained of suffering pain. One of these physicians, however, stated, as did Dr. Cress, that the fracture had left a slight deformity, due to the thickening of the wrist joint.

[1, 2] The foregoing is substantially all the testimony received at the trial, both for plaintiff and defendant. It will thus be seen that, upon the question whether there was a lighted lantern or any artificial light at the point in the sidewalk where the accident occurred, the evidence is in positive conflict. In fact, while it is true that the night watchman of the defendant stated that before sunset of the day the plaintiff was injured as described by her he placed a lighted lantern reflecting a red light at the excavation in the alley, he did not say, nor did any other witness testify, that such a light was at said place at the time the accident occurred. It was for the jury to resolve the evidentiary conflict upon that question, and the verdict implies that the jury's conclusion as to that matter was that, when the plaintiff met with the accident, there was no light at the point where thus she was injured. The defendant further insists that the evidence without conflict shows that the plaintiff herself was guilty of negligence which constituted the proximate cause of her injuries, for the reason that she was given warning of the unsafe condition of the passageway in the alley before she stepped into the excavation, in that the board above referred to was placed and maintained at or against the excavation for the purpose of preventing just such a mishap as that with which she met, but that, without first making the investigation obviously suggested by the danger warning so maintained, she stepped over or across the board from a position of safety "into a place of unknown quality." The evidence was such as to make this question one entirely within the province of the jury to decide. As seen, both the plaintiff and the witness Hall testified that the board near the excavation was "lying" on the ground. From this testimony the jury would have been well within its discretion, as the triers of the questions of fact, in concluding that the

board was not, at the time of the accident, in such a position as to suggest danger at or near the point where it had been placed or left, or at any point in the sidewalk ahead of her, and it is to be assumed that they did so find. In fact, such a finding is necessarily implied from the verdict. Certainly, it is very clear, and it may properly be assumed that the jury so found, that the board was not lying over or upon the excavation, since the uncontradicted testimony of the plaintiff was that, observing the board "lying" on the ground, she stepped across or over it and into the excavation. The statement of the plaintiff that the "board did not look good" to her, and for that reason she stepped over it, is taken by defendant as disclosing want of care on her part, since, as is the argument, the very fact that it did not "look good" to her was sufficient to lead her to believe that there was some dangerous defect in the sidewalk at or near the place where the board was lying, and hence sufficient to suggest to her mind the necessity for an investigation of conditions thereabout before attempting to proceed further; that, having proceeded on her way without making an investigation, she assumed the risk of any injuries which she might receive through any dangerous defectiveness of the sidewalk. The statement is reasonably capable of different interpretations, in so far as it was intended to express the particular thought in the plaintiff's mind when she conceived it to be safer to step over rather than upon the board. The statement does not necessarily force the inference that the board was placed there as a signal of danger, or that its appearance suggested to plaintiff's mind that there was danger ahead of her on the sidewalk, since, as seen, it was lying flat on the ground. Hence it was for the jury and not for this court to determine what particular thought the plaintiff intended to convey when she said that the board did not "look good" to her and so determine what specific reason induced her to step over rather than upon the board.

[3] It is not clear that counsel for defendant takes the position that the general knowledge, as shown by her own admission, which plaintiff had of the condition of the street itself prior to the accident was sufficient to charge her with knowledge or notice of a like condition of the sidewalk. The cases cited by counsel would seem to imply that such was his contention. Those cases apply the familiar rule that, where a person uses a street or sidewalk which his observation, prudently exercised, would inform him was dangerous, he takes the risk of such injuries as may result to him from open and apparent defects such as his observation ought to have detected and avoided. *Slaughter v. City of Huntington*, 64 W. Va. 237, 61 S. E. 155, 16 L. R. A. (N. S.) 459; *Moore v. Huntington*, 31 W. Va. 519, 8 S. E. 515. Or, as the rule

invoked by defendant is stated in Abbott on Municipal Corporations, section 105:

"When the defect is open, a traveler must take into consideration this fact, and, if he is injured, through an attempted use of a highway in a notoriously defective and dangerous condition, he is chargeable with contributory negligence."

The case of *Slaughter v. City of Huntington*, supra, was where the plaintiff, in the nighttime, while a rain was in progress, the night being unusually dark, attempted to use a street which had been plowed and excavated preparatory to the repavement thereof, and which was in a dangerous condition for use by reason thereof at the time he made such attempt, having full knowledge of such condition of the street prior to and at the time he attempted to use it. In such a case, the rule is that it is wholly immaterial whether there are danger signals or warning signs maintained on the excavated street, since such warnings, while required for those of the public having no knowledge of the dangerous condition of the street or sidewalk, are not designed for those who know about the danger, or have sufficient knowledge thereof to put them on their guard or to charge them with the exercise of such an amount of care as the situation in such a case would require. *Buckingham v. Commary-Peterson Co. et al.*, 39 Cal. App. 154, 162, 178 P. 318, and cases cited.

But a reply to that position would be and is that it does not necessarily follow, from the fact that a street may be torn or plowed up, and is, therefore, unfit for use, preparatory to the contemplated repairs or repavement or reconstruction thereof, that the sidewalk with which it parallels is also likewise to be improved and for that purpose has been put and is in the same condition that the street is in; hence it cannot be declared as an abstract proposition or as a matter of law that one having a general knowledge of the condition of a street which has been left in a defective condition, preliminarily to and for the purpose of the improvement thereof, also, from such general knowledge, has acquired like knowledge of a like condition of the sidewalks paralleling such street, if, in point of fact, such sidewalks are in such a condition, nor can it be held that such knowledge by a person of such condition of a street for the purpose of improvement has the effect of imputing to such person knowledge of a like condition of the sidewalk. It is the statement only of a trite proposition to say that a person having no special interest in the improvement of a particular street, which has been dug up or excavated preparatory to such improvement, might, in passing near or across such street, observe and so acquire general knowledge of the condition thereof and know that it was for that reason unfit for use by the public, and yet not observe or

know or even suspect, if such was the fact, that the sidewalks along the street or any part thereof were also to be improved, and for that purpose had been and were "torn up," and hence in such a condition as to make it dangerous to those passing or attempting to pass over it. It is doubtless true that, in some cases where a street is repaved or to be repaved, the sidewalk paralleling it is also to be improved, or a new curb to be installed along the sidewalk, in either of which events the "tearing up" of the sidewalk or the digging of trenches or ditches for the curb is required, but it is also commonly known to be true that there are many instances where streets are improved by a repavement or reconstruction thereof, in which there is no necessity for the improvement of, and no intention to improve, the sidewalks bordering upon such streets or for the installation of new curbs, in which case the sidewalks are left undisturbed or in a condition in which pedestrians may, with the usual safety to themselves, use them simultaneously with the prosecution of the work of repaving or reconstructing the street. It is hence clear that the mere fact that Seventeenth street was plowed or torn up and in an unsafe condition to be used by the public did not itself necessarily afford ground for the inference that the sidewalks with which it parallels were also in the same condition preparatory to the improvement thereof or that the sidewalks were in any way or for any reason in such a defective condition as to render them hazardous to the personal safety of those attempting to use them.

[4] On taking up the examination of the jurors on their voir dire, counsel for plaintiff asked the talesmen, collectively, "if any of you are stockholders in any insurance company that carries any insurance for the Clark & Henery Construction Company, by reason of any personal injuries that might be caused?" to which question objection was made on the usual grounds by counsel for defendant, but overruled by the court. Each of the talesmen returned a negative answer to the question. Defendant cites a number of cases from this and other jurisdictions as in confirmation of his contention that the above indicated line of examination of the jurors on their voir dire was not only improper but prejudicial and compels a reversal. Among the cases so cited is that of *Arnold v. Cal. Port. Cement Co.*, 41 Cal. App. 420, 183 P. 171. The following are the questions propounded to the talesmen in that case:

"Now, if you were sworn as a juror, and during the trial of this case, near the end of it, you should learn that the New Amsterdam Casualty Company, one of these surety companies, was a surety at the time of this accident alleged, or an insurer against any injury to employees, would that in any wise affect your verdict in this case?" Also: "And if it came to your knowledge, if you

were a juror in this case, and it came to your knowledge from any source whatever, that the New Amsterdam Casualty Company was a surety for any injury to the employees of the defendant company at the time of this alleged injury, would that knowledge of that fact in any wise influence your verdict in the case?"

The court held that, while "there is a decided divergence of opinion among the courts of the several states as to the right of counsel for plaintiff in a personal injury action to suggest in any way, in the presence of the jury, that an indemnity insurance company is an actual party in interest," the conduct of counsel for plaintiff in that case in asking the questions was improper and prejudicial, citing a number of cases, and upon that conclusion ordered a reversal of the judgment. Among other things, the court, in its opinion, said:

"It is entirely proper for counsel to ask the jurors such questions as may reasonably be necessary to ascertain whether they are free from a bias or interest that may affect their verdict. To this end it is proper for counsel, in good faith, to ask of each juror whether he is interested as an agent or stockholder or otherwise in a specified casualty company. Or he may be asked the broad question whether he is interested in any insurance company insuring against liability for negligence. (*Rinklin v. Acker*, 125 App. Div. 244 [109 N. Y. S. 125]; *Grant v. National, etc., Co.*, 100 App. Div. 234 [91 N. Y. S. 805].) But counsel must take pains to propound such questions in such a manner as not unnecessarily to convey the impression that the defendant is in fact so insured. It is misconduct on the part of counsel for plaintiff in such actions so to frame his question that it goes beyond what is reasonably necessary to serve the legitimate purpose of eliciting the facts he is entitled to adduce in order to secure a jury free from bias or prejudice, if it is also apparent that the question may fairly be said to have the effect of serving the illegitimate purpose of prejudicing the jury by fixing in their minds the idea that the defendant is protected by insurance against liability for negligence. *And if the amount of the verdict is large as compared with the nature of the injuries sustained, or the defendant's liability is a close question, such misconduct is prejudicial and ground for reversal.*"

It is readily to be observed that there is some difference between the questions asked the talesman in the Arnold Case and the question likewise asked in the case here. In the former case, the questions were not, as in the case here, whether any of the jurors were stockholders in *any* company "that carries insurance," etc., for the Clark & Henery Construction Company, but, substantially, whether the jurors, should they learn during the course of the trial of the case, or should it come to their knowledge from any source, that a certain named surety company was, at the time of the accident therein involved, a surety for the defendant against any injuries to its employees, would

allow that fact in any wise to affect or influence their verdict in the case. The form of the questions propounded in that case itself plainly indicates that the purpose of that line of inquiry was to get before the jury the fact that the defendant therein was not the real party in interest in the defense of the action. This conclusion is sustained by the consideration that the questions so asked were not followed up with an inquiry as to whether any of the jurors were interested as stockholders or otherwise in any or the particular surety company named. It would amount to an unjust imputation against the acumen or good sense of a lawyer to say that the attorney asking those questions would not know that the effect of giving information to a jury in a personal injury case of the fact of the indemnification of the defendant therein by a surety company against injuries caused through his or its negligence would be, if having any such effect at all, to prejudice the defendant's case in the minds of the jury. The very theory upon which the cases have held such an inquiry improper, and, under certain circumstances, prejudicial, is that there is such a strong popular prejudice against surety or other insurance companies that juries trying issues in an action in which it is sought to establish the liability of such corporations are very apt to permit their judgment to be improperly swayed by such prejudice. Another reason given by the cases for the exclusion of testimony in cases of this character, disclosing the fact that the defendant is indemnified by a surety company against liability, is that juries, when in possession of such information, may conclude, without real evidentiary justification therefor, that the defendant was led to the exercise of a less degree of care in prosecuting his business, so far as the personal safety of others was concerned than the law exacts, considering the nature and character of the business. So, as we have in effect stated, it is clear that the questions propounded to the talesmen in the Arnold Case could not have been asked in good faith, or, in other words, were asked for no other purpose than to place before the jury the fact, if it was a fact, that the defendant therein was indemnified against the payment of any damages which might be assessed against it by the jury.

Here the question to the jurors was addressed directly to the proposition of whether they were in any way interested in any surety company, and while it is true that the question also embraced a query as to whether they were stockholders in any company "that carries any insurance for the Clark & Henery Construction Company," thus implying that said company carried indemnity insurance, still, viewing the question as a whole, it is to our minds quite clear that the central purpose thereof was to ascertain

whether there existed in that particular any ground for the exercise of a challenge, either for cause or peremptorily, and that the question was therefore asked in good faith. Of course, the "good faith" or "good motive" in the asking of an improper question cannot make it a proper question, but where an improper question propounded to a juror or a witness is thus prompted, it does relieve from the imputation of willful misconduct on the part of the party asking it, in that thus he made a purposed attempt wrongfully to influence the jury.

[5-7] But it would be idle to argue that the question to the jurors in this case does not go beyond the restrictive qualification to the right to ask such a question at all pointed out in the Arnold and other cases dealing with the same proposition, for obviously it did. Conceding, however, as well we may, that the question asked in this case was technically equally as objectionable as were those asked in the Arnold and other cases in which the identical point has been considered and passed upon, still it does not necessarily follow that the judgment herein should be reversed for the error in allowing it. No case has been cited—indeed none can be found—which goes to the extent of holding that, where such an examination by plaintiff is allowed, it is prejudicial per se. To the contrary, many cases hold that there are certain circumstances under which such an examination may properly be allowed and all the cases hold that, where the allowance of that line of examination, either of jurors on their voir dire or of witnesses, involves error, the question whether it is or is not to be deemed to be of sufficient gravity, in its effect upon the rights of the defendant, to require a reversal, is dependent entirely upon the circumstances of each particular case. See *Arnold v. Cal. Port. Cement Co.*, supra; *Roche v. Llewellyn Iron Works Co.*, 140 Cal. 563, 74 P. 147. In the *Arnold Case* it will be observed, from the excerpt from the opinion therein reproduced hereinabove, the court says:

"And if the amount of the verdict is large as compared with the nature of the injuries sustained, or the defendant's liability is a close question, such misconduct is prejudicial and ground for reversal."

In the instant case, we do not find, nor can it reasonably be said, that the amount of damages assessed is out of proportion to the nature and effect of the injuries sustained, or that the defendant's liability is under the evidence a close question. The testimony of the doctor who treated plaintiff's injuries clearly shows that they were serious, in that, as in effect, he declared, her wrist, perhaps due in a measure to her advanced years, would never regain its normal strength. Thus, since she was required to perform manual labor to support herself, her

earning power was to some extent permanently diminished, and her opportunity for securing such employment as she was able to engage in was naturally correspondingly lessened. Other considerations were that she was not able, by reason of her injuries, to work at all for several weeks after she was hurt, a positive loss to one who is required to labor for others to earn a livelihood, and the pain and suffering she was required to endure because of her injuries, in a more or less degree, according to her uncontradicted testimony, continuously to the date of the trial, which was 6 months from the time she was injured. As to the question of the defendant's responsibility for the injuries, the testimony of plaintiff and her witness Hall, as seen, is to the effect that there was no light at the point where she met with the accident at the time that it occurred, that there was no barrier against or about the excavation into which she fell, and that it was very dark at that place at the time; there being no moon that night or at that particular time. That testimony was not contradicted, except in so far as it might be regarded as having been disputed by the testimony of defendant's night watchman that he placed a lighted lantern at the point of the excavation prior to sunset on the day of the accident, but such "contradictory" evidence is of little apparent force, and, according to the jury's estimate of that fact, as exposed by their verdict, they regarded it as of no force at all, when compared to the accepted positive testimony of witnesses that, at the time of the accident, there was no light of any kind at said place. All the foregoing matters are here considered, not that this court can weigh the testimony or has the right to attempt to do so, since that is the function of the jury, but merely for the purpose of showing that, upon the face of the record, the amount assessed by the jury as damages is not disproportionate to the damage done, and that there can be no question under the evidence of the defendant's liability for the injuries sustained by plaintiff, and that from all these well-established facts it is clear that the error in allowing the plaintiff to ask the jurors on their voir dire a question to some extent implying that defendant, at the time of the accident, was indemnified against the payment of any damages which might be assessed against it for injuries to others directly occasioned by its negligence was not productive of a miscarriage of justice.

[8] The same question as the one above considered is in a different aspect also presented. It arose from the following cross-examination of one of the physicians who testified for the defendant as an expert as to the nature, extent, and the general effect of the injuries received by plaintiff:

"Q. In the examination of this plaintiff, were you employed by the Georgia Casualty Com-

pany? The Witness: I was employed by Mr. Gibson.

"Mr. Welsh: You sent a report, did you not, to the Georgia Casualty Company?"

"Mr. Welsh: You have a copy of the report in your files. The Witness: The Georgia Casualty Company, 341 Montgomery Street, San Francisco.

"Q. You sent the original of that to the company—a report of your examination, doctor? A. Yes, sir."

The cases are not uniform upon the question whether under any circumstances such a line of inquiry in the examination of witnesses in personal injury cases is permissible. There are many cases in which the question is considered, but we will not review them herein. It is, though, quite obvious that it would be highly improper to allow the plaintiff in a personal injury case to show, as an independent fact, having no relation to the other proved facts, that the defendant is protected by indemnity insurance against the payment of any damages which may be awarded against him for injuries directly caused by his negligence. If it is at all competent or legally proper to show the fact, it perhaps would have to be done through cross-examination of some witness as in impeachment of his testimony or by way of the impeachment of some special defense. It has been held to be proper to go into the question for the purpose of rebutting the claim of defendant that employees of a certain department of the business conducted by defendant were under the sole control of another party as an independent contractor with defendant. *Barg v. Bousfield*, 65 Minn. 355, 68 N. W. 45. As going to the question of the credibility or the weight of his testimony, it would seem that it ought to be proper for plaintiff to show by cross-examination of a physician called by defendant to testify, and who does testify that he had examined plaintiff's injuries and had found that they were less serious in nature and effect than as claimed by plaintiff, that such physician had been specially employed by a surety company by which defendant was indemnified against the payment of any damages awarded against him to make such examination and state the result thereof to the jury. See section 1868, Code Civ. Proc. Such, however, is not the rule in this state, so our decisions seem to hold. *McPhee v. Lavin*, 183 Cal. 264, 269, 191 P. 23; *Roche v. Llewellyn*, 140 Cal. 563, 74 P. 147. But we do not think that the case should be reversed because of the error involved in allowing the physician thus to be questioned by the plaintiff. This conclusion is founded on the reasons above given for holding that the act of the trial court in allowing the examination of the tentative jurors along the same line could not be held to be of so serious a character as to call for a reversal. In other words, considering the entire record—the

nature of the injuries sustained by plaintiff and the effect thereof upon her, the pain and suffering she endured because of those injuries, the ample evidence that defendant's negligence was the cause of her injuries, and the reasonableness, when compared with all the foregoing facts, of the amount of damages awarded her—it cannot justly be declared that the error involved in the ruling permitting such examination has resulted in a miscarriage of justice. Const. art. 6, § 4½. The answers by the doctor to the questions asked by plaintiff added nothing to what was plainly to be implied from the question on the same line likewise asked of the jurors on their voir dire.

[9-12] The next and last point urged by defendant is that the amount of damages awarded plaintiff is excessive. This point has practically been answered above in the discussion of the contentions that error was committed in permitting plaintiff to ask the tentative jurors called to the jury box the question as to defendant's indemnity insurance and the cross-examination of one of the physicians testifying for defendant along the same line. It may be added, however, that, in view of the ordinance of the city of Sacramento expressly superimposing upon defendant the duty of maintaining lights at all dangerous points on the street or sidewalk, it was negligence per se for it to have failed in the performance of that duty. But, regardless of that consideration, if the testimony of plaintiff and her witness, Hall, is true (and we must, in view of the verdict, so accept it, since it is not inherently improbable), the defendant, in failing to maintain a light and proper safeguards about the excavation as a protection to those attempting to use the sidewalk at that point was guilty of gross negligence. We are firmly of the conviction that, under all the circumstances of the case, it would be an unjust invasion of the province of the jury for this court to declare the verdict excessive. Of course, it is to be conceded that the matter of assessing damages in a personal injury case is generally attended with more or less difficulty. The element of pain and suffering, which is proper to be taken into account with other elements, in determining in such cases what would be a just admeasurement of compensatory relief, affords no definite or certain criterion by which the amount to be assigned to that item may be ascertained, and the same is often true, in a less degree perhaps, of other elements of the several which it is competent to consider in making the general award. Hence, in the last analysis, in the general run of cases, the determination by the jury of the amount which will fairly compensate for the loss sustained by reason of the defendant's tortious breach of a duty which he owes to others must be accepted as an honest, fair, intelligent, and just adjustment of the matter. The rule

which thus we attempt to state has, perhaps, never been more succinctly, clearly, and forcefully expounded than in Graham & Waterman on New Trials, p. 451 (an old publication, perhaps not now extant), as follows:

"It is clear that the reason for holding the parties so tenaciously to the damages found by the jury in personal torts is, that in cases of this class there is no scale by which the damages are to be graduated with certainty. They admit of no other test than the intelligence of a jury, governed by a sense of justice. It is indeed one of the principal causes in which the trial by jury has originated. From the prolific fountain of litigation numerous cases must daily spring up, calling for adjudication for alleged injuries, accompanied with facts and circumstances affording no definite standard by which these alleged wrongs can be measured, and which, from the necessity of the case, must be judged of and appreciated by the view that may be taken of them by impartial men. To the jury therefore, as a favorite and almost sacred tribunal, is committed by unanimous consent the exclusive task of examining those facts and circumstances, and valuing the injury and awarding compensation in the shape of damages. The law that confers on them this power and exacts of them the performance of the solemn trust, favors the presumption that they are actuated by pure motives. It therefore makes every allowance for different dispositions, capacities, views, and even frailties in the examination of heterogeneous matters of fact where no criterion can be supplied; and it is not until the result of the deliberations of the jury appears in a form calculated to shock the understanding and impress no dubious conviction of their prejudice and passion that courts have found themselves compelled to interpose."

See, also, *Bonneau v. North Shore R. Co.*, 152 Cal. 406, 93 P. 106, 125 Am. St. Rep. 68; *Lee v. Southern Pacific R. Co.*, 101 Cal. 118, 35 P. 572; *Wilson v. Fitch*, 41 Cal. 368; *Wheaton v. N. B. & R. Co.*, 36 Cal. 590; *Aldrich v. Palmer*, 24 Cal. 513; *Scally v. W. T. Garratt & Co.*, 11 Cal. App. 138, 104 P. 325.

We think it would work an injustice to do otherwise than to sanction and support the result arrived at below, and therefore the judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

75 Cal. App. 428

PEOPLE v. NEAL (Cr. 1242.)

(District Court of Appeal, Second District, Division 2, California. Dec. 4, 1925.)

1. Criminal law § 1053—Failure to except to alleged improper remark of court held to preclude successful complaint thereof on appeal.

Failure to except to alleged improper remark of court held to preclude successful complaint thereof on appeal.

2. Criminal law § 485(1)—Hypothetical question held not improper as uncertain and indefinite.

Hypothetical question, asked physician as to whether defendant would have been able to walk within stated time after operation for abscess of rectum, assuming "there was no evidence that she was suffering from any other ailment," held not improper as indefinite and uncertain as to character of accused's health.

3. Criminal law § 485(1)—Hypothetical question held not improperly allowed because of its form.

Hypothetical question, seeking to elicit expert opinion on question whether defendant would be able to walk five or six days after operation, held not improperly allowed because examiner assumed that "you (witness) had a patient," and that "you performed a minor operation."

4. Criminal law § 473—Exclusion of question asked expert witness held not error.

Where counsel, seeking to show that, because defendant was suffering from an abscess, she could not have been at place of crime, it was not error to exclude expert testimony as to what caused pus which witness testified he had drained from abscess, where court specifically stated that counsel might in another manner show defendant's physical condition aside from the abscess; that being the avowed purpose of question excluded.

5. Criminal law § 1186(4) — Witnesses § 367(1)—Exclusion of evidence affecting credibility of prosecuting witness held error, though not grounds for reversal.

In prosecution for burglary, evidence that conviction of defendant was necessary to a recovery by prosecuting witness of insurance on stolen jewelry held improperly excluded, when tendered on issue of credibility of witness, though such error was not grounds for reversal, in view of Const. art. 6, § 4½, requiring examination of entire cause.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Mabel Neal was convicted of burglary, and she appeals. Affirmed.

Fred H. Thompson, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Erwin W. Widney, Deputy Atty. Gen., for the People.

WORKS, J. Defendant was charged in two counts with the crime of burglary. She was convicted upon both counts, and appeals from the judgment of conviction and from an order of the trial court denying her motion for a new trial.

Appellant's sole defense against both charges lay in her attempt to prove an alibi. There was ample evidence, however, to support each charge, if the jury gave credence to the testimony of witnesses to the effect that they identified appellant as the culprit in each instance. There was some testimo-

ny that she was actually present at a place other than the scene of the crimes, but the great burden of her defense was that she was in such a condition, through illness, that it was impossible for her to have gone to the places where the offenses were committed. Specifically, her main defense was that she was so afflicted with an abscess or ulcer of the rectum, or with an anal fistula, as to render impossible a locomotion by her to the scenes of the crimes, both being at a considerable distance from her place of residence. Various physicians testified to a state of affairs in these respects which would have justified the jury in believing that appellant could not have gotten to the places where the two burglaries were committed.

[1] There was evidence at the trial to the effect that a physician on a certain occasion had lanced an abscess in appellant's rectum, and also that after the operation it would have been impossible for appellant to walk. For the purpose of meeting this testimony the district attorney asked another expert witness:

"Assuming, Doctor, that you had a patient between the ages of 25 and 35, that you performed a minor operation for an abscess of the rectum on the 3d or 4th day of August, that on the 9th day of August you called upon the patient, and at that time his pulse was normal, and there was no pus in the wound or abscess, would you say that the patient would be able to walk at that time?"

Appellant's counsel objected to the question on several grounds, one of the objections being that it was indefinite and uncertain as to the character of the condition of health of the assumed person. The trial judge then remarked:

"Well, if you will embrace in your statement that it is a woman. There is no showing made of her suffering from any other condition of ill health."

The point is now made that the last sentence of the judge's statement was an invasion of the province of the jury, and was therefore misconduct. If we grant, for the purpose of argument, that the assailed remark should not have been made, we are to observe that no exception was taken to it at the time and no request was made that the judge direct the jury to disregard it.

"When a judge makes damaging comment in the presence of the jury during a trial, * * * it is the duty of the counsel for the injured party to give the judge the opportunity to obviate the possibility of harm by means of admonition addressed to the jury, if the misconduct * * * is such that its effect may be removed by admonition." *People v. Orosco* (Cal. App.) 239 P. 82.

Granting again that the remark of the trial judge here was improper, its effect could readily have been eradicated by an

admonitory statement to the jury. The claim of misconduct must therefore fall.

[2] Following the comment of the judge to which exception is taken, the district attorney added this to his question:

"Assume, further, Doctor, that this was a lady, and there was no evidence that she was suffering from any other ailment."

Appellant's counsel repeated his objection, and it was overruled. It is contended that the ruling was error, upon the ground that the assumption contained in the amendment to the question was opposed to the actual evidence in the case. No such ground, however, was stated in the objection. The only point made was, so far as this particular point is concerned, that the question was indefinite and uncertain as to "the character of the condition of health" of appellant. We can perceive no indefiniteness or uncertainty in the question in the respect mentioned. Certainly, it was not indefinite or uncertain after the addition was made to it, for it was thereby rendered certain to the point of perfection. The ruling on the objection was therefore proper.

[3] It was objected at the trial, and it is now insisted, that the question of the district attorney which is above quoted, was improper, for the reason that the examiner assumed that "you had a patient," and "you performed a minor operation," and then completed his question upon those assumptions. It is said, in effect, that the witness was not asked for his general opinion as an expert, but for the result in a case assumed to have been handled by him, and that the question was therefore improper. We think the question was not objectionable on the ground stated. It will be observed that the conditions upon which the opinion of the expert was asked were those existing 5 or 6 days after the assumed operation was performed. The assumption as to those conditions was that the "pulse was normal, and there was no pus in the wound or abscess," and it is not contended that there was anything improper in the statement of the situation at that time. Further, the witness to whom the question was addressed had been properly qualified as an expert. When he was put on the stand, appellant's counsel was asked if he would "stipulate the doctor's qualifications." The emphatic response was, "No question in the world about it." Not only was the witness thus heartily vouched for by the defense, but he testified that he had "treated" many cases of ulcer and of abscess of the rectum. Under all these circumstances we think the witness must have understood the question to assume that a properly executed minor operation had been performed for an abscess of the rectum at the time mentioned in it. This last matter becomes one of insignificant import, however, when we recur to the view,

already expressed, that the opinion of the witness was mainly to depend upon the correctly stated conditions existing 5 or 6 days after the operation had been performed. Even if we concede, therefore, that the question might have been put in better form, we are convinced that no harm whatever was wrought by it. Under all the circumstances it must be apparent that the expert gave the same answer that he would have given if the question had been unimpeachable.

[4] The record shows the following as having occurred during the direct examination of one of appellant's expert witnesses:

"Q. * * * What was the condition? A. She had an abscess in the tissue adjoining the rectum, which had broken through partly, and under a local anæsthetic I further opened it so that the pus could drain out. * * *

"Q. Well, now, what caused this pus there?"

The question was objected to on the ground that it was immaterial, and the objection was sustained. Then this transpired:

"Mr. Thompson: To show the physical condition of this defendant, your honor.

"The Court: No, that does not show it. You can find out what her physical condition was at the time if you want to.

"Mr. Thompson: Well, I am leading up to that. * * *

"The Court: It is immaterial what caused this abscess."

It is insisted that the court erred in sustaining the objection that the question was immaterial, and this for the reason that counsel expected, by means of the question, to show the physical condition of appellant. The ruling, however, as shown by the remarks of the judge, was not intended to foreclose inquiry into her physical condition. The judge evidently took the view that an answer to the propounded question would not tend to show anything of that nature. We need not pause to inquire whether this view was correct, for the judge, in effect, stated that counsel might show appellant's physical condition by other questions. The matter of making the proof which counsel now says he sought to make by the assailed question was thus left entirely in his hands, and he actually asked questions of the same witness, afterward, as to appellant's physical condition. If we assume, then, for the sake of argument, that the question might have educed something as to appellant's state of health, and that the ruling of the court was therefore technically erroneous, we are bound to say, for the reasons stated, that no harm flowed from the error.

[5] There was evidence to the effect that certain jewelry which was involved under one of the charges against appellant was of the value of \$2,000, and that the prosecuting witness under that charge, who was the owner of the jewelry, carried insurance up-

on it. Appellant sought, on cross-examination of the witness, to show that the amount of the insurance policy on the jewelry could have been collected only upon a conviction of appellant. Counsel stated that he proposed to make this showing for the purpose of affecting the credibility of the prosecuting witness, who had identified appellant as having been at the place of residence of the witness at about the time the jewelry disappeared. The evidence was objected to on the ground of immateriality, and the objection was sustained. It is contended that in its several rulings excluding the evidence the trial court erred. We think the rulings were erroneous. The facts sought to be developed, if proven, would have shown a special and financial interest of the prosecuting witness in the conviction of appellant, which, in the eyes of the jury, might have affected her credibility. In view of the error referred to, we have examined the entire cause, including the evidence, as it touches the conviction under the count now in question, as required by section 4½ of article 6 of the Constitution, and we are of the opinion that the error complained of has not resulted in a miscarriage of justice.

Judgment and order affirmed.

We concur: FINLAYSON, P. J.;
CRAIG, J.

75 Cal. App. 695
**CALIFORNIA REAL ESTATE EXCHANGE
v. SEQUOYAH HILLS CO.**
(Civ. 5126.)

(District Court of Appeal, First District, Division 1, California. Dec. 22, 1925.)

1. Appeal and error — 373(1)—Undertaking not required to effect appeal, filing of notice being sufficient.

Notice of appeal, filed within time provided and in form prescribed by Code Civ. Proc. § 940, was sufficient to effect appeal without undertaking required before amendment of sections 940, 941, by St. 1921, p. 193, §§ 1, 2.

2. Appeal and error — 439—Power of trial court to vacate judgment held suspended pending appeal.

Appeal taken pursuant to Code Civ. Proc. § 940, as amended by St. 1921, p. 193, § 1, without filing undertaking, was regular and transferred cause to Supreme Court, and power of trial court pending such appeal to vacate judgment was suspended.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by the California Real Estate Exchange against the Sequoyah Hills Company. From an order denying motion to vacate and set aside a judgment for defendant, plaintiff appeals. Affirmed.

Herbert Chamberlin, of San Francisco, for appellant.

O. G. Foelker, of Oakland (E. C. Miles, of Oakland, of counsel), for respondent.

CASHIN, J. An appeal from an order denying a motion to vacate and set aside a judgment entered against appellant.

An action was commenced in the superior court in and for the county of Alameda by appellant in which respondent appeared and answered the complaint, filing with its answer a cross-complaint against the former. The action was regularly set for trial by respondent, and, appellant not appearing, the cause was heard and the judgment mentioned entered on August 24, 1923; the court finding, as appears from its decision and judgment, that appellant was duly and regularly served with notice of trial and had knowledge of the time fixed therefor. Thereafter, on February 11, 1924, appellant served and filed a notice of motion to vacate the judgment; the motion being supported by affidavits alleging the failure by respondent to serve notice of the date fixed for the trial of the action. The motion came on regularly for hearing on February 15, 1924, was denied, and this appeal taken from the order.

It is conceded that on October 22, 1923, appellant filed a notice of appeal from the original judgment mentioned to the Supreme Court of the state of California; that if such appeal was perfected it was pending at the time of the making of the above motion and order, and was subsequently dismissed.

It is contended by respondent that the appeal last mentioned was taken in all respects as provided by statute, and that as a result the trial court was without jurisdiction to grant the motion to vacate the judgment, and, by appellant, that no undertaking on appeal having been filed the proceeding was ineffectual for any purpose, and that the trial court abused its discretion in denying the motion.

[1] The notice of appeal was filed within the time provided by statute and was in all respects in the form prescribed by section 940 of the Code of Civil Procedure (Stats. 1921, p. 193). Since the amendment of sections 940 and 941 of the Code of Civil Procedure (Stats. 1921, p. 193)—which prior to the amendment provided for the giving of an undertaking on appeal—the filing of such notice is sufficient to effect the appeal without the undertaking previously required. *People v. Jackson*, 190 Cal. 257, 212 P. 4.

[2] The appeal having been regularly taken, its effect was to transfer the cause to the Supreme Court and to suspend the power of the trial court pending such appeal to vacate the judgment. *Parkside Realty Co. v. McDonald*, 167 Cal. 342, 139 P. 805; *Kinard v. Jordan*, 175 Cal. 13, 164 P. 894; *Crawford v. Meadows*, 55 Cal. App. 4, 203 P. 428; *Jack-*

son v. Dolan, 58 Cal. App. 372, 208 P. 315; 14 Cal. Jur. (Judgments) sec. 84.

The order is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

75 Cal. App. 591

Ex parte WEST. (Cr. 1300.)*

(District Court of Appeal, First District, Division 1, California. Dec. 15, 1925.)

1. Statutes ⚡68—"General laws" defined.

"General laws" are those which operate alike upon all persons to whom they apply, and apply equally to all persons in the same category within the jurisdiction of the law-making power on subjects possessing such intrinsic peculiarities as to justify legislative determination that they require special enactments.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Law.]

2. Statutes ⚡71—Classification in general law must be proper.

Classification in general law must be founded on reason, not being product of exercise of an arbitrary will, and necessity for such classification must appear.

3. Constitutional law ⚡48—Classification in general law supported by every presumption in its favor.

When classification in general law is attacked in courts, wide discretion of legislative body will be supported by every presumption in favor of reasonable classification, and it will not be set aside merely because in court's judgment it may be unwise or unnecessary to apply certain rules to certain classes.

4. Constitutional law ⚡93(1), 240(1)—Municipal corporations ⚡111(2)—Ordinance regulating jewelry auctions held constitutional.

Ordinance regulating jewelry auctions, providing for granting permits only to established jewelers to auction stock not imported, especially for auction purposes, held valid, not violating inalienable rights clause of Const. Cal. art. 1, § 1, or article 1, § 11, relating to uniform operation of general laws; article 4, § 25, subd. 33, prohibiting special laws, where general laws could be applicable, or Const. U. S. Amend. 14, providing no state shall deny any citizens equal protection of law.

5. Constitutional law ⚡211—Fourteenth Amendment does not take from states right and power to classify subjects of legislation.

It is not purpose of Const. U. S. Amend. 14, in equal protection clause, to take from states the right and power to classify subjects of legislation, and court can declare such classification beyond legislative authority only when it is arbitrary and unreasonable.

*Application to the Supreme Court for habeas corpus was denied December 22, 1925, without filing an opinion.

6. Constitutional law ☞211—When legislative discretion as to classification is subject to review stated.

Where legislative action is arbitrary, and has no relation to purpose which it is competent for government to effect, limit of legislative power is violated, but, where there is reasonable relation to an object within governmental authority, exercise of legislative discretion is not subject to judicial review.

7. Auctions and auctioneers ☞2—Ordinance prohibiting jewelry auctions at night reasonable.

Provision in ordinance regulating auction of jewelry, which prohibited such auctions between 6 p. m. and 8 a. m., *held* reasonable, owing to opportunities for fraud in night auctions of jewelry.

8. Licenses ☞7(1)—Requiring information from jeweler as to stock prior to auction held not to invalidate ordinance.

Where jeweler, attacking ordinance to regulate jewelry auctions, did not claim he could not comply with provisions therein, requiring certain information as to stock and other matters, *held* such provision was not sufficiently burdensome to render it unconstitutional.

9. Licenses ☞6(2)—Municipal boards may grant permits as to occupations, which are proper subjects of police regulation.

As to those kinds of occupations or businesses which are proper subjects of police surveillance and regulation, delegation of power to municipal boards or officers to grant or refuse permits will be sustained.

10. Evidence ☞83(2)—Municipal officer assumed to use sound discretion in issuing permits.

It is not to be assumed that council or officer in exercising dispensing power as to permits relating to conduct of business will act arbitrarily or otherwise than in exercise of sound discretion.

11. Constitutional law ☞46(1)—Part of ordinance not affecting one attacking is not considered.

Where jeweler conducted auction contrary to ordinance, but had employed licensed auctioneer as provided, that part of ordinance relating to auctioneers would not be considered in his attack on it; he not being affected thereby.

Application by Sam West for a writ of habeas corpus, prayed to be directed to the Chief of Police of the City of Oakland, to secure release of petitioner from custody. Writ denied.

David J. Aaron and R. C. Young, both of San Francisco (Maxwell McNutt, of San Francisco, of counsel), for petitioner.

Leon E. Gray, City Atty., Markell C. Baer, Asst. City Atty., Earl Warren, Dist. Atty., and J. Paul St. Sure, Deputy Dist. Atty., all of Oakland, for respondent.

KNIGHT, J. The petitioner, Sam West, was arrested by the chief of police of the city of Oakland under a warrant issued in a criminal action wherein petitioner was charged with having violated the provisions of an ordinance of said city relating to the holding of auction sales of jewelry, and he now seeks to be discharged from custody on habeas corpus upon the ground that said ordinance is unconstitutional.

The ordinance in question purports to regulate the retail selling of jewelry at public auction. It provides that "it shall be unlawful for any person, firm, corporation or association to sell, dispose of, or offer for sale, in the city of Oakland, at public auction, or to cause or permit to be sold, disposed of, or offered for sale in the city of Oakland, at public auction, any platinum, gold, silver, or plated ware, precious stones or semiprecious stones, watches or other jewelry, whether the same shall be their own property or whether they shall sell the same as agents or employees of others," but it expressly exempts from its operation judicial sales, those made by executors or administrators, or licensed pawnbrokers, and also sales made "at public auction of the stock on hand of any person, or persons, or corporation, that shall for the period of one year next preceding such sale have been continuously in business in the city of Oakland as a retail or wholesale merchant of * * * jewelry," provided that, in the latter case, before such merchant may hold an auction he must obtain a permit therefor which shall be applied for and issued in the following manner: Said merchant shall, not less than 15 nor more than 30 days previous to conducting such sale, make a written application therefor, under oath, to the city council specifying "the name and address of the applicant, the location and purpose of the sale and its expected duration, and itemizing in detail the quality, quantity, kind, or grade of each item of goods, wares, and other articles to be sold, the wholesale market value thereof, the name of the auctioneer who shall conduct the sale," which application shall then be investigated by the chief of police and a report made thereon by him to the city council as to the character of the applicant and of his auctioneer, "the bona fide nature of the proposed sale," and whether the place where it is proposed to carry on said sale is a proper place. The council must be furnished also with satisfactory evidence that the jewelry proposed to be sold is "a bona fide part of the merchant's stock in trade and not secured, purchased, or brought into said place of business for or in anticipation of said sale." The ordinance then provides that "the council in considering the application and the attending facts shall exercise a reasonable and sound discretion in granting or denying the permit applied for." The ordinance further requires that such sale at pub-

He auction "shall be held on successive days, Sundays and legal holidays excepted, and shall not continue for more than thirty days in all from the commencement of the sale, and shall be permitted only where such merchant is bona fide disposing of his stock for the purpose of retiring from business," and that said auction shall be conducted during the daytime between the hours of 8 and 6 o'clock. Other provisions of the ordinance prohibit the making of false representation as to the previous history, ownership, or quality of the goods to be disposed of; also the activity of "cappers," "boosters," or "shillers," or the offering of any false bids.

It appears that petitioner was eligible, so far as residential qualification was concerned, to obtain a permit to hold an auction sale, having been engaged in the jewelry business in the city of Oakland for 12 years immediately preceding his arrest, but that he refused to comply with the ordinance, in the matter of applying for such permit, upon the ground that said ordinance was void, contending in this respect that said ordinance constituted an unjust discrimination against merchants engaged in the jewelry business, and that the regulatory measures thereof were so oppressive and burdensome as to make it impracticable for him to comply with them without sustaining great financial loss. In this regard petitioner alleges that during the 12 years he has been in said jewelry business he has accumulated a large and valuable stock in trade, which he now desires to dispose of and retire from business; that, since said stock consists of articles of luxury and of personal adornment, it cannot be quickly and profitably sold in the ordinary course of retail business or at wholesale or in bulk, but can be disposed of readily and to the best advantage only under special conditions afforded by public retail auction sale, and that the time required for such sale would necessarily extend over a period of four months; furthermore, he alleges, that those provisions of said ordinance requiring jewelers, before they may sell at retail auction, to file a schedule of the stock proposed to be sold, specifying quality, quantity and grade thereof, and to furnish satisfactory evidence to the effect that only the stock on hand will be disposed of, and which prohibit the holding of the auction during the nighttime, amount to an imposition of disabilities and burdensome conditions not justified by any features of the jewelry business, or by any consideration of the public safety, health, or welfare, and that, inasmuch as similar disabilities and conditions are not imposed upon merchants engaged in other lines of business, an unreasonable discrimination is exercised against those engaged in the jewelry business. In view of those alleged facts, petitioner contends that said ordinance and the provisions thereof above noted are violative of the inalienable rights clause of the

state Constitution (section 1, art. 1), also of those clauses thereof declaring that "all laws of a general nature shall have a uniform operation" (section 11, art. 1), and that the Legislature shall not pass local or special laws where a general law can be made applicable (subdivision 33, § 25, art. 4); also of that portion of the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall deny to any citizen within its jurisdiction the equal protection of the law.

Petitioner does not question the authority of the city, in the exercise of its police power, to reasonably regulate the conduct of auction sales generally, but contends, first, that no valid reason exists why jewelry merchants should be subjected to certain burdens and restrictions in disposing of their property at auction while merchants engaged in the sale of other kinds of merchandise are exempted from such burdens and restrictions; and, secondly, that, if such classification may be legally made, the regulatory features of said ordinance are unnecessary for the public welfare, unreasonable, and void.

[1-3] With respect to those constitutional provisions relating to equal protection of laws, class legislation, and uniformity of operation, upon which petitioner relies, it has been held generally in this state, as will be seen from the treatise on constitutional law contained in California Jurisprudence (volume 5, p. 790 et seq.), that general laws are those which operate alike upon all persons to whom they apply, and apply equally to all persons in the same category within the jurisdiction of the lawmaking power (*McDonald v. Conniff*, 99 Cal. 386, 34 P. 71; *Cody v. Murphey*, 89 Cal. 522, 26 P. 1081); that, to be general in its scope, an act need not include all classes of individuals, but the requirements of the Constitution are met if the act relates to and operates uniformly upon the whole of any single class validly selected (*City of Los Angeles v. Lankershim*, 160 Cal. 800, 118 P. 215); that every subject which might have been included need not be covered, but it is sufficient if the subjects covered possess such intrinsic peculiarities as to justify the legislative determination that those subjects require special enactment (5 Cal. Jur. 795; *Matter of Application of Miller*, 162 Cal. 687, 124 P. 427; *In re Martin*, 157 Cal. 51, 106 P. 235, 26 L. R. A. [N. S.] 242). It is furthermore held that, in order to be uniform in its operation, a law need not operate universally. It is general if it applies to all of a certain class alike, and operates uniformly upon all persons standing in the same category and upon rights and things in the same relation. The classification must be a proper one, however (*Barbier v. Connolly*, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923; *French v. Davidson*, 143 Cal. 658, 77 P. 633), that is, the necessity for the classification must appear, and it must be found-

ed upon reason and must not be the product of the exercise of an arbitrary will (*Pasadena v. Stimson*, 91 Cal. 238, 27 P. 604; *Darcy v. San Jose*, 104 Cal. 642, 38 P. 500). The discretion of the legislative body to make these classifications is very wide, and, when such classification is attacked in the courts, it will be supported by every presumption in its favor (*In re Cardinal*, 170 Cal. 519, 150 P. 348, L. R. A. 1915F, 850), and will not be set aside merely because in the court's judgment it may be unwise or unnecessary to apply certain rules to certain classes (*Title & Document Restoration Co. v. Kerrigan*, 150 Cal. 289, 88 P. 356, 8 L. R. A. [N. S.] 682, 119 Am. St. Rep. 199). Agreeable to these conclusions, it has been held in this state that particular businesses may be classified and regulated (*In re San Chung*, 11 Cal. App. 511, 105 P. 609; *People v. Bank of San Luis Obispo*, 154 Cal. 194, 97 P. 306; *State Sav. & Com. Bank v. Anderson*, 165 Cal. 437, 132 P. 755, L. R. A. 1915E, 675; *Wood v. Krepps*, 168 Cal. 382, 143 P. 691, L. R. A. 1915B, 851; *Ex parte Sohneke*, 148 Cal. 262, 82 P. 956, 2 L. R. A. [N. S.] 813, 113 Am. St. Rep. 236, 7 Ann. Cas. 475).

[4] While the question of the constitutionality of an ordinance of this particular kind, that is, one by which the municipality seeks to regulate the holding of retail auctions of jewelry, does not seem to have been previously passed upon by the courts of the appellate jurisdiction in this state, similar ordinances have been assailed before the courts of other states, upon grounds identical with those now urged by petitioner against the validity of this ordinance, and those ordinances have been held to be constitutional; the effect of the decisions being that the classification of business thus made is not arbitrary or discriminatory, but based upon substantial reason, in view of the object sought to be accomplished by said ordinances. *Holsman v. Thomas* (Ohio) 147 N. E. 750, 39 A. L. R. 760; *City of Roanoke v. Fisher*, 137 Va. 75, 119 S. E. 259; *Mogul v. Gaither*, 142 Md. 380, 121 A. 32; *Carlton v. City of Watertown*, 124 Misc. Rep. 244, 207 N. Y. S. 339; *State ex rel. Cook v. Bates*, 101 Minn. 301, 112 N. W. 67.

We agree in the main with the reasoning of those cases, and believe that the conclusions stated therein should be held as controlling here. It is pointed out in those cases that the evils which may flow from the holding of such auctions and the opportunity afforded through them to impose upon and defraud the public are well known; that in many cases such auctions are likely to be attended with abuses, and frequently result in cheating and defrauding the unsophisticated. It is asserted, and, we think, truthfully, that jewelry auctions are often mere schemes for trapping and defrauding the unwary; that the people, in general, are unskilled in the art of determining the purity of gold and sil-

ver or the genuineness of diamonds, particularly at a glance under artificial light; and that the sale of those articles under such circumstances in competition at public auction necessarily exposes many persons to misfortunes against which this character of legislation might probably protect them. It is further said that the character of an ordinance such as the one now under consideration tends in some degree to prevent those evils and misdeeds, and therefore is enacted in the interests of public safety and welfare, and not, as has been claimed, as an arbitrary or capricious attempt to interfere with the freedom of trade or as an invasion of the rights of an individual to conduct a lawful business. Furthermore, it is quite clearly demonstrated by those decisions that similar opportunities for practicing fraud and deception of the public do not ordinarily attend the holding of auctions for the sale of other articles of merchandise, and that consequently there are reasons for the application and enforcement of rigid regulations against jewelry auctions that do not exist in the cases of auctions in other lines of business.

[5] Referring more particularly to the decision in *Holsman v. Thomas*, supra, the ordinance considered there is similar in a number of details to the one involved in the instant case. It required a license to be obtained before an auction of jewelry could be conducted, and only those merchants residing in the city for one year and owning a regular stock of jewelry therein for a period of six months during that year were qualified to obtain said license. It also limited the period of time the auction might continue. In holding said ordinance to be constitutional, the court declared that the mere fact that said ordinance did not include within its scope dealers selling other kinds of commodities did not render it an arbitrary and unreasonable discrimination against those engaged in the jewelry business, nor was its constitutionality impaired because it did not extend over the entire field of possible abuses of like kind. The ordinance, as was shown, did apply with equal force to every seller of jewelry who desired to sell at auction in the city, and consequently there was no discrimination against any one of that class. It was further held that the ordinance was not confiscatory in its effect, and did not deprive the owner of the jewelry of his right to the enjoyment of his property, because he might at any time, without restriction, dispose of his stock through the ordinary course of business, but, if he desired to dispose of his stock at public auction, which was a matter over which the municipality had control, he would be compelled to do so under certain prescribed conditions, and within a limited period during each year, and if, in so doing, he was obliged to suffer some incidental inconvenience and possibly some financial loss on account of the enforcement of certain regula-

tions provided for in the ordinance, the validity of the ordinance was not affected thereby, for the reason that the imposition of those regulations was well within the exercise of the police power of the municipality. Upon this last point may be cited the case of *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 35 S. Ct. 167, 59 L. Ed. 364, wherein it was said:

"This court has many times affirmed the general proposition that it is not the purpose of the Fourteenth Amendment in the equal protection clause to take from the states the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond the legislative authority. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78, and previous cases in this court cited on page 79 [31 S. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1915C, 160]. That a law may work hardship and inequality is not enough. Many valid laws from the generality of their application necessarily do that, and the Legislature must be allowed a wide field of choice in determining the subject-matter of its laws, what shall come within them, and what shall be excluded."

Later on, in another case, in sustaining the constitutionality of certain state legislation regarding the sale of corporate securities, the same court said:

"We think the statute under review is within the power of the state. It burdens honest business, it is true, but burdens it only that under its forms dishonest business may not be done. This manifestly cannot be accomplished by mere declaration; there must be conditions imposed and provisions made for their performance. Expense may thereby be caused and inconvenience, but to arrest the power of the state by such considerations would make it impotent to discharge its function. It costs something to be governed." *Merrick v. Halsey & Co.*, 242 U. S. 568, 587, 37 S. Ct. 227, 231 (61 L. Ed. 498).

In *Mogul v. Gaither*, *supra*, the right of the city, in the exercise of its police power, to adopt said ordinance regulating the holding of jewelry auctions was conceded, but the constitutionality of said ordinance was challenged upon the ground that said ordinance, like the one in the instant case, made a distinction in its operation between those engaged in business for one year and those who had not been engaged for that length of time, and, furthermore, like the one before us, said ordinance contained a provision limiting the sale to 30 days. The ordinance was sustained, the court holding it to be apparent that auction sales of the class prohibited might be attended with much greater risk to the public than auction sales permitted upon the conditions named, and that therefore the classification created by the ordinance was not arbitrary, but one that bore a reasonable relation to the object sought to be accomplished by it. In *State ex rel. Cook v. Bates* (Minn.) *supra*, a municipal ordinance was de-

clared constitutional which forbade a licensed auctioneer from holding auction sales of jewelry under any circumstances. After discussing the evils which sometimes flow from such auctions, the court said:

"The claim that the ordinance is invalid, because it is 'discriminatory as against a certain business within a certain class,' cannot be sustained. True it is that the ordinance, as a means of policing and regulating the general business of an auctioneer, prohibits the conducting of auction sales of jewelry and watches; but such special sales are liable to be attended with great abuses, and to result in cheating and defrauding the unsophisticated, which is not the case with the general business of an auctioneer. The ordinance applies equally to all auction sales within the city, and it is not discriminatory; and we hold it valid."

In the case of *People v. Gibbs*, 186 Mich. 127, 152 N. W. 1053, Ann. Cas. 1917B, 830, cited herein by petitioner on another point, the court held in reference to an ordinance regulating jewelry auctions that there could be no serious question raised as to the general power of the city under its charter to enact an ordinance to license and regulate auctioneers and auctions held within its limits, and therein prescribe such regulations as are necessary and appropriate in that connection to eliminate fraud, and to protect the public from annoyance and imposition.

[6] It may be conceded, as petitioner contends, that the question of the reasonableness of an ordinance is, to a certain extent, a judicial one (*In re Smith*, 143 Cal. 368, 77 P. 180), but, as stated in *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 31 S. Ct. 259, 55 L. Ed. 328, the scope of the judicial inquiry may not transcend those considerations which are allowed to influence the legislative body in dealing with the matter of the policy of the law which it enacts. And therefore, whether the enactment is a wise one, or based upon sound economic theory, or is the best means to achieve the desired result, are matters for the judgment of the legislative body, and, even though there be a conflict of opinion in relation thereto, it is not sufficient to bring those considerations within the purview of judicial cognizance. Where the legislative action is arbitrary, and has no relation to a purpose which it is competent for government to effect, the limit of legislative power is violated, but, where there is reasonable relation to an object within the governmental authority, the exercise of legislative discretion is not subject to judicial review. The language employed in the decision in *In re Girard*, 186 Cal. 718, 200 P. 593, is in apparent harmony with the rule just stated. There the question arose as to the constitutionality of the Corporate Securities Act (St. 1917, p. 673) of this state, wherein trustees created by will or by order of court in a judicial proceeding were allowed to sell without a permit securities issued by such trus-

tees, but which act forbade a sale without such permit in case of trustees created under an instrument executed by individuals. The court said:

"We cannot declare a law unconstitutional in the matter of discrimination unless there is no rational doubt that it improperly discriminates between persons similarly situated. We must presume that the Legislature made inquiry to determine whether or not there were evils which required regulation, and that upon such inquiry it was ascertained that the mischief sought to be corrected was being done under the form of trusts created by private individuals and not under the form of testamentary trusts or trusts declared in judicial proceedings."

And in the case of *Carlton v. City of Watertown*, supra, which dealt with an ordinance regulating jewelry auctions, it was said that the court was a judicial and not a legislative body, and that the duty of determining whether the measure in question was wise and for the best interest of the people was vested in the common council, and not in the court. Continuing, the court said:

"It may be a debatable question whether the evils sought to be remedied will be cured by this act, or whether the medicine is not too bitter and powerful a dose for the disease. Reasonable men might take opposite sides in such a debate. If so, the court cannot substitute its judgment for that of the law-making body. The court can step in only when it is clearly apparent that the law involved is unreasonable and capricious, and when that question is not fairly debatable."

In view of the foregoing authorities, we conclude that the municipality, in making the classification complained of, and in applying the provisions of said ordinance to jewelry auctions only, acted entirely within the lawful exercise of its constitutional power.

[7] We find no merit in the objection made against the provision of said ordinance prohibiting auctions from being conducted "between the hours of 6 p. m. and 8 a. m." In the case of *City of Roanoke v. Fisher*, supra, this precise question was raised and decided. Evidence was referred to showing "that the public have * * * been frequently deceived and defrauded by the auction sales of such articles as are mentioned in such ordinance [jewelry and diamonds] after usual business hours and under artificial lights, and that this is likely to occur if such sales are allowed, for the reasons that it is more important and necessary for the protection of the purchaser that he be afforded a reasonable opportunity of inspection of such articles, under ordinary conditions and lighting than of other forms of merchandise; that, unless such opportunity is afforded, the purchaser is easily defrauded and misled in his purchase." Other cases holding to the same effect are *Alexander v. Enright*, 211 App. Div.

146, 206 N. Y. S. 785; *Carlton v. City of Watertown*, supra; *Biddles, Inc., v. Enright*, 208 App. Div. 790, 203 N. Y. S. 920, disapproving *Robinson v. Wood*, 119 Misc. Rep. 299, 196 N. Y. S. 209, holding to the contrary. Counsel for petitioner cites two cases holding such a provision to be unreasonable. In the first case, however, *People v. Gibbs*, 186 Mich. 127, 152 N. W. 1053, Ann. Cas. 1917B, 830, it will be found that the ordinance contained many rigid restrictions that are not embraced in the ordinance before us, and which amply protected the purchaser against fraud, among them being that the party holding the auction was not allowed to close his place of business within 5 days following such sale, and during that time the purchaser of any article might return the article purchased by him if the same had been misrepresented, demand the return of the purchase price, and collect it from the person conducting the auction or from his bondsmen. Upon a refusal to comply with the purchaser's demand the seller was liable for a forfeiture of license and payment of fine. In view of these and other drastic safeguards inserted in the ordinance for the protection of the buyer, the court said that there was no evidence indicating "what special wrong to the public would or could result from auctions during business hours after 6 p. m., when conducted according to the requirements of said ordinance, justifying their prohibition as a necessary police regulation." (Italics ours.)

Since the Oakland ordinance does not contain any of the exacting requirements noted, we think that the necessity for the clause in the Oakland ordinance in regard to the hours of conducting the sale cannot be considered unnecessary or unreasonable. The other case cited (*Hayes v. City of Appleton*, 24 Wis. 542) dealt with an ordinance declaring it to be unlawful for an auctioneer to sell any goods "after sundown," and it was said by the court that it was not shown what evil was to be prevented or good promoted by the passage of the ordinance in question; "nor can we judicially see" says the court, "that any restriction of the kind was necessary." It does not appear that this was a jewelry auction case; but, in any event, we think it only necessary to call attention to the fact that this case was decided during the year 1869, before the invention of the electric light, and therefore the reasons assigned in the Virginia case for prohibiting auction sales of diamonds and jewelry with the aid of artificial light did not exist when the Wisconsin case was decided.

[8] The requirement of the Oakland ordinance that the applicant for a permit furnish certain information as to his stock and other matters is not sufficiently burdensome, we think, to render the ordinance in that respect unconstitutional. Petitioner does not claim that those requirements cannot be complied with, and in our opinion they are not any

more burdensome than those inserted in similar ordinances which have been sustained. *Clein & Ellman v. City of Atlanta*, 159 Ga. 121, 124 S. E. 882; *Carlton v. City of Watertown*, supra; *People v. Gibbs*, supra.

[9, 10] The contention that said ordinance in effect vests an illegal arbitrary power in the city council in the matter of granting or refusing permits is fully answered by the decisions in the cases in *In re Holmes*, 187 Cal. 640, 203 P. 398; *Boyd v. City of Sierra Madre*, 41 Cal. App. 520, 183 P. 230; and *Parker v. Colburn* (Cal. Sup.) 236 P. 921—wherein it held in substance that as to those kinds of occupations or businesses which are the proper subjects of police surveillance and regulation the delegation of power to municipal boards or officials to grant or refuse permits will be sustained. Moreover, it is not to be assumed that the council or officer, in exercising the dispensing power, will act arbitrarily, or otherwise than in the exercise of a sound discretion (Dillon on Municipal Corp. [5th Ed.], p. 937), and, if this petitioner had applied for a permit under the requirements of the ordinance, and been either whimsically or arbitrarily refused such permit, he might then have had recourse to the courts for relief from such unjust or arbitrary action (*In re Holmes*, supra; *Gaylord v. City of Pasadena*, 175 Cal. 433, 166 P. 348).

[11] A discussion of the second feature of the ordinance, which deals with the matter of the application for and issuance of permits to auctioneers, is not necessary, for the reason that petitioner is not affected thereby (*Ex parte Murphy*, 8 Cal. App. 440, 97 P. 199; *Id.*, 155 Cal. 322, 100 P. 1134), and furthermore his petition shows that, when arrested, his auction was "being conducted by a regular licensed auctioneer."

The writ is denied.

We concur: TYLER, P. J.; CASHIN, J.

75 Cal. App. 729

VICTORY AUTO PAINTING CO. et al. v. INDUSTRIAL ACC. COMMISSION et al.
(Civ. 5394.)

(District Court of Appeal, First District, Division 1, California. Dec. 23, 1925.)

I. Master and servant § 405(2) — Evidence held to show relation of employee and employer.

Evidence held sufficient to show that toolmaker and machinist, asked by foreman of auto painting company to remove hub cap from automobile on which company's employees were working, was employee and not independent contractor, within meaning of Workmen's Compensation Act, § 8 (b).

2. Master and servant § 367—Power of control determinative factor as to whether person is employee or independent contractor.

In determining whether a person is an employee, within Workmen's Compensation Act, § 8 (b), rather than an independent contractor, the determinative factor is who has the power of control as to means and methods by which result is accomplished.

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by R. F. Daniels for injuries, opposed by the Victory Auto Painting Company, employer, and the Pacific Employers' Insurance Company, insurer. From an order of the Industrial Accident Commission granting an award, the employer and insurer bring certiorari. Affirmed.

H. C. Kelsey, of San Francisco, for petitioners.

Warren H. Pillsbury, of San Francisco, for respondents.

TYLER, P. J. Petition for writ of review to determine the lawfulness of an award of respondent commission in an application for compensation benefits under the Workmen's Compensation Act (St. 1917, p. 831).

It appears from the petition that respondent R. F. Daniels sustained an injury to his eye, and thereafter filed an application with the Industrial Accident Commission wherein he claimed that the injury occurred at a time when he was an employee of the petitioner, the Victory Auto Painting Company.

Following the filing of the application, hearing was had, in which the issue was raised of the existence of the relation of employer and employee between the company and the applicant at the time of said injury. The matter was submitted for decision, and on May 29, 1925, the commission rendered its findings to the effect that the injury caused temporary total disability, continuing for a period of three weeks, entitling the employee to \$20.83 during said time, exclusive of the waiting period, amounting to \$41.66. Thereafter, within the time prescribed by law, petitioners herein, the Victory Auto Painting Company, and its insurance carrier, Pacific Employers' Insurance Company, filed a petition for rehearing. Respondent Daniels also filed a like petition. After hearing, the commission rendered its order denying the same.

[1] The only question here presented is whether Daniels was at the time of his injury an employee of petitioner. While there is a conflict upon the subject, there is sufficient evidence in the record to show that the relationship of employee and employer existed.

It appears therefrom that Daniels was a toolmaker and machinist. He conducted such business in the same building occupied by the

Victory Auto Painting Company. During the noon hour of January 19, 1925, certain employees of the latter concern were attempting to remove a hub cap from an automobile, but were unable to do so. Daniels was asked by the foreman of the company to take the cap off and put in his time for the work at the office. While engaged in chipping the cap, a piece of brass struck Daniels' right eyeglass and either the brass or a piece of the eyeglass injured his right eye.

There is evidence to show that Daniels had performed auto repair work on other occasions for the company for which he had charged \$2 an hour, and that he intended to make a similar charge for the services which resulted in his injury.

Further evidence is to the effect that, while performing the particular task which resulted in his injury, Daniels was working with the other employees of the company under the direction of its foreman at an hourly wage.

Under section 8 (b) of the Workmen's Compensation Act, any person rendering service for another other than an independent contractor is presumed, unless excluded by the act, to be an employee.

[2] In determining in any given case whether a person was an employee or independent contractor, the determinative factor is found in the solution of the question, who has the power of control as to the means and method by which the result is accomplished. *Luckie v. Diamond Coal Co.*, 41 Cal. App. 480, 183 P. 178.

We are of the opinion that the award of the commission finds full support in the evidence as above narrated.

The award is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

75 Cal. App. 617

LEE v. ZIMMERMAN, Public Adm'r, et al.
(Civ. 5290.)

(District Court of Appeal, First District, Division 1, California. Dec. 17, 1925.)

Wills — 67—Heirs of deceased, and not administrator or purchasers at probate sale, are proper parties to suit to impress trust on residue of estate.

In action to impress trust upon residue of estate by virtue of agreement of deceased to give by will or otherwise to plaintiff so much of her property as should remain after expenses of estate had been paid, the heirs of deceased are the necessary and only proper parties, and neither administrator nor purchasers of realty of estate at probate sale are interested.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

Action by Jane B. Lee against H. P. Zimmerman, as Public Administrator and personally, the estate of Eva Boyd, deceased, and others. Judgment for defendants, sustaining a general demurrer, and plaintiff appeals. Affirmed.

George Goode, of Los Angeles, for appellant.

H. K. Stahl, of Corona, for respondents.

CASHIN, J. An action by appellant for the enforcement of an oral contract by Eva Boyd to make a certain testamentary disposition of her property; said Eva Boyd having died intestate. The heirs of the deceased were not made parties to the action; the persons joined as defendants being the public administrator of the county of Riverside, to whom letters of administration of the estate of the intestate had been granted, and others who acquired by purchase from the estate certain real property, the legal title to which was vested in the intestate at the time of her death; the proceedings mentioned having been so far as appears from the complaint in all respects regular.

The estate consisted of the real property mentioned on which the deceased resided at the time of her death, and certain household effects and garden implements, the whole valued at the sum of \$4,000.

The terms of the alleged contract as set forth in the complaint were as follows:

"On or about the 20th of October, 1921, plaintiff agreed with Mrs. Eva Boyd, now deceased, that she would care for her the balance of her natural life, provided the said Eva Boyd would give her by will or otherwise all of the property of which she was then possessed or as much thereof as should remain after being properly cared for, paying her debts, including her last illness and funeral expenses."

"That it was further agreed, in case the small pension of said Eva Boyd of \$30 per month was insufficient for household expenses and to keep up the property of said Eva Boyd and other current expenses, then plaintiff should pay up the balance."

It is further alleged that appellant, pursuant to the contract, removed from her residence in San Francisco, which removal entailed considerable loss and expense, and on November 30, 1921, went into possession of the property "in common" with Mrs. Boyd, caring for and nursing the latter, and paying part of the expenses of their "joint residence together," which continued until the death of the intestate on January 26, 1922; appellant being thereafter dispossessed by the public administrator, and that the agreement had been fully performed by appellant. The complaint also alleges facts tending to support the conclusion that the agreement was fair and reasonable; that the consideration moving from appellant was adequate; and prays

the decree of the court adjudging her to be the owner of the property of the estate.

A general demurrer in which the defendants joined was sustained, and appellant, having declined to amend, a judgment was entered thereon, from which this appeal was taken.

Assuming, without deciding, that the agreement was one which might be enforced in equity, it is clear from its terms that it was not the intention of the parties that any part of the property owned by the deceased should be specifically devised or bequeathed to appellant, but that the latter should acquire the residue of the estate after payment of the debts, including funeral expenses, and, by necessary implication, the costs of administration. Such being the reasonable construction of the agreement, in view of the circumstances alleged, the action in effect was one to impress a trust upon the residue of the estate and to determine the respective rights of those beneficially interested therein, to which litigation the heirs of the deceased are the necessary and only proper parties, and in which neither the administrator nor the purchasers of property of the estate at a probate sale are interested. *Estate of Healy*, 137 Cal. 474, 70 P. 455; *McCabe v. Healy*, 138 Cal. 81, 70 P. 1008.

The complaint not having stated a cause of action against the defendants, the demurrer thereto was properly sustained, and the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

75 Cal. App. 620

PEOPLE v. SCANLON. (Cr. 1287.)

(District Court of Appeal, First District, Division 2, California. Dec. 17, 1925. Rehearing Denied Jan. 15, 1926.)

Criminal law — § 1186(4)—Refusal to instruct as to aiding and abetting crime held not reversible error.

Where accused, in prosecution for attempt to commit grand larceny, denied presence at scene of crime, but state's evidence showed he was participant therein, no issue was raised requiring instructions on aiding and abetting crime, and refusal to give them was not prejudicial, in view of Const. art. 6, § 4½, precluding reversal for misdirection except when resulting in miscarriage of justice.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Thomas Scanlon was convicted of an attempt to commit grand larceny, and he appeals. Affirmed.

J. F. Resleure, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

NOURSE, J. The defendant and one Castro were tried jointly on an information charging them with an attempt to commit grand larceny. Both were convicted, and Scanlon has appealed from the judgment and from the order denying his motion for a new trial. The record is prepared under section 953a, Code of Civil Procedure.

The two defendants were seen by two police officers on Mission street at about 8:15 p. m., acting in a suspicious manner, and were followed by the officers as they walked along the north side of Mission street, going east. The defendants passed one Donnelly, who was lying on the sidewalk badly under the influence of liquor; they continued easterly for about 50 feet, then turned back, and while the defendant Scanlon held Donnelly in an upright position Castro went through his pockets. The defendants then left Donnelly where they found him, and walked directly across the street, where the police officers placed them under arrest. The officers searched both defendants and found \$2.50 in the pockets of Castro.

Upon the trial the defendant Castro did not take the stand, but the defendant Scanlon testified that he was not on the north side of Mission street on the night in question; that he did not see Donnelly until after the arrest; that he did not take any money from Donnelly and did not see Castro take any; that he was merely engaged in a friendly conversation with Castro, whom he had just met at the time, when he was struck on the head by one of the arresting officers.

The only point raised on the appeal is that the trial court erred in refusing to give two instructions asked by defendant Scanlon, and which read:

"If you are satisfied from the evidence that the defendant, Thomas Scanlon, stood by at the time the offense is alleged to have been committed, but did no act to aid, assist, or abet the same, you should find the defendant, Thomas Scanlon, not guilty;" and, "Unless you are satisfied, beyond a reasonable doubt, that defendant, Thomas Scanlon, did some act to aid, assist or abet the offense alleged to have been committed, you should find the defendant, Thomas Scanlon, not guilty, notwithstanding he was present at the time the offense was alleged to have been committed."

The appellant relies on *People v. Woodward*, 45 Cal. 293, 13 Am. Rep. 176, where the Supreme Court held that it was error to have refused to give an instruction similar to the one first above quoted. There is a marked distinction between the facts of this case and those in *People v. Woodward*. In the case cited the evidence was that Woodward stood by while some small boys attempted to commit the assault with which they were all charged. There was no evidence that Woodward took any part in or

"aided or abetted" the commission of the crime. Here the evidence of the prosecution is that appellant actually took part in the commission of the crime—not as an accessory, but as a participant. In answer to this the appellant did not, as did Woodward in the case cited, admit that he was present and merely witnessed the commission of the crime by the other defendants, but he denied that he was present, that he witnessed the commission of the crime, and that his codefendant was a party to the crime.

There was therefore no issue in the trial which required either of the requested instructions on aiding and abetting, and the refusal to give them was not prejudicial. For this reason section 4½ of article 6 of the state Constitution, which was adopted subsequent to the Woodward decision, compels an affirmance, as we are satisfied, upon an examination of the entire record, that the appellant was fairly tried and fairly convicted.

Judgment and order affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J

75 Cal. App. 657

PEOPLE v. HAWTHORNE. (Cr. 1279.)

(District Court of Appeal, First District, Division 2, California. Dec. 18, 1925. Rehearing Denied Jan. 14, 1926. Hearing Denied by Supreme Court Feb. 15, 1926.)

1. Witnesses $\S$ 269(4)—Question as to detective's conversation with witness just prior to latter's identification of accused held improper cross-examination.

In prosecution for robbery, where witness to crime afterward identified accused in hospital, but where prosecution did not introduce conversation between such witness and detective who took him to hospital, and defense did not ask if identification was based solely on recollection of robber's appearance, questions as to whether detective told him why they were going to hospital held not proper subject-matter of cross-examination.

2. Criminal law $\S$ 683(1)—Evidence as to whether detective received money as result of police activities in case held inadmissible.

Where, after prosecution closed case, defense called as witness detective who had taken identifying witness to hospital to identify accused, objection to question as to whether detective had received money from certain insurance company arising as result of police activities in the case held properly sustained.

3. Criminal law $\S$ 655(5)—Court did not usurp function of jury by warning counsel to confine himself to facts proved.

In prosecution for robbery, where accused was not identified until some time after crime,

and defense counsel, in argument to jury, started to read of other cases where identifying witnesses had made mistakes, but made no immediate objection to court's phraseology in sustaining objection of prosecution to such argument, in which court warned counsel to confine himself "to the facts proved in this case," held court was not usurping function of jury; such language not holding testimony of prosecution to be conclusive.

4. Criminal law $\S$ 718—Defense counsel in argument to jury could not refer to other cases of which there was no evidence in record.

In prosecution for robbery, where accused was not identified until some time after crime, trial court did not err in refusing to allow defense counsel in argument to jury to read of other cases concerning which there was no evidence in record, in which identifying witnesses had made mistakes.

5. Criminal law $\S$ 825(4)—Instruction as to proof required to convict held sufficient, in absence of tender of additional instructions.

In prosecution for robbery, instruction that defendant is presumed innocent until contrary is proven, and is entitled to acquittal in case of reasonable doubt as to guilt, held sufficient, in absence of showing that additional instructions were tendered and refused.

6. Criminal law $\S$ 655(1)—Remarks of juror could not constitute error of trial court.

Where juror, by remarks during defense counsel's argument, showed her inexperience and ignorance of law as to burden of proof in criminal cases and as to duty of defendant to take stand in his own behalf, but apologized when her statements were ruled irregular, held, matters were not acts of trial court, and could not constitute error on his part.

7. Criminal law $\S$ 925(1)—Remarks of juror relative to accused, made during defense counsel's argument, held not to constitute misconduct.

Where juror, in prosecution for robbery, by remarks during defense counsel's argument as to why defendant did not say where he was, showed her inexperience of law as to burden of proof, and duty of defendant in criminal prosecution to take stand in his own behalf, held, such remarks did not constitute misconduct.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

James Hawthorne was convicted of robbery, and he appeals. Affirmed.

Clarence M. Booth, of San Jose, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

STURTEVANT, J. The appellant was convicted of the crime of robbery. He made a motion for a new trial, and the motion was denied. He has appealed from the judgment of conviction and the order denying his motion for a new trial.

Mr. McLean, called as a witness by the prosecution, testified that he is a clerk employed with Houston-Gilmore & Company, and at the time of the trial had been so employed for six and a half years. His employers' place of business is located on the northeast corner of the intersection of Post and Stockton streets in San Francisco. On the morning of the 24th of June, 1924, the witness went to his place of business a little after 9 o'clock. As he walked up to the door from Stockton street, he noticed two men standing around the corner in Post street. As the witness walked up to put his key in the door, he turned around to see if the men were interested in him. They evidently were not, because they were reading a paper. As the witness walked in the door, he was forced in from behind, and, when he turned around, there was a gun held on him by one of the men, and who was afterwards designated by the witness as No. 1. That individual ordered the witness to go back to the vault and give him the goods. The witness told him that he did not have the combination, and could not. Two men followed the witness into the store, and the second man the witness designated as No. 2. The witness thereupon proceeded to delineate all of the facts of the robbery. He stated that neither of the robbers was masked, and he delineated what No. 1 did and what No. 2 did. He also stated that, when the three mentioned were in the store a little later Mr. Gilmore, one of the proprietors, arrived. The witness continued to state the story as to what transpired after Mr. Gilmore came in. In giving his testimony the witness mentioned several occasions in which he looked at each of the robbers squarely in the face, and also had other views of each of those men. Continuing his story, the witness stated that later it transpired that No. 1 was William O'Connor, and still later, on October 22, 1924, the witness again saw No. 2 in bed at the San Francisco Hospital, and recognized him, and thereafter heard that his name was James Hawthorne. During his examination the witness fully delineated the facts of the robbery. Later Mr. Gilmore was called as a witness, and testified to all the facts as he remembered them. Among other things, he testified to seeing O'Connor at a later date, and that O'Connor had pleaded guilty, and was serving his time. Furthermore, Mr. Gilmore testified that on the 22d of October, at the same time and place above mentioned, he saw the appellant, and was later informed as to his name. The prosecution called one other witness, Francis X. Lattulipe. That witness testified that he is a detective sergeant of the police department detailed in charge of the police photograph gallery and as draftsman for the police department. He produced a drawing which he had made of the store which had been robbed.

That witness did not purport to give testimony on any other subject.

[1] The first point made by the appellant is that the trial court erred in not permitting cross-examination of the witness Gilmore, and not allowing a certain examination of the witness Bohr, who was called by the defense. There was testimony in the record that Detective Fred Bohr took Mr. McLean and Mr. Gilmore to the hospital. The prosecution did not introduce any conversation held by those persons. In cross-examining the witness McLean and the witness Gilmore the defense did not ask either one if his identification was based solely on his recollection of the appearance of the robber. Neither did the defense ask either of the witnesses if any other person had made any statement to the witness on which the witness in part rested his testimony as to identification. Nevertheless, the defense propounded to Mr. Gilmore these questions:

"Did Fred Bohr tell you why he was taking you out there? Did Mr. Bohr talk to you on the way out about what you should do when you got there? As a matter of fact, Mr. Gilmore, didn't Mr. Fred Bohr tell you at that time that there was a man out there named Hawthorne who was dying, and that he wanted you to go out and identify him before he died?"

[2] The prosecution objected to each question, the objection was sustained, and it is these rulings that the appellant attacks in the first division of the point under discussion. We think there was no error in any one of the rulings, and, furthermore, that the questions were not the proper subject-matter of cross-examination of the witness Gilmore. After the prosecution had closed its case, the defense called Detective Bohr, and propounded to him the question:

"Mr. Bohr, have you received, or did you in the month of December, 1924, receive, any money from an insurance company called Lloyd's, arising as a result of police activities in this robbery?"

The prosecution objected to the question, and the objection was sustained. Under the facts above recited the ruling was clearly correct.

[3] The second point made by the appellant is that the trial court erred in commenting on the evidence in the presence of the jury. In presenting this point some short excerpts are quoted. In arguing the case to the jury one of the attorneys for the appellant started to read about certain cases in which the witnesses had made mistakes in identifying defendants. The prosecution objected, and claimed that counsel should confine their arguments to the matters that were within the record that was before the court. The record shows clearly the contention of the prosecution, the contention of the defense, and that the trial court was ruling on that con-

tention, and nothing more. However, in ruling, the trial court used different expressions, such as "confine yourself to the record"; "to the facts proved in this case"; "to inferences from the facts proven." The appellant argues that the language used by the trial court was in effect to hold that the facts testified to by the witnesses for the prosecution conclusively proved those facts, and that the trial court thus usurped the functions of a jury. Taking the context from which the excerpts are quoted, we think it is quite clear, indeed, that no one present at the trial then thought the trial court was usurping the functions of the jury. Moreover, if either counsel had called the attention of the trial judge to some of the phrases used, no doubt the matter would have been stricken out or modified on the spot.

[4] In the next place, the appellant contends that the trial court erred in limiting the argument of the appellant's counsel. This point reverts to the attempt of the defense to read from books and papers some of the facts regarding alleged mistakes in identification. There was no evidence of course in the record regarding the other cases to which counsel was referring, and there was no error in the trial court holding that the argument should be confined to the evidence that had been introduced.

[5] The trial court instructed the jury, among other things, as follows:

"In every criminal proceeding under our system of criminal jurisprudence, the defendant is presumed to be innocent until the contrary is proven, and, in case of reasonable doubt whether his guilt has been satisfactorily shown, he is entitled to an acquittal."

We do not understand the appellant to contend that said instruction is not a sound statement of the law, but that he complains that the court did not give other and additional instructions on that general subject. However, it is not claimed that the defendant tendered such additional instructions and that the trial court refused to give the same. Under these circumstances the trial court committed no error.

[6, 7] The last point made by the appellant involves the proceedings had when Mr. Cunha, as counsel for the appellant, was arguing the case to the jury. The point is novel. For that reason we state the record in full as it appears in the transcript:

"Mr. Cunha (continuing): * * * There is nothing here to show that Mr. Hawthorne was ever even in San Francisco at that time.

"A Juror: Where was he then?

"The Court: Just a moment, lady. The case has been submitted to you on the facts. You have no right at this time to interfere with the course of this trial. You remain silent and retire to the jury room at the proper time.

"Mr. Cunha: I think, if your honor please, it is important now, on the part of the defendant, for us to request your honor to advise the other

jurors to entirely disregard that question propounded to me by the juror in the jury box.

"The Juror: I apologize.

"The Court: The juror has apologized.

"Mr. Cunha: An invasion of the rights of the defendant, and prejudicial conduct, and I request your honor to specifically instruct the other jurors to disregard that incident.

"The Court: Let the remark of the juror be disregarded for any purpose at this time, ladies and gentlemen of the jury. Proceed.

"Mr. Cunha: I am very glad, my dear friends, that that question was asked, for this reason—I take it I will proceed away from that, from the proposition of the question, because that has to be disregarded altogether.

"The Court: Yes.

"Mr. Cunha: But I will proceed with my argument in this manner: The situation might be made, in a general sense, as to where Mr. Hawthorne was upon the day in question, if he wasn't at the scene of the robbery. Now, if that be the fact, and there is some doubt in somebody's mind as to where he was, or some one feels that there should be some proof as to where Mr. Hawthorne was, let me say this to you, that the burden of clearing up any situation of that kind is upon the prosecution in this case and not upon the defense. There is no burden or obligation upon the defendant—I think, if your honor please, we better wait until—

"The Court: What is it?

"Mr. Cunha: Until the ladies—

"The Court: Let us proceed. The time is getting short.

"The Juror: I apologized. I can't do anything more.

"Mr. Stafford: It was just an innocent mistake.

"Mr. Cunha: Oh, I realize that.

"The Juror: But I would tell just where I was.

"The Court: Now, keep in mind, ladies and gentlemen—

"Mr. Cunha: I think a continuance—

"The Court:—that we are here at this trial. I trust there will be no more outbursts of this kind. I understand that emotion sometimes gets away from one, but we should refrain from any flights at this time. The jury will retire at the proper time and deliberate upon their verdict.

"Mr. Cunha: I ask your honor to specifically instruct the jury to disregard that last remark of the juror also. There was another remark just made.

"The Court: What remark?

"Mr. Cunha: I ask the jury be specifically instructed to disregard it. I don't know what it was. Some remark.

"The Court: It has no place here. Proceed."

Looking directly at this incident in the very face of it, it appears at once that the juror was wholly inexperienced as such, and that she was entirely uninformed on those parts of the law of this state which place the burden of proof on the prosecution and not on the defense, and which leave to a defendant to take the stand as a witness in his own behalf or omit to do so, as he sees fit, and that no inference is to be drawn by the jurors because the defendant remains silent. These matters were no act of the trial court, and

consequently no possible error on the part of the trial court. The juror said nothing constituting misconduct, but, on the other hand, did all that she could do under the circumstances; namely, she apologized when it appeared that her question or statement, as the case might be, was ruled as being irregular. If there is any real criticism to be made, it is a criticism of the lawmaking power which rendered the incident possible, and not an error on the part of the court or any official acting thereunder.

The judgment and order are affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

75 Cal. App. 447

PEOPLE v. STRAUSS et al. (Cr. 1250.)

(District Court of Appeal, Second District, Division 2, California. Dec. 7, 1925. Opinion Modified and Rehearing Denied Jan. 6, 1926. Hearing Denied by Supreme Court Feb. 4, 1926.)

1. Criminal law § 144(13)—On appeal evidence must be viewed in light most favorable to verdict.

On appeal from judgment of conviction, evidence must be viewed in light most favorable to verdict.

2. Robbery § 24(1)—Evidence held to sustain conviction of robbery in first degree.

Evidence held sufficient to sustain conviction of robbery in first degree.

3. Criminal law § 792(3)—Instruction relating to law of principals, and directing acquittal if not satisfied of guilt beyond reasonable doubt, held proper.

Instruction that all concerned in commission of felony, whether directly or aiding its commission, though not present, are guilty as principals, and directing acquittal unless jury were convinced to a moral certainty and beyond reasonable doubt that those accused aided and abetted commission of offense, held properly given.

4. Criminal law § 741(6)—That inference of innocence may be drawn from circumstances does not require taking case from jury.

Where circumstances reasonably justify inference of guilt, that inference of innocence may also be drawn does not require taking case from jury.

5. Robbery § 14—That money was returned to victim held not to preclude conviction.

That money taken from victim at point of revolver was immediately returned held not to preclude conviction for robbery.

6. Criminal law § 1186(4)—Instruction as to weight and credibility of testimony of accused not taking stand held not prejudicial, where evidence of guilt clear.

Instruction that accused is not required to take stand, but if he does his credibility is to be determined by rules applicable to other wit-

nesses, and general instruction as to weight and credibility of such testimony, though error, where none of those accused testified, held, under Const. art. 6, § 4½, not prejudicial, where evidence of guilt was so convincing that jury could not reasonably have arrived at any other conclusion.

7. Robbery § 23(1)—Evidence that officer found memorandum in accused's apartment with name of victim of robbery thereon held competent and admissible.

In prosecution for robbery, testimony of officer that he found memorandum in accused's apartment with name of victim of robbery and telephone number thereon held competent and admissible.

8. Criminal law § 1023(12)—Order denying motion in arrest of judgment is not appealable.

Order denying motion in arrest of judgment is not appealable.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Marvin Strauss, Charles Sciorplate, and Harry Russell were convicted of robbery in the first degree, and named defendants appeal. Affirmed.

Anderson & Anderson, T. E. Parke, and Homer C. Mills, all of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

CRAIG, J. The three defendants above named were charged jointly by an information consisting of two counts, in the usual form, with having committed robberies in Los Angeles county. The first count charged that on or about the 11th day of January, 1925, they robbed one E. E. Foley of a Nash automobile, a diamond ring, and \$19 in money, and the second count alleged that on or about the same date they robbed one Johnny Wilkerson of \$3 in money. At the close of the people's evidence, a motion for instructed verdicts of acquittal was made in behalf of appellants, and was overruled. Thereupon two witnesses testified as to the past history and reputation of defendant Strauss for truth, honesty, and integrity, but none of the defendants took the stand. Six separate verdicts were returned by the jury, convicting the respective defendants upon each count of robbery in the first degree. Motions for new trial were presented in behalf of each defendant, which were denied, and thereafter motions in arrest of judgment were made by appellants, and these motions also were denied. This is an appeal by Strauss and Sciorplate from the rulings of the trial court upon said motions, and from the individual judgments and sentences applicable to each appellant, respectively.

[1, 2] We will first consider the claim that

the evidence is insufficient to sustain a conviction upon either count. Regarding the evidence, as a reviewing court must, in the light most favorable to support the verdicts, the facts which will now be detailed we think are quite sufficient.

At about 9 o'clock a. m. on the 11th day of January, 1925, Foley and Wilkerson drove the former's Nash sedan automobile into a garage near the corner of Moneta avenue and Forty-Fifth street, in the city of Los Angeles. Before they alighted the defendant Russell and a large man whom they could not identify stepped to either side of the car, ordered them out, searched them at the points of revolvers, and escaped with Foley's machine. A diamond ring and \$19 in money were taken from Foley, and \$3 was taken from Wilkerson, which however, was returned. A Buick touring car, with side curtains up, which had been standing on the opposite side of the street, immediately followed the Nash in an easterly direction on Forty-Fifth street, north on Main street; both cars turning toward the east on Miles street. As soon as his car left the garage Foley ran into the street to call an officer, and Wilkerson went through Foley's restaurant to Moneta avenue. As soon as the Nash turned onto Forty-Fifth street the two machines sped easterly, the Buick keeping within 7 to 10 feet behind the Nash. Wilkerson testified that Russell drove the Nash away, and that the large man stood on the running board; that the latter would weigh 175 to 180 pounds. This witness also stated that he had known the defendant Sciorplate for some time as a customer of Foley's. It appears that several persons, including a Mrs. Leonard, summoned the police, and that two motorcycle officers, who were in the immediate vicinity, took up the chase. Officer Hansch testified that a number of people ran across the street, saying that there had been a robbery, and that as he called Policeman Bayer and started in pursuit of the fleeing machines, some of those in the crowd indicated the Buick, saying, "That is the car!"; that it was running at the rate of about 55 miles per hour, and when he sounded his siren it increased its speed, but slackened to turn onto Miles street, where it stopped. Hansch stated that as he arrived beside the Buick he discovered two men in the car, and that they at once threw up their hands when they saw him. One of the officers related that at this time he said to Strauss, "This is one stickup job you are not going to get away with," to which Strauss made no reply, but sneered, and that Sciorplate, although present, also made no reply.

It is admitted that the two men arrested in the Buick were the appellants, and that Sciorplate is a large man as compared with Strauss or Russell. Foley's Nash was later found, abandoned, some distance from the scene of the arrest. The verdict indicates that the jury were satisfied beyond a reasonable

doubt that the defendants were guilty as charged, and we cannot say that the evidence does not justify that belief. Russell undeniably participated in the robbery. A person corresponding to Sciorplate also took part in it. Russell lived at the same place as Burton. Burton owned the Buick car. This car was the one driven by Strauss and Sciorplate. The conduct of these two appellants is sufficient in itself to convict them. It amounts to more than a confession, and it is corroborated by a number of other incriminating circumstances. The jury were justified in believing that at the time of the robbery the Buick was waiting on Forty-Fifth street opposite the garage; its presence and appearance there has no other reasonable explanation. When it arrived is not shown, but it stood in a convenient location for the use to which it appears to have been put, and its shades were drawn—a circumstance no doubt regarded by the jury as unusual and suspicious. A man of Sciorplate's size participated in the robbery. He rode out of the garage on the running board of the stolen Nash, in the direction of where the Buick was parked, necessarily going in close proximity to the latter, and immediately Sciorplate was with Strauss in the Buick car. This is an inevitable inference from the other circumstances. The last-named car with Strauss driving, as he would naturally do if he had been waiting for Sciorplate, at once started up and followed the Nash so closely as to suggest extreme hazard considering that both cars were traveling at the rate of 55 miles per hour. Bearing in mind that the evidence indicates as clearly as it could without the testimony of any eyewitness to the fact, that Sciorplate had transferred from the Nash to the Buick and that he and Strauss were undoubtedly acting in concert, the credulity of the court is indeed challenged when it is asked to believe that this pursuit was innocent and not intended to assist in the escape of Russell with the Nash car, or when we are asked to say that a jury of reasonable men should have entertained a reasonable doubt that such was the case. It surely was not a mere coincidence that Strauss drove the Buick car at the rate of 55 miles an hour, keeping it within 7 to 10 feet behind the Nash which had just been stolen.

The only logical deduction appears to be that these appellants and Russell planned a scheme to evade capture should pursuit of the Nash be made. The system evidently adopted might well have proven successful but for certain circumstances whose happening they failed to foresee. The Buick car was the property of Burton; the appellants' right to its possession could not be questioned, for Burton and Russell lived at the same address and Burton undoubtedly had loaned the car, possibly knowing to what use it was to be put. At any rate, they were secure in the knowledge that he would uphold them in their

assertion that their driving this machine was entirely with the consent of the owner. By driving it at an excessive speed they might reasonably expect to attract the attention of pursuers to themselves as the possible robbers, and thus shield the Nash and its driver by distracting attention from the latter. This they did, then, allowing the Nash to round a corner in advance, Strauss stopped, running his car in to the curb. It could fairly be expected that the officers, supposing that they had overtaken the stolen automobile and the robbers, would make no further pursuit or search. Two persons only committed the robbery, and there were two in the Buick when it allowed itself to be overhauled. Russell in the Nash might reasonably have been thought to have thus been given a clear chance to make his getaway. It is probable that Strauss and Sciorplate, confident that they could not eventually be connected with the robbery, acted with deliberation at this time in giving an appearance of guilt. At any rate, their conduct was most suspicious and damaging to them, as events finally terminated. They at once, and without being asked to do so, put their hands up as a token of surrender, and advanced toward the officers. This is not the demeanor of men conscious of having done no wrong; it is not the conduct of men who have merely committed the offense of violating a minor regulation, such, for instance, as a traffic ordinance. But their incriminating conduct was emphasized by their failure to deny the accusation of having committed a felony which was involved in the officer's statement, to Strauss, in Sciorplate's presence, that "this is one stickup job you are not going to get away with." And yet, without further connection with the robbery, doubtless appellants would have been liberated. They might well have felt secure when the police learned that the car which had been stolen was not a Buick but a Nash and that Burton, the owner of the Buick, knew of and had consented to Strauss and Sciorplate driving his car, they could be charged with no more serious offense than speeding, and in the meantime Russell would have had ample time to escape with the Nash. But the officers insisted upon knowing more about the men whom they had apprehended. In answer to questions Strauss told where he lived. The officers went there accompanied by Mrs. Strauss, entered the apartment, and found the Los Angeles telephone number of a Mr. Burton whom they located, and who proved to be the owner of the Buick car; but Strauss had said that Burton was in Kansas City, and that he (Strauss) had borrowed the car there, and had driven it to Los Angeles. An innocent man would have had no occasion to have falsified as to Burton's whereabouts, or in any other manner. However, the reason for this becomes apparent when we consider that Russell, who had the stolen property in his

possession lived at the same place where Burton resided. Of course, Strauss knew that if Burton were located Russell would be almost instantly taken into custody; in conformity with the canny philosophy of Burns, "The best laid plans o' mice and men gang oft agley," their scheme would be punctured and would collapse, and this happened. Bayer and Hansch, the arresting officers, located the address of Burton by the telephone number, went there, and found Russell standing on the front porch, and Foley's diamond ring, and the guns, offered in evidence at the trial, were found in his room. The jury had submitted to its consideration the fact that the appellants, having the Buick car parked with curtains drawn in the immediate vicinity of the robbery, had at once fled, and when given the siren by pursuing officers, had continued their flight; that they had not denied guilt when called upon to do so; that they had so conducted themselves as to be subject to the charge of having intentionally aided in the escape of Russell driving the purloined Nash; that they had falsified in statements to the officers, and were shown to have directly maintained connection with Burton, and indirectly with Russell. These facts are amply sufficient to sustain the verdicts, and there are others which might be pointed out of lesser import, but nevertheless adding certainty, almost to the point of demonstration, to the conclusion already fairly reached.

[3,4] The jury were properly instructed that all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are guilty as principals; and that unless they were convinced by the evidence before them to a moral certainty and beyond a reasonable doubt that the appellants did aid and abet in the commission of the offense, they should acquit them. The evidence upon which the verdicts in question were based is largely circumstantial, but as was said in *People v. Muhly*, 15 Cal. App. 416, 114 P. 1017:

"It rarely happens that circumstances attending the commission of a crime may not, in the opinion of the reviewing court, reasonably be susceptible of an interpretation compatible with the innocence of the person associated with such circumstances; and if one after another of the alleged incriminatory circumstances may be eliminated, they would necessarily cease to have any probative force considered collectively.

"* * * As we understand the *Staples Case* [149 Cal. 405, 425, 86 P. 886], the rule there laid down followed an analysis of the evidence from which the court was authorized to conclude that there was no evidence warranting the verdict. We do not understand that case to hold that where the circumstances are such as to reasonably justify the inference of guilt, the case will be taken from the jury because an inference of innocence might also reasonably have

been drawn. Between these two inferences the jury must choose, and it is only where the evidence obviously does not warrant the inference of guilt that the court will interfere."

It was also held in *People v. Martinez*, 20 Cal. App. 343, 128 P. 952, that where the circumstances are such as to reasonably justify the inference of guilt, as found by the jury, the fact that an inference of innocence might likewise be reasonably drawn therefrom does not present a question of law for review by an appellate court, any more than does a verdict based upon direct conflicting evidence; that in neither case will the verdict be disturbed.

[5] It is further insisted that Wilkerson, having immediately regained possession of the money taken from him by Russell, was not robbed, and that therefore a conviction upon the second count of the information was unauthorized. He was ordered out of the automobile, held up at the point of a revolver, and his money taken from him, as alleged, by force and against his will. Had Russell kept the \$3, there would have been no dispute upon this point; but it is urged that the robber returned the money to his victim, and that therefore he committed no offense. Russell's generosity seems to have been smitten only by the small amount and Wilkerson's remark that it was all the money that he had, but the appellants seek to mitigate the offense upon the fact of recovery, rather than to explain their counsel and support of one who went prepared to kill had the amount been larger and its theft been met with resistance.

The question presented has heretofore been considered and decided in this state. In *People v. Anderson*, 59 Cal. App. 408, 211 P. 254, the defendants were charged with having robbed another of a bill of sale to an automobile, a gold watch, money, and other property; Anderson compelled the victim to assign the bill of sale to his machine to the robber, but returned it to him. It was there said:

"Nor does the fact that the defendants returned the property to Litts of itself relieve their act in taking it of the stigma of criminality. It was for the jury to consider that circumstance with the other circumstances in the case in determining the question of guilt or innocence."

In *McGinty v. State*, 97 Ga. 368, 23 S. E. 831, it was held that—

"Where the offense of robbery is once actually completed by the felonious and violent taking of property from the person of another into the possession of the thief, it cannot be purged by any subsequent redelivery of the property to the owner; and this is true although the thief may have retained possession but a short length of time. 2 Bishop, New Crim. Law, §§ 1161, 1163; 2 Russell, Crimes, 104, and cases cited."

The evidence was therefore clearly sufficient to establish the crime charged in the second count, and the return of the money did not have the effect of relieving the defendants of criminal liability.

[6] None of the defendants took the stand, but the trial court gave the following instruction, which appellants contend was reversible error:

"You are instructed that while the defendant in a criminal action is not required to take the stand and testify, yet if he does so, his credibility, and the value and effect of his evidence are to be weighed and determined by the same rules as the credibility and effect and value of the evidence of any other witness is determined."

It is contended that the court, thus, in effect, singled out the defendants for special comment upon a matter which was nonexistent, and yet must have conveyed to the jury the impression that, by failing to take the witness stand, they were not willing to subject themselves to the same rules as those governing the credibility and effect and value of the evidence of any other witness. A general instruction also was given, wherein the jury were told that they were the exclusive judges of the credibility of witnesses, and that the character of witnesses should be taken into consideration in determining their credibility and the facts, as to whether or not they had spoken the truth; that a witness is presumed to speak the truth, but that such presumption may be repelled by the manner in which he testified, his interest in the case, if any, or by evidence affecting his character for truth, honesty, and integrity, or by contradictory evidence. It is argued that coupling the two instructions results in charging matters which have been criticized upon appeal even where a defendant testified. *People v. Maughs*, 149 Cal. 253, 86 P. 187, is quoted as supporting this contention. There the defendant took the witness stand, and an instruction was given, expressly stating to the jury that—

"Where the defendant offers himself as a witness, in determining his credibility, it is proper to take into consideration the consequences, inducements, and temptations which would ordinarily influence a person in his situation."

In other words, it was indicated that the defendant's interest in the case might be expected to cast a doubt upon the credibility of his testimony. The Supreme Court said that it had previously been told "that it is difficult, logically, to attribute the giving of such an instruction to anything other than a purpose to expressly disparage the defendant, 'the very thing that a court has no authority to do, in view of our constitutional provision.'" *People v. Emmons*, 13 Cal. App. 487, 110 P. 151, is also relied upon. There, the defendant did not take the stand, but the jury were instructed that if the defendant offered himself

as a witness he might be cross-examined by counsel for the people as to all matters about which he was examined in chief. It was said that since it was not a question for the jury as to what could be done had the defendant taken the stand, there appeared to be no conceivable occasion which could arise during a criminal trial for giving an instruction upon this point. Since the defendant in that case did not testify, it was held that the instruction could only be regarded as a suggestion that the only probable reason he did not do so was because, in that event, he might have been cross-examined. It will be observed that the court further instructed the jury that the defendant's "neglect or refusal to be a witness cannot in any manner prejudice him or be used against him on the trial or proceeding." The reasoning of the opinions in these cases hardly applies with equal force to the instruction before us, and yet we have no doubt that under the circumstances here involved its giving was technically an error. The defendant had not offered himself as a witness, and did not testify; there was no occasion or justification for any instruction upon that point unless, if requested, to have informed the jury that the defendant is not required to testify and that his failure to do so must not prejudice him in any way. To go further and add comment upon any consequences which might follow had the defendant chosen to become a witness is to create in the minds of the jury at least a question as to whether or not his not having testified might be attributed to a desire upon his part to avoid such consequences; that is, not to have his evidence weighed and determined by the same rules as that of other witnesses.

However, we consider this a proper case for the application of section 4½ of article 6 of the Constitution of this state. The evidence of the defendants' guilt is so convincing that we do not think the jury could reasonably have arrived at any other conclusion, even if the erroneous instruction mentioned had not been given. A careful reading of the entire record satisfies us that no miscarriage of justice can result from affirming the judgments from which appeals are here taken.

[7] One other point remains to be considered. It appears that the officer, Brown, was permitted to testify that at Strauss' apartment he found written on a piece of paper the following memoranda: "Mr. Burton, Atlantic 6206." He also stated that he called "Information," and that "that telephone was registered to M. C. Jackson, 319 East Sixteenth street." Before this testimony was given, appellants' counsel objected on the grounds that it was irrelevant, incompetent, and immaterial. After a part of the answer had been given, the same objection was repeated, with the additional ground stated that the answer was not responsive to the question.

The first statement made by the officer, that he had found a piece of paper lying on top of the telephone, bearing the writing "Mr. Burton, Atlantic 6206," was clearly admissible; it may be that the rest of the statement made by him should have been excluded as hearsay, but no objection was made upon that ground. All of this evidence was competent, relevant, and very material. This is apparent from our discussion of the evidence bearing upon a point previously considered. It is noteworthy also that the judge, in overruling the objections, remarked that he did not know at that time whether or not the testimony would be admissible, but that it could be stricken out in case it should be found to be objectionable. No motion to strike was made.

[8] The appeals from orders denying the motions in arrest of judgment are dismissed, since such orders are not appealable. *People v. Peery*, 26 Cal. App. 143, 146 P. 44; *People v. Mooney*, 132 Cal. 13, 63 P. 1070; *People v. Matuszewski*, 138 Cal. 533, 71 P. 701; *People v. Feld*, 149 Cal. 464, 86 P. 1100. The orders denying appellants' motions for new trial are affirmed, and the judgments are affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

75 Cal. App. 664

HEEP v. BOHAN. (Civ. 5274.)

(District Court of Appeal, First District, Division 2, California. Dec. 19, 1925.)

1. Assault and battery ☞35—Evidence held sufficient to support judgment for plaintiff in action for assault.

In action for assault where plaintiff was pushed from defendant's place of business, evidence held sufficient to support judgment for plaintiff.

2. Appeal and error ☞1001(2)—Where evidence sufficient to support judgment, appellate court's opinion as to weight of evidence not ground for reversal.

That appellate court believed evidence preponderated against verdict is no ground for reversal, if substantial evidence supports judgment.

Appeal from Superior Court, Los Angeles County; Thomas O. Toland, Judge.

Action by F. H. Heep against E. R. Bohan. From judgment for plaintiff, defendant appeals. Affirmed.

F. A. Waters, of Los Angeles, for appellant.

I. R. Rubin and M. G. C. Harris, both of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment of \$300

against him in an action for damages for assault. The defendant was in the business of selling paints, and the plaintiff was a builder. Plaintiff had engaged a third person to do some painting on a building which he was constructing and claimed to have paid such third person for his work and the materials used. The materials were supplied, however, by defendant, who caused a lien to be placed upon the building for their value. Plaintiff went to the place of business of the defendant and attempted to compromise with him upon his claim. He explained to the defendant that he had paid the painting contractor and should not have to pay the bill twice. Defendant declined to suffer any loss or to sacrifice his right to a lien. The plaintiff became angry and said, in effect, that he would take the matter up with the district attorney, whereupon defendant ordered him to leave the place.

The evidence of what happened thereafter is conflicting. Plaintiff states that defendant pushed him toward the door, and after he had reached the sidewalk pushed him again, and that he twisted himself in attempting to avoid an anticipated blow, thereby causing injury to his groin from which he suffered severely for several weeks. There is also testimony of a physician that the plaintiff came to him suffering from an injury to the groin on the day of the assault, and that he treated him for several weeks and made a charge of \$70 for his services; that such an injury cannot be completely relieved for several months.

[1] This testimony, of course, supports the judgment and really ends the inquiry of this court, for appellant's claim is that the evidence is not sufficient to support the judgment. The defendant admitted placing his hands upon plaintiff and giving him a slight push as he was leaving his store after being ordered out, but contends that the pressure exerted was very slight, and maintains that he never touched plaintiff after he reached the sidewalk, which latter occasion is the one when plaintiff states he suffered injury. In this testimony defendant is corroborated by several witnesses who were in the store at the time.

[2] If we should be disposed to agree with the defendant that the evidence preponderates in his favor, that would not entitle him to a reversal of this judgment. It is not our function to weigh the evidence and decide upon its preponderance; our power with reference to the facts ends upon finding in the record substantial evidence which, if taken as true, would support the judgment. We have pointed out such evidence in this case, and the judgment must be affirmed.

It is so ordered.

We concur: STURTEVANT; J.;
NOURSE, J.

198 Cal. 85

LAKE et al. v. HARRIS, Judge of Superior Court. (S. F. 11642.)

(Supreme Court of California. Feb. 1, 1926.)

1. Appeal and error ☞553(1)—Trial judge must authenticate all papers which are not subject to certification by clerk and essential to determination of appeal notwithstanding there was no reporter present at hearing (Code Civ. Proc. § 953a).

Appellant may proceed on appeal by the alternative method under Code Civ. Proc. § 953a, notwithstanding there was no reporter present at hearing of motion or other proceeding, and it is duty of trial judge to authenticate all papers, records, and files which are not subject to certification solely by the clerk, and which are essential to proper determination of appeal.

2. Appeal and error ☞607(1).

Code Civ. Proc. § 953a, as amended by St 1915, p. 206, § 1, authorizes preparation of a record under that section, even when appeal is on the judgment roll alone.

3. Appeal and error ☞117—Order of trial judge striking his certificate from clerk's transcript held not an appealable order.

Where, on appeal, in attempted compliance with Supreme Court rules, § 7, subd. 2, record was prepared in two parts, and certain nonappealable orders were made part of clerk's transcript, which was certified by both clerk and

judge, later order of the trial judge striking his certificate from the clerk's transcript held not an appealable order.

4. Appeal and error ⚡82(1)—Special order, made after final judgment, to be appealable, must affect judgment in some manner (Code Civ. Proc. § 963, subd. 2).

In order that a special order, made after final judgment as contemplated by Code Civ. Proc. § 963, subd. 2, be appealable, such order must affect the judgment in some manner or bear some relation to it, either by way of enforcing it or staying its execution.

5. Appeal and error ⚡571.

Trial judge will not be required to certify record on appeal from an order which is not appealable.

6. Appeal and error ⚡571—Mandamus is proper remedy to compel trial judge to properly authenticate portion of appeal record which could not be certified by clerk.

Mandamus is the proper remedy to compel trial judge to properly authenticate that portion of record which could not be certified by clerk; clerk being competent only to certify judgment roll and notice of appeal.

In Bank.

Application by Fannie D. Lake and others for writ of mandate to compel T. W. Harris, as Judge of the Superior Court in and for Alameda County, to authenticate a transcript on appeal. Demurrer sustained, and proceeding dismissed.

Anson Hilton, of San Francisco, and Fred W. Lake, of Oakland, for petitioners.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

SHENK, J. Application for writ of mandate to compel the respondent to authenticate a transcript on appeal. Upon the filing of the petition an order was issued requiring the respondent to show cause, if any he had, why an alternative writ of mandate should not issue. No alternative writ has been issued. The matter is submitted on a general demurrer to the petition.

It appears that in an action in ejectment in the superior court in and for the county of Alameda, wherein the Central Savings Bank of Oakland was plaintiff and the petitioners herein were defendants, a judgment was rendered and entered against said defendants and their appeal therefrom is pending in this court. In due time the defendants filed with the clerk of the superior court a notice to prepare the record on appeal. The notice requested the preparation of a transcript of "the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts or statements of the court, also all objections or exceptions of counsel, and all matters to which the same relate," as provided for in section 953a of the Code of Civil Procedure. In attempted compliance with

the requirements of subdivision 2 of section 7 of the rules of this court the record was prepared in two parts. One was designated the reporter's transcript, in which was incorporated only the phonographic report of the trial. The respondent judge, on the 17th day of September, 1924, certified to the truth and correctness of that transcript.

Prior to the trial certain proceedings were had and taken and certain nonappealable orders of the court were made, the records of which proceedings and motions, consisting of some 21 items, were specially designated by said defendants in their notice to the clerk for inclusion in the record to be prepared. These 21 items were not included in the reporter's transcript, but were set forth in the second part of said record, called the clerk's transcript, in which was also embodied the judgment roll and notices of appeal. This so-called clerk's transcript was also certified by the respondent judge as being true and correct. Both of said transcripts were filed in this court on October 28, 1924, as the record on appeal. Thereafter on the 30th day of March, 1925, counsel for the respondent bank filed in the superior court a notice of suggestion of diminution of record and of a motion to strike from the said clerk's transcript the 21 items referred to and to cancel the certificate of the respondent judge appended to said clerk's transcript on the grounds, among others, "that if any occasion existed for the inclusion of such matters or things in the record on appeal, such matters and things should have been included in the reporter's transcript on appeal; that, although said clerk's transcript on appeal was presented to the court for authentication and certification, the clerk gave no notice to counsel for plaintiff of the fact of such presentation"; that they had no notice that the same were included in the clerk's transcript until March 3, 1925; and that the court erred in executing its certificate, in that the said clerk's transcript was duly certified by the clerk, and that there was and is no authority in law for the certification of the clerk's transcript by the trial judge. Thereafter, on May 2, 1925, the respondent judge granted said motion in part, in this, that he made an order canceling his said certificate, setting forth in said order as the reason for such cancellation:

"That there is no provision of law requiring or authorizing the trial judge to certify the clerk's transcript on appeal, and that the certificate to said clerk's transcript on appeal was executed by the undersigned judge of the superior court [respondent here] through inadvertence. * * *

Thereafter, on the same day, to wit, May 2, 1925, the defendants in the said action, petitioners herein, filed their notice of appeal from the order last above mentioned, referring to the same as an "order after final

judgment," and concurrently therewith filed a notice with said clerk requesting that a transcript of the proceedings on said motion for diminution be prepared pursuant to said section 953a. The respondent judge refuses to certify said transcript, first, on the ground that said order is not an appealable order; and, secondly, on the ground that no record can be made up, allowed, or certified in any case or upon any appeal under said section 953a unless a reporter was present at the hearing of the motion or other matter passed upon.

[1] Considering the grounds of refusal in their reverse order, it must be taken as settled that where there is no office for the reporter to perform at the hearing of a motion or other proceeding, and consequently there is no reporter present, nevertheless the appellant may proceed under the alternative method, and it is the duty of the trial judge to authenticate all papers, records, and files which are not subject to certification solely by the clerk, and which are essential to a proper determination of the appeal. *Pierce v. Works*, 154 P. 852, 171 Cal. 684. The case of *Allen v. Conrey*, 134 P. 730, 22 Cal. App. 409, relied on by the respondent, was decided before the amendment to section 953a in 1915. By that amendment the scope of the section was enlarged so as to permit an appellant to have the record prepared thereunder; also:

"For the purpose of presenting a record on appeal from any appealable judgment or order, or for the purpose of having reviewed any matter or order reviewable on appeal from final judgment." Stats. 1915, p. 206.

[2] The effect of the amendment was to authorize the preparation of a record under that section, even when the appeal is on the judgment roll alone. See opinion of Supreme Court appended to *McKinnell v. Hansen*, 167 P. 887, 34 Cal. App. 81, in denying petition for rehearing; also *Beckett v. Stuart*, 171 P. 107, 35 Cal. App. 796; *Locke Paddon v. Locke Paddon*, 194 Cal. 73, 227 P. 715. It is competent for the clerk to certify only the judgment roll and the notice of appeal (*Jeffords v. Young* [Cal. Sup.] 239 P. 1054; 2 Cal. Jur. 666); and the judge may refuse to certify the clerk's transcript when it comprises only those documents (*Christenson Lumber Co. v. Seawell*, 108 P. 276, 157 Cal. 405).

[3-5] As to the first ground of refusal, we think the contention of the respondent that the order striking his certificate from the said clerk's transcript was not an appealable order must be sustained. In order that a special order, made after final judgment, as contemplated by subdivision 2 of section 963, Code of Civil Procedure, be appealable, such order must affect the judgment in some manner or bear some relation to it either by way of enforcing it or staying its execution. *Griess v. State Investment, etc., Co.*, 28 P. 1041, 93 Cal. 411; *Kaltschmidt v. Weber*, 69

P. 497, 136 Cal. 675; *Watson v. Pryor*, 193 P. 797, 49 Cal. App. 554; 2 Cal. Jur. 153. The order striking said certificate is but an order in an ancillary or procedural matter prescribed by statute in connection with the preparation of a record on appeal and the making thereof neither added to nor subtracted from the relief granted by the judgment. It is obvious that to compel the respondent judge to certify a record on appeal from an order which is not appealable would be to require a vain and useless thing. This is not the proper function of the writ of mandamus. 16 Cal. Jur. 777, and cases cited.

[6] But it would not follow that because the order striking the certificate is not appealable the petitioners would be without remedy. It was the plain duty of the respondent under the statute on an appeal from the judgment to properly authenticate that portion of the record which could not be certified by the clerk and, as above stated, the clerk is competent to certify only the judgment roll and the notice of appeal. Mandamus is the proper remedy to compel the trial judge to perform that duty. *Schmitt v. White*, 158 P. 216, 172 Cal. 554; *Waymire v. California Trona Co.*, 168 P. 563, 176 Cal. 395, 399; 16 Cal. Jur. 831, 832, and cases cited. The difficulties arising in this controversy resulted from at least two deviations from the prescribed practice. First, it was the duty of the stenographic reporter under section 953a to include in the reporter's transcript, in addition to the stenographic report of the trial, "all other matters and things required by the notice" of the appellants to the clerk. This he did not do for he omitted to include therein said 21 several items specified in the notice. And, second, the clerk improperly included in the transcript certified by him the said items which it was not competent for him to certify.

While it may be said that the appellants should not be prejudiced because of mistakes on the part of the reporter and the clerk, since it does not appear that the appellants were in anywise at fault, it may also be said that the respondents should have the opportunity, after notice, to object to the inclusion of the said 21 items or any of them before the same are authenticated by the trial judge as a part of the reporter's transcript, and it appears that they have not had such notice. If the question of the authentication of the record on appeal from the judgment were rightfully before us, it would undoubtedly be proper in the present proceeding to require the trial judge to cause all items specified in the notice to the clerk and not embraced within the judgment roll and notice of appeal to be included in the reporter's transcript and, after notice, to authenticate such transcript. For that purpose an appropriate order could be made by this court transmitting the transcript to the trial court;

but, as the question of the authentication of the record on the appeal from the judgment is not presented herein, we deem it improper to issue a writ for the purpose of compelling an authentication of that record. The foregoing suggestion is made to the end that petitioners may take proper proceedings if they be so advised. So far as the present petition is concerned, the demurrer is sustained, and the proceeding is dismissed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; LAWLOR, J.

198 Cal. 30

Ex parte GARBUTT. (Cr. 2875.)

(Supreme Court of California. Jan. 26, 1926.)

1. Criminal law — Statute authorizing reimposing death sentence after appeal, in absence of defendant, held valid.

Pen. Code, § 1193, as amended by St. 1923, p. 626, § 1, providing death sentence may be reimposed, in absence of defendant, where judgment imposing death sentence, which had been stayed by appeal, was affirmed, held valid, not depriving defendant of any substantial rights.

2. Criminal law — Statute authorizing appointing day of execution, in absence of defendant, held valid.

Pen. Code, § 1227, as amended by St. 1923, p. 627, § 2, authorizing court, in absence of defendant, to appoint day of execution, where judgment of death remains in force, but has not been executed, held valid, not depriving defendant of any substantial rights.

In Bank.

Application by Harry Garbutt for writ of habeas corpus, prayed to be directed to the warden of Folsom State Prison, to secure release of petitioner. Writ denied.

Ernest B. D. Spagnoli and Walter F. Lynch, both of San Francisco, for petitioner.

PER CURIAM. Harry Garbutt, in whose behalf this application for a writ of habeas corpus is urged, was convicted of murder in the first degree, and the death penalty was imposed. On appeal to this court, the conviction was affirmed. *People v. Garbutt*, 239 P. 1080. Upon the going down of the remittitur, the trial court followed the procedure prescribed in sections 1193 and 1227 of the Penal Code as amended in 1923, and "reimposed" sentence upon the defendant without requiring him to be again brought before the court for that purpose. The defendant is now confined in the state prison at Folsom, awaiting execution on the date fixed.

[1, 2] It is urged in support of the petition now filed that sections 1193 and 1227 of the Penal Code as amended are unconstitutional and void, in that they permit the trial court to confer particular privileges and impose

peculiar restrictions and disabilities upon a class arbitrarily selected from a larger number of persons, all of whom stand in the same relation to the privileges granted and burdens imposed, and between whom and the persons not so favored or burdened no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the other. Otherwise stated, the point is that, under the sections supra, the trial court is given the power either to have the defendant personally present when sentence of death is reimposed or to reimpose sentence of death during the absence of the defendant.

On behalf of petitioner several decisions of this court have been cited, among them *People v. Sprague*, 54 Cal. 92, and *People v. Sing Lum*, 61 Cal. 538. These cases hold that, by the provisions of the sections supra, as they stood at the time the opinions were handed down, the Legislature conferred upon a defendant the right to be present in court when the order for his execution was made. The identical situation presented by the present petition was considered by this court in *Re Application of Spagnoli for a Writ of Habeas Corpus for Isaac Wolfgang*, 193 Cal. 472, 225 P. 274, and it was held that the amendment of the sections did not deprive the defendant of any substantial rights. On a writ of error to the Supreme Court of the United States, the decision of this court was affirmed. *Wolfgang v. California*, 46 S. Ct. 206, 70 L. Ed. —, January 25, 1926.

The petition is denied.

198 Cal. 71

KLEIN v. MILNE et al. (L. A. 8131.)

(Supreme Court of California. Feb. 1, 1926.)

1. Trial — 395(5)—Finding probative facts upon which ultimate facts as to negligence were deduced held unnecessary.

Where driver of automobile attempted to pass another while meeting a third, and all three cars were damaged in collision, in action in which each driver alleged negligence of other two, finding that only one driver was negligent was sufficient to respond to issues of negligence; it not being necessary to also find on probative facts from which ultimate facts were deduced.

2. Trial — 395(5)—Amount of damage to automobile held ultimate fact to be deduced from evidence.

In action for damages to automobile, where evidence showed nature and extent of injury and expense of repair work which had been paid, finding that car was damaged to extent of certain sum corresponding to evidence held sufficient; amount of such damage being ultimate fact to be deduced from evidence.

3. Trial — 395(3)—Complainant specifying items of damage entitled to special finding.

Where complainant or cross-complainant pleads both general and special damages, speci-

firing items wherein each consists, and they are put specifically in issue, such complainants are entitled to special findings on issues as presented, in order that they may point out precise errors of trial court on motion for new trial or appeal.

4. Trial $\hookrightarrow$ 396(2)—Finding lump sum as damages held error, where one item thereof unsupported by evidence.

Where cross-complainant, in action occasioned by collision of three automobiles, alleged several items of damage, including one of damage to his car, but evidence furnished no basis for finding as to such damage, finding of lump sum to constitute amount of recovery was error, since any allowance included therein for damage to car would be unsupported by evidence.

5. Damages $\hookrightarrow$ 188(2)—Evidence held insufficient to furnish basis for finding of damages.

Where cross-complainant, in action occasioned by collision of three automobiles, alleged damage to his car, his statement, admitted over objection, that car "was of no value to me in the condition that it was whatever," would furnish no basis for finding as to amount of such damages.

In Bank.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by E. A. Klein against Florence B. Milne and others, in which William L. Hovis and others filed cross-complaints. From the judgment, Florence B. Milne and another appeal. Affirmed as to plaintiff, and reversed as to cross-complainant Hovis.

W. A. Alderson, of Los Angeles, G. E. Sandford, of San Francisco, and Chas. N. Sears, of Bakersfield, for appellants.

Emmons & Aldrich, of Bakersfield, for respondents.

A. J. O'Brien, F. W. Murphy, and C. C. Legerton, all of San Francisco, for cross-complainants.

RICHARDS, J. The plaintiff commenced this action against the defendants and each of them to recover damages for injuries to a certain Nash automobile received in a collision upon the state highway near Kingsburg, county of Fresno, state of California, on or about December 23, 1921. In his first amended complaint the plaintiff alleged that at said time and place his said automobile was being driven and operated by the defendants J. C. May and wife, on and along the highway going in a northerly direction; that the defendant Florence B. Milne was at said time and place the owner and possessor of a certain Chevrolet automobile, and was driving and operating the same along said highway going in a southerly direction; that at said time and place the defendant William L. Hovis was the owner and in possession of a certain Overland automobile, and was driv-

ing and operating the same upon said highway following the said Chevrolet car, and hence also going in a southerly direction; that, as the said Chevrolet and Nash cars approached each other along said highway, the said Florence Milne so negligently drove and operated her said Chevrolet car as to drive the same to the east of the center of said highway at a rate of speed in excess of 35 miles an hour; that at the same time the said William L. Hovis, as the said Overland and Nash cars approached each other, attempted to pass the said Nash and Chevrolet cars as they were passing each other, and in so doing so carelessly and negligently drove and operated his said overland car as not to allow a safe distance between said Overland and Chevrolet cars, and also at said time and place drove and operated the same at an excessive rate of speed, to wit, in excess of 35 miles an hour; that the defendants J. C. May and wife, also at said time and place, so negligently and carelessly drove and operated said Nash car that said Chevrolet car and said Overland car, by reason of the negligence and carelessness of each of said defendants, then and there collided with and against the said Nash car, and broke and damaged the same in the specific parts thereof enumerated in the complaint, to the plaintiff's damage in the sums set forth in his said complaint aggregating in excess of \$800, for which he seeks a recovery against all of said defendants.

The defendants answered separately, denying negligence and liability to the plaintiff, respectively. The defendant Hovis accompanied his answer with a cross-complaint against the plaintiff and also each of his codefendants, Milne, husband and wife, and May, husband and wife, wherein he averred that the cross-defendants Milne were negligent in the operation of their Chevrolet automobile at the time of said collision whereby both his machine and himself were injured and suffered damages as specifically set forth therein; that the cross-defendants May were at the time of said collision acting as the agents of said plaintiff, Klein, in the operation of the Nash automobile owned by the latter; and that as such the Mays were negligent at the time of said collision; and that both they and their principal, Klein, were liable to said cross-complainant Hovis for the injuries to himself and his machine sustained thereby. Wherefore, the said cross-complainant Hovis prayed judgment against each and all of said cross-defendants for the sum of \$5,734.46. The defendant Florence B. Milne also accompanied her answer to the plaintiff Klein's complaint with a cross-complaint against the latter, and also against her codefendants May, for damages to her machine in the sum of \$165. To each of these cross-complaints answers were filed, and, the issues being thus made up, the cause proceeded

to trial before the court sitting without a jury. At the close of the trial the court permitted the plaintiff to file a further amendment to his complaint to conform to the proofs, and, by stipulation, the answers thereto filed were deemed answers thereto. Thereupon the cause was submitted for decision, and the trial court in due course filed its findings of fact and conclusions of law, wherein, after finding the ownership of the respective automobiles to be as averred in the pleadings, it proceeded to find that the defendants Milne so carelessly and negligently operated their Chevrolet car as to collide with and damage the plaintiff's Nash car to the extent and in the sum of \$553.90, and also to collide with and damage the defendant and cross-complainant Hovis and also his Overland car to the extent and in the sum of \$786.50. The court further found that the defendant Hovis was not negligent at said time and place in the operation of his Overland car; and further found that the defendants May were not negligent at said time and place in the operation of the plaintiff's Nash car.

As conclusions of law from the foregoing findings of fact, the court found that the plaintiff, Klein, was entitled to judgment against the defendant Florence B. Milne for the sum of \$553.90, but that, as to the defendants May and Hovis, the plaintiff, Klein, was entitled to take nothing; that the cross-complainant William Hovis was entitled to judgment against the cross-defendants Florence B. Milne and William Milne for the sum of \$786.50, but that as against the plaintiff, Klein, and the cross-defendants May he was entitled to take nothing; that the defendants May were entitled to their costs. Judgment was entered accordingly, and from such judgment the cross-defendants Milne only appeal.

[1, 2] The respondents herein have not seen fit to aid this court with any briefs or any argument upon this appeal. The appellants make several contentions. As to their contention that the findings of the trial court, as to the negligence or lack of negligence of the respective parties to the action, are insufficient to respond to the issues presented respectively as to negligence, we are of the opinion that they are each and all without merit. The trial court found clearly and tersely the ultimate facts as to the negligence or want of negligence of the respective parties at the time and place of said collision in the operation of their respective cars. It was not necessary to also find upon the probative facts from which the court deduced the ultimate facts as to the negligence or want of it of the participants in the collision. The appellants make the further contention that, as to the plaintiff, Klein, the finding that his car was damaged to the extent and in the sum of \$553.90, is a mere conclusion of law. We do not think so. The amount of such damage

and injury was an ultimate fact, to be deduced from the evidence as to wherein such damage consisted. The witness for the plaintiff, May, testified to the details of the injury to the car, the smashed fenders, the injured running board, radiator, and wheels. The witness Sutter also testified as to the extent of the injuries to the plaintiff's car and as to the reasonable cost of the repairs to be made thereon. The finding of the trial court was based upon this and other evidence as to the expense to the plaintiff in making these repairs and that he had paid the bill. The finding corresponded to the foregoing evidence, and was a sufficient finding upon the ultimate facts in issue.

[3-5] A more serious question is presented with respect to the sufficiency of the findings of the trial court with respect to the damages alleged to have been sustained by the cross-complainant Hovis. In his cross-complaint against the appellants herein said Hovis alleges that his automobile, prior to the collision, was of the value of \$800 and that by reason of the injuries to it in said collision it was so damaged as to be of the value of but \$300. In addition to these general damages to his machine, said cross-complainant also alleges that he suffered special damages by being obliged to hire another car to take himself and wife to a hotel, and being compelled to return to his home by train. These damages he itemizes and places at about \$120. In his cross-complaint, said Hovis also alleged that he suffered personal injuries in said collision, the extent of which he details, requiring the services of a physician at an expense of \$71.50 and for which personal injuries he demands general damages in the sum of \$5,000. The denials of the cross-defendants specifically put in issue these averments as to both the special and the general damages sustained by the cross-complainant Hovis. The findings of the trial court upon the issues thus presented are general and to the effect that Hovis was damaged to the extent of \$786.50. We think the trial court was in error in thus making a general finding upon the foregoing separate and specially averred items of damage alleged to have been sustained by the cross-complainant Hovis. Where a complainant or cross-complainant does not in his pleading rely upon a general averment of damages, but pleads both general and special damages, and particularizes the items wherein each consists, and where the defendants or cross-defendants put these specifically in issue, they are entitled to special findings upon the issues as thus presented in order that they may point out the precise errors of the trial court upon motion for a new trial and upon appeal. *Franklin v. Franklin*, 74 P. 155, 140 Cal. 609; *Frascona v. Los Angeles Ry. Corp.*, 191 P. 968, 48 Cal. App. 135. The importance of the application of this rule to this particular case consists in the fact that the only evidence which the

cross-complainant Hovis presented to the trial court upon the question of the amount of damage to his machine as a result of the collision consisted in his statement, admitted over the cross-defendants' objection, that his car "was of no value to me in the condition that it was whatever." Such a statement would furnish the trial court no proper basis for a finding as to the amount to be awarded the cross-complainant for the injuries to his car; and it would follow that the finding of the lump sum found by the trial court to constitute the amount of the cross-complainant's recovery, if it included any allowance for the damages to his car, would be unsupported by the evidence in the case.

The judgment is affirmed as to the plaintiff, Klein, but is reversed as to the amount there-of awarded to the cross-complainant Hovis.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; LAWLOR, J.

198 Cal. 32

In re BELL'S ESTATE. (S. F. 11406.)

(Supreme Court of California. Jan. 29, 1926.
Rehearing Denied Feb. 27, 1926.)

1. Appeal and error ⚡979(2)—**New Trial** ⚡70—Motion for new trial on conflicting evidence as to heirship held in discretion of court, not reviewable save for abuse.

Proceedings on petition for partial distribution of estate, where will was denied probate on grounds of testator's unsound mind and plaintiff's heirship was contested, *held* governed by the rule that granting new trial for insufficient evidence to sustain verdict was in court's discretion, and not to be disturbed in absence of showing abuse.

2. New trial ⚡140(3)—Evidence held sufficient to support motion for new trial.

In petition for partial distribution of estate by contested heir, where will was denied probate on grounds of testator's unsound mind, evidence *held* to support a motion granting other alleged heirs a new trial.

3. Wills ⚡433—Will held admissible as pedigree evidence, and to show testator's regard as to beneficiaries.

In petition for partial distribution of estate, where plaintiff's heirship was contested, it was proper to admit will of deceased over general objection, to show no mention or reference to plaintiff in will, as declarations of testator in last will are admissible both upon question of pedigree and objects of testator's bounty.

4. Evidence ⚡332(7)—Documentary evidence of probate court held admissible to show alleged heir had never been a party thereto.

In application for partial distribution of estate by alleged sole heir, it was proper to admit orders, decrees, and documentary evidence of probate court for limited purpose of showing

plaintiff had never been mentioned therein, or a party to any prior probate proceeding.

5. Evidence ⚡383(3)—Documents offered generally and admitted over general objection held in the record for any evidentiary purpose they might serve.

Documents pertaining to probate of estates of plaintiff's alleged parents, being admissible on her claim of heirship and being offered generally and admitted over general objection only, where in record for whatever evidentiary purpose they might subserve, including defendants' claim that the probate proceedings showed plaintiff was estopped to claim heirship.

6. Judgment ⚡735—Proceedings in probate court held not *res judicata* as to paternity in contested heirship.

Where heirship was contested on application for partial distribution of estate, and records, decrees, and orders in proceedings for probate of will were admitted on question of heirship of plaintiff because she was not mentioned therein, *held*, such decrees and orders were not *res judicata* as to paternity of contestants binding on plaintiff, as contestants in the probate proceedings were claiming under the will, and their paternity was not a contested issue.

7. Judgment ⚡958(f)—Failure to instruct as to application of *res judicata* to probate proceedings held error.

In application by alleged sole heir for partial distribution of estate, where proceedings in probate court were admitted to show alleged sole heir had never been mentioned therein, or a party thereto, it was error for court to refuse instruction that such probate proceedings were not *res judicata* as to paternity of contestants, an issue not involved in the former proceedings.

8. Evidence ⚡351—Baptismal records held admissible as general evidence as to contested heirship.

In application for partial distribution of estate where heirship was contested, the admission in evidence of baptismal records of church was proper where offered for no limited purpose and objection was only general.

9. Evidence ⚡354(l)—Books of account of college and convent held admissible as general evidence as to contested heirship.

In application for partial distribution of estate where heirship was contested, books of account of denominational college and convent, showing charges for contestant's attendance were made against testator and wife, were properly admitted for general purpose of showing conduct of testator's family, and attitude toward younger members over general objection.

Seawell, J., dissenting in part.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Teresa Bell, deceased. Petition by Viola S. Bell for partial distribution to her, as child of deceased, opposed by Robina Bell Hessel and others. From decree directing partial distribution, and from rulings on motions for new trial, Viola S. Bell appeals. Affirmed in part, and reversed in part.

Rehearing denied; Seawell, J., dissenting.

Leo J. McEnerney and A. L. O'Grady, both of San Francisco, for appellant.

John L. McNab and Bert Schlesinger, both of San Francisco, J. F. Frick, of Lompoc, and J. E. Manning and Glensor, Clewe & Van Dine, all of San Francisco, for respondents.

RICHARDS, J. The appellant herein, Viola S. Bell, appeals to this court from certain portions of a decree of the superior court, in and for the city and county of San Francisco, in the matter of the estate of Teresa Bell, deceased, and also from two certain orders of said court, the one granting and the other denying certain motions for a new trial in respect to the particular proceeding wherein said decree had been entered and said orders made. In order to an intelligent understanding of the situation, and of the parties, and of the matters presented for consideration upon this appeal, the following preliminary statement is required: Thomas Bell died in the city of San Francisco on October 16, 1892, being at that time a resident of said city and leaving a large estate therein and in other portions of the state of California which he distributed among the beneficiaries named in his will. He left as his surviving widow Teresa Bell, to whom by his will he devised a considerable portion of his said estate. He devised to certain other persons, whom he designated by name therein and called his children, the remainder of his said estate. The said will of Thomas Bell was duly admitted to probate, and thereafter by decrees of both partial and final distribution the estate was distributed to the devisees named therein; the said decree of final distribution being made and entered on or about the 8th day of June, 1917. By the terms of these several decrees, Teresa Bell, his widow, came into the ownership and possession of a large estate. Teresa Bell died on the 11th day of August, 1922. She left a will and several codicils thereto, which will with its codicils was presented for probate in the superior court of said city and county by the executors named therein on August 18, 1922. The admission to probate of said will of Teresa Bell and the several codicils thereto was opposed by several contestants who claimed to be children and heirs of Teresa Bell (but of which contestants the appellant herein was not one), and as a result of such contests and of a trial thereon the said will of Teresa Bell and each

of the codicils thereof were found and decreed to be invalid, and the same were denied probate upon the ground that Teresa Bell at the time of the execution thereof was of unsound mind. Thereafter and on March 23, 1923, E. J. Talbott was appointed special administrator of the estate of Teresa Bell, deceased. On October 17, 1923, Viola S. Bell, the appellant herein, filed her petition for the partial distribution to her of a portion of said estate, alleging herself to be a child and next of kin of said decedent. To this petition of the appellant herein an opposition was filed by Robina Bell Hessel, Thomas Frederick Bell, Reginald Bell, and Muriel Bell Hoster; and also by Reginald Bell and Dorothy Bell, as executor and executrix, respectively, of the last will and testament of Eustace Bell, deceased; and also by Dorothy Bell as guardian of the person and estate of Eustace Bell, Jr., a minor. The opposition of these last-named persons to the granting of the said petition of Viola S. Bell was based upon their denial that said Viola S. Bell was either a daughter or an heir of Teresa Bell, deceased, or was entitled to any portion of her estate; and was also based upon the affirmative plea that Viola S. Bell was estopped to claim such relationship and heirship. In support of said last-named plan, said contestants set forth in *hæc verba* certain records, orders, and decrees in the matter of the estate of Thomas Bell and also of Teresa Bell, deceased, theretofore made and entered and of the making, entry, and effect of which it was alleged that Viola S. Bell had at all times full knowledge. Coupled with their said opposition to the granting of the petition of Viola S. Bell, the said persons also presented and filed their joint petition for the partial distribution of a portion of the estate of said Teresa Bell, deceased, to them and each of them as the sole surviving children and heirs, or representatives of a deceased child and heir, of Teresa Bell. To the foregoing opposition to her said petition Viola S. Bell filed an answer denying the averments thereof; and also filed an opposition to the petition of the above-named persons for partial distribution to them of any portion of said estate, which said opposition was based upon her denial that Thomas Frederick Bell, Muriel Bell Hoster, Robina Bell Hessel, Reginald Bell, or either or any of them, was a child or heir at law of said Teresa Bell, deceased, and upon her averment that Thomas Bell and Teresa Bell were husband and wife; that Thomas Bell died intestate in the year 1892, leaving estate which was the common property of Teresa Bell and Thomas Bell; that Thomas Bell left surviving him as his next of kin and heirs at law his wife, Teresa Bell, and one child, namely, Viola S. Bell.

Other petitions for partial distribution were filed by various persons claiming a

right thereto, to all of which, in so far as they disputed the right of Viola S. Bell to a share in said estate as the daughter and heir of said decedent, she filed answers putting in issue the averments thereof. When the pleadings were thus made up and the particular issues thus presented were ready for trial, the said Viola S. Bell demanded and was accorded a jury trial thereon, and such trial was had upon the following six special issues submitted to the jury, to wit:

"Is Thomas Frederick Bell a child of Teresa Bell, deceased? Is Robina Bell Hessel a child of Teresa Bell, deceased? Is Reginald Bell a child of Teresa Bell, deceased? Is Muriel Bell Hoster a child of Teresa Bell, deceased? Was Eustace Bell, now deceased, a child of Teresa Bell, deceased? Is Viola Bell a child of Teresa Bell, deceased?"

The jury returned a verdict in which each of the foregoing special issues was answered in the affirmative, whereupon a decree was made and entered in accordance therewith adopting the findings and verdict of the jury upon the special issues above set forth and also embodying full and detailed findings of fact upon the averments set forth in the pleadings of the respective parties in their several applications for partial distribution and in their several oppositions to the respective applications of each other. The trial court, however, by its said decree denied all of the foregoing petitions for partial distribution in said estate upon the ground that no general administrator of said estate had as yet been appointed. Upon the entry of said decree, the foregoing persons, who had appeared in opposition to the petition for partial distribution in said estate presented by Viola S. Bell, gave notice of intention to move to set aside the said verdict and to vacate the said decree in so far as the said verdict and decree purported to find and decree that Viola S. Bell was a child of Teresa Bell, deceased, and to grant a new trial upon that particular issue; said motion being made and based upon all of the usual grounds and being supported by affidavits as to certain of the several grounds thereof requiring such support. To said motion Viola S. Bell responded with counter affidavits by herself and other persons; and she also on her own part gave notice of intention to move to vacate and set aside said verdict and decree in so far as the same found and decreed the contestants of her said application to be the children of Teresa Bell, deceased. When these several motions came on to be heard and were respectively submitted for decision, the trial court made and filed its order granting the motion of the said contestants of the right of said Viola S. Bell, as her child and heir, to share in the estate of Teresa Bell, deceased, and in so doing expressly based its order upon the ground of the insufficiency of the evidence to sustain

the said verdict and decree in so far as said decree purported to find or adjudge: (1) That said Viola S. Bell is a child of Teresa Bell, deceased; (2) that Thomas Bell died leaving him surviving Viola S. Bell as one of his children; (3) that Viola S. Bell is not estopped from asserting her claim to distribution; (4) that Viola S. Bell is entitled to one-sixth of the estate of Teresa Bell, deceased.

The trial court also and at the same time, but by a separate order, denied the said motion of Viola S. Bell for a new trial generally and without specifying the particular grounds of such denial. From the portions of said decree adverse to her contentions in her pleadings and upon the trial and from the making and entry of each of the aforesaid orders upon the two motions for a new trial, Viola S. Bell has taken and prosecuted the present appeal.

[1] Upon that portion of her said appeal which relates to the action of the trial court in granting the motion of the respondents for a new trial, her contention is that the trial court was in error in its conclusion that the evidence was insufficient to sustain the verdict and decree in so far as it was found and decreed therein that she was a child of Teresa Bell, deceased. The record presented both upon the trial and upon the motion for a new trial based upon that ground is voluminous, and an examination thereof shows that it presents a degree of doubtfulness and a sharpness of conflict such as are rare even in family controversies such as this. Charges and counter charges of perjury, of the instability of witnesses, and utter unreliability of particular testimony, abound. The purposes, motives, and conduct of persons both living and dead, whose lives and actions are interwoven in the tapestry of this remarkable case, are veiled in mystery as to the meaning of which we only gain occasional glimpses between the lines of the cold record before us. It is a case wherein the impressions gained by the trial judge from the vantage of the presence and appearance and actions and utterances of the parties and witnesses before him would be invaluable in the formation of judicial convictions as to where the truth lay. In such a case this court ought not to overthrow the determination of the trial court to grant the motion for a new trial upon the specified ground in the absence of a clear showing of an abuse of discretion or of the existence of such bias or prejudice on the part of the trial judge as would interfere with a just and impartial balancing of the evidence in the case. We do not find that such exists in this case, nor do we think that a detailed or extended review of the facts of the case would be either profitable or expedient in view of the fact that another trial is to be had upon the particular issue as to which a new trial has been granted herein.

[2] The appellant's next contention upon her appeal is directed against that portion of the decree herein which adjudges that the respondents herein are children and heirs, or the representatives of deceased children and heirs of Teresa Bell, deceased, and entitled as such to share in her estate; and also against the order of the trial court refusing to grant her motion for a new trial upon that issue. In support of this contention the appellant urges that the evidence in the case, which the trial court found by its said order to be insufficient to support that portion of the verdict and decree which finds and adjudges that appellant is a child and heir of Teresa Bell, is also insufficient to support that portion of said verdict and decree which finds and adjudges that said respondents are children and heirs, or representatives of a deceased child and heir of Teresa Bell, deceased. This contention has no merit, for the all-sufficient reason that the evidence which was offered in support of the claim of the appellant to be the child and heir of Teresa Bell, deceased, differed in many material aspects from the evidence offered in support of the like claim on the part of the respondents. A single illustration will suffice. In the case of the appellant there was not a particle of evidence connecting her with the family household of the Bell home prior to a time when she was 6 or 7 years of age; while in the case of certain of the respondents there was evidence which referred directly to the place and time and circumstances attending their birth in that home. The evidence offered and admitted in opposition to and in support of the claim of heirship of these respective claimants differed materially in another respect which may as well be considered and disposed of here. The respondents herein in their opposition to the appellant's application for partial distribution set forth in their pleading the successive papers, proceedings, orders, and decrees in the matter of the estate of Thomas Bell, deceased, and also certain prior proceedings in the estate of Teresa Bell, deceased, and predicated thereon their plea that the applicant, Viola S. Bell, was estopped to claim relationship or heirship with respect to either Thomas or Teresa Bell. On the other hand, Viola S. Bell, in her answer and opposition to the asserted claims of relationship and heirship with respect to Thomas and Teresa Bell, pleaded that she was the only child and heir of Thomas and Teresa Bell and that none of the respondents was a child or heir of either Thomas or Teresa Bell.

[3] Upon the trial the appellant herein testified in support of the foregoing averments of her answer and opposition at least in respect to the paternity and maternity of some of said respondents. When she had rested her case in chief the respondents offered in evidence the last will of Thomas Bell, deceased, wherein he had left his estate to cer-

tain trustees for the "support and maintenance of my children Thomas Frederick Bell, Mary Teresa Bell, Robina Bell, Muriel Bell, Reginald Bell and Eustace Bell"; and wherein also and after these trusts were satisfied he had devised one-third of his estate to his wife, Teresa Bell, and directed that "The remainder of my estate shall be divided among my children share and share alike, that is to say to Thomas Frederick, Mary Teresa, Robina, Muriel, Reginald and Eustace." No mention in said will was made of the name or existence of Viola S. Bell. To the admission of this will of Thomas Bell in evidence the counsel for Viola S. Bell offered the general objection that it was "immaterial, incompetent and inadmissible," which objection the court overruled. We are of the opinion that the trial court did not err in so ruling, for the reason that the declarations of a testator in his last will are admissible both upon the question of pedigree and upon the question as to whom he regards as the proper objects of his bounty. *Estate of Morrison* (Cal. Sup.) 242 P. 939, and cases cited. The appellant practically concedes this by her own offer of the rejected will of Teresa Bell, deceased, for the same purpose. Thereupon the respondents offered in evidence various papers, proceedings, and orders in the course of the probate of the said last will of Thomas Bell, deceased, to the admission of which a like objection was urged and overruled.

[4, 5] One of the purposes urged by the respondents in favor of the admission of these proceedings in the course of probate of the Thomas Bell estate was that of showing that at no time during the course of the probate thereof, covering a period of about a quarter of a century prior to the year 1917, did it appear that Viola S. Bell was ever mentioned or referred to as one of the children or heirs of Thomas Bell, deceased, or was ever served with process or that she was ever required or ever sought to participate in any way in the proceedings for the disposition of his estate among those entitled thereto; and that this sort of evidence was relevant and admissible when taken in connection with the testimony and admission of Viola S. Bell that she was at all times during the period of the probate of said estate aware that such proceedings were pending and proceeding in the courts and that their purpose was the disposal of the estate and properties of him whom she claimed to be her father, among others than herself who claimed to be his children; and that such documentary evidence was admissible as having some more or less material bearing upon the validity of her said claims and upon her own credibility and good faith in their belated assertion. And the respondents make the same claim as to the proceedings had and the papers and records presented in the matter of the estate of Teresa Bell, deceased, prior to the appearance of

the appellant as a claimant therein to practically the whole of said estate. It is true that the respondents herein in their pleadings in opposition to the appellant's said claim set forth the proceedings in both estates as the basis of an alleged estoppel based thereon. The documentary evidence of such proceedings, however, when offered in evidence, were offered generally and were objected to generally as immaterial, irrelevant, and inadmissible for any purpose whatever. Being admitted generally and over this objection, they were properly in the record for whatever evidentiary purpose they might subserve. The trial judge in his charge to the jury instructed that body, and, we think, properly, that Viola S. Bell was not estopped in the assertion of her said claims, and we must assume that the jury obeyed that instruction in its consideration of said evidence; and we may also assume, in the absence of any showing to the contrary, that the trial judge, in granting the motion for a new trial, was actuated by no change of mental attitude with respect to that feature of the case or that he did so from any other view of the value of such evidence than that of its bearing upon the credibility and good faith of the appellant's present assertion that she is the only child and heir of Thomas and Teresa Bell, and upon her present claim predicated thereon, that she is entitled to have distributed to her a portion of the latter's estate.

[6] Sufficient has been set forth herein to indicate that, in our opinion, no reversible error was committed by the trial court in granting the motion for a new trial upon the issue presented by the appellant's application for partial distribution to herself of a portion of this estate; and its order in so doing upon the ground stated will therefore be affirmed. With respect to the order of the trial court denying the appellant's motion to have the decree of the court set aside and a new trial granted as to the respondents' application for partial distribution to themselves of portions of the said estate, some of the same questions are discussed and a number of different problems are presented. With respect to the evidence offered by the respondents in the form of the records and proceedings in the course of probate of the estates of Thomas and Teresa Bell, the respondents argue that the orders and decrees of the court in which such proceedings were pending, in so far as they relate to the status of said respondents as the children and heirs of both Thomas and Teresa Bell, are *res judicata*, and that both the appellant in assailing and the trial court and jury in passing upon their present claims as to being the children and heirs of Teresa Bell are therefore bound thereby.

[7] We have hereinbefore held these records and proceedings in these two estates to have been admissible in opposition to the appellant's claim and to her evidence in sup-

port thereof for the limited purpose above outlined, but a different question is presented when the respondents urge that such evidence is available on behalf of their own claims to heirship as *res judicata*. That they did so urge and argue during the course of the trial the record sufficiently shows, and because of that insistence the appellant presented certain instructions having relation to the effect to be given to the aforesaid evidence, with the request that they be given to the jury. The court refused to give these instructions, and the appellant on her motion for a new trial contended, and now contends, that the trial court committed prejudicial error in so doing. The jury was sought to be instructed by these offered instructions that the statements or recitals in the several petitions, orders, and decrees in each of said two estates, to the effect that the respondents herein, or any of them, were children of Thomas or Teresa Bell, or both, were not to be taken by them as evidence that these respondents, or any of them, were in fact children of Thomas or Teresa Bell and were not to be considered as *res adjudicata* upon that question. With respect to some, at least, of these offered and refused instructions, laying aside as insufficient merely technical objections as to defects in form, we are of the opinion that they were correct in point of law and that they should have been given. Take, for example, the following requested instruction:

"I instruct you that any statement or declaration made by Thomas Frederick Bell, Reginald Bell, Robina Hessel, or any petition filed by them, either in the estate of Thomas Bell or in the estate of Teresa Bell, that they are children of either Thomas Bell or of Teresa Bell, must not be considered by you as evidence that they are children either of Thomas Bell or of Teresa Bell."

Such petitions had been offered and received in evidence, and such self-serving statements had been contained therein; and hence the foregoing instruction was a correct one as a matter of law. We are further of the opinion that the several orders and decrees in the matter of the estate of Thomas Bell, whether of partial or of final distribution of the estate of said decedent in accordance with the terms of his will and which contain statements giving the names of said respondents and containing recitals that they are his children, do not constitute *res adjudicata* as to the paternity of said respondents which would be binding upon either the appellant, the court, or the jury in the instant proceeding; and this for the obvious reason that the persons named in the last will of the decedent Thomas Bell would be entitled to have his estate distributed to them as his devisees under said will, whether or not they were his children; and hence that such recitals were not necessary to the making or validity of such orders or decrees. They

were not therefore *res adjudicata*. Code Civ. Proc. § 1911; Estate of Heydenfeldt, 127 Cal. 456, 59 P. 839; Estate of Freud, 134 Cal. 333, 66 P. 476; Chapman v. Hughes, 134 Cal. 641, 58 P. 298, 60 P. 974, 66 P. 982; Herman on Estoppel and Res Adjudicata, § 275; Wells on Res Adjudicata, § 295. The recent decision of this court in Estate of Barton, 238 P. 681, contains nothing inconsistent with the principle declared in the foregoing authorities, nor do we think that any of the other cases cited by respondents either overthrow it or interfere with its application to the instant case. We are therefore of the opinion that the statements and recitals in the several orders and decrees of partial or of final distribution in the matter of the estate of Thomas Bell were not *res adjudicata* as to the status of the respondents herein or any of them as the child or children of Thomas Bell, and that the appellant's offered instructions herein embraced a correct statement of the law in that regard and should therefore have been given. Nor do we think that the prejudicial effect of the refusal of the trial court to give the foregoing offered instructions was cured by other instructions which the trial court did give, or that the brief instruction which was given upon the subject of estoppel obviated the evil effect of the court's refusal to give an express instruction upon the subject of *res adjudicata*.

[8] The appellant further contends that the trial court erred in the admission in evidence of certain baptismal records of St. Johns Church, showing the baptism upon certain dates of Robina Bell, Reginald Bell, Muriel Bell and Eustace Bell. The appellant concedes that these baptismal records were competent and admissible to prove the fact and date of the baptism of the persons named therein, but assigns another and an unlawful purpose in their offer and admission in evidence. The purpose for which these records were offered was not stated or limited at the time of their admission, nor did the objection thereto require or suggest such limitation. They were, therefore, properly admitted in evidence. It is significant to note that the trial court in its charge to the jury, in dealing with this particular evidence, instructed that body that these certificates of baptism were "evidence only of the fact that the persons named in said certificates were baptized at the dates specified therein." No error was therefore committed either in their admission or in the consideration of them by the jury for the limited purpose outlined in the instructions of the court.

[9] The appellant next contends that the trial court erred in permitting the introduction in evidence of the books of account of St. Marys College and the Convent of Holy Names in Oakland, showing charges made against Thomas or Teresa Bell for the board and tuition of one or other of these respond-

ents and the payment of such charges by the person against whom they were made upon such books of account. We are of the opinion that these books of account were properly admissible as tending to show the course of conduct of the Bell family and those who were the parental heads thereof with respect to the younger members of the family. These records were offered generally and were only subjected to the usual and general objection. They were therefore admissible over said objection. If those objecting to their admission generally desired that their purpose be confined to a narrower scope, they should have made manifest that desire either in the form of their objection or in requested instructions to the jury. Not having done either of these, we find no merit in their present contention in that regard.

The appellant's next contention is that the trial court was in error in its refusal to admit in evidence the will of Teresa Bell, offered by appellant for the purpose of showing the declarations of the maker of said will that certain of the respondents were not her offspring. Prior to said offer, it had already been shown in evidence that by the judgment of the trial court in the proceedings for the probate of said will in the matter of the estate of Teresa Bell, deceased, the said will had been declared invalid for the reason that the maker thereof was of unsound mind at the time of the purported execution thereof; and that such judgment had become final. In such a state of the record we are satisfied that while the offer of this rejected will of Teresa Bell comes within the rule above stated admitting the declarations of testators regarding pedigree, we are of the opinion such a will would no more be admissible to prove the declarations of the maker thereof as to who were her children than would the statements of the maker herself be admissible after it had been judicially declared that she was of unsound mind. Moreover, it would seem that the appellant herein was in no wise injured by the court's refusal to admit in evidence the statements contained in said document, since the maker thereof therein declared that she had "no children."

The appellant makes certain further contentions as to errors alleged to have been committed by the trial court in its rulings upon questions propounded to various witnesses. We shall not deal with these in detail for the reason that to do so would unduly extend this opinion. We shall assume that as to these alleged errors they would probably be avoided upon the retrial of this cause.

It is our conclusion and decision that the order of the trial court granting the motion of the respondents for a new trial be and the same is hereby affirmed, and that the order of said court denying the motion of the appellant for a new trial be and the same is hereby reversed.

We concur: WASTE, C. J.; LENNON, J.; SHENK, J.; LAWLOR, J.; CURTIS, J.

SEAWELL, J. I concur in that portion of the opinion which affirms the order of the lower court granting respondents' motion for a new trial, but I am disposed to dissent from that portion of the opinion which reverses the order of the trial court denying appellant's motion for a new trial. That the respondents were the children or the descendants of children of Thomas and Teresa Bell there seems to be no substantial room for doubt. If any error was committed as to the rule of the application of *res adjudicata* as to their status, or the doctrine of estoppel, it was harmless error and clearly falls within the contemplation of section 4½ of article 6 of the Constitution.

193 Cal. 23

McCLURE, Director of State Department of Public Works, v. RILEY, State Controller.
(Sac. 3853.)

(Supreme Court of California. Jan. 26, 1926.)

1. Statutes §109—Requirement that subject be expressed in title construed.

Restrictions in Const. art. 4, §§ 24, 34, requiring subject of act to be expressed in title, should be reasonably construed considering substance rather than form, to require expression in title of general object, but not details, or means of effecting such object and to include subject of act, not purpose and reasons which brought about its enactment.

2. Statutes §109—Court will look to history of legislation in determining whether title reflects subject-matter of act.

In determining whether subject-matter embraced in body of act is sufficiently referred to in title, court will look to history of particular legislation to which act in question relates.

3. Statutes §225—Statutes, relating to need for and building of state buildings, should be read together.

St. 1911, p. 1855, appointing commission to investigate necessity for new quarters for state library, Supreme and appellate courts, and St. 1913, p. 389, providing for erection and equipment of state buildings for state purposes, should be read together and construed as intended merely to amplify unit of structural area to be used for state purposes.

4. States §132—Expenditures, under later act, held intended to be devoted to same purpose as former acts, which were supplemented.

Since body of St. 1925, p. 726, declares it is supplemental to St. 1911, p. 1855, and St. 1913, p. 389, providing for erection of state buildings, whatever appropriation and expenditure is provided for was intended to be devoted to same general purpose as that contemplated by preceding acts, though title merely provides for completion of construction and equipment in furnishing state buildings.

5. Statutes §123(2)—Provision in act for change in state capitol building held embraced in title.

Provision in St. 1925, p. 726, supplementing St. 1911, p. 1855, and St. 1913, p. 389, providing for erection of certain state buildings, providing for making changes in state capitol building, was germane to object and purpose of former acts, and was embraced within title which provided for completion of construction and equipment and furnishing of state buildings.

In Bank.

Application for writ of mandate by W. F. McClure, as Director of the Department of Public Works of the State of California, prayed to be directed to Ray L. Riley, as Controller of the State of California. Writ granted.

Wesley E. Marten and Dixwell L. Pierce, both of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondent.

RICHARDS, J. The petitioner herein, in his capacity as director of the department of public works of the state of California, has applied for a writ of mandate to compel the respondent herein, as controller, to audit and draw his warrant for the payment of certain claims for work done and material furnished in connection with the construction and equipment of the state buildings now in course of construction in the city of Sacramento; the said respondent having refused to audit and approve said claims. The facts as set forth in the petition herein are admitted by the answer of the respondent, and the only question presented for our determination is as to whether or not the act of the Legislature (Stat. 1925, p. 726) constitutes a valid appropriation of the moneys of the state of California available for the payment of such claims. The act reads, in part, as follows:

"An act appropriating the sum of three hundred thousand dollars for the completion of construction and equipment and furnishing state buildings in the city of Sacramento for state purposes.

"The people of the state of California do enact as follows:

"Section 1. The sum of three hundred thousand dollars, or so much thereof as shall be necessary, is hereby appropriated out of any money in the state treasury not otherwise appropriated, to be expended in completing the construction, equipment and furnishings of state buildings in the city of Sacramento for state purposes, for laying out and beautifying the grounds, and also for the rearrangement of the state capitol building. This appropriation is in addition and supplemental to the funds heretofore provided for that purpose by an act entitled 'An act to provide for the issuance and sale of state bonds to be known as "state building bonds,"' etc. Stat. 1913, p. 389.

[1] The objection which the respondent urges against the validity of the foregoing act of 1925 is that said act violates the provision of the Constitution (article 4, § 24), which provides that every act shall embrace but one subject, which subject shall be expressed in its title; and also violates a further provision of the Constitution (article 4, § 34) to the effect that no bill making an appropriation of money, except the budget bill, shall contain more than one item of appropriation and for one single and certain purpose, to be expressed therein. In approaching the determination as to what scope and meaning shall be given to the foregoing provision of the state Constitution, it is to be borne in mind that the rule of interpretation to be applied to these sections is well settled and is conceded by the respondent herein to be substantially that set forth in 36 Cyc. 1017, as follows:

"3. *Construction of Provisions.* The provisions of the various Constitutions relating to the subject-matter and titles of acts should be construed liberally to uphold proper legislation, all parts of which are reasonably germane on the one hand, and to prevent trickery on the other hand. The restrictions requiring the subject of an act to be expressed in its title should be reasonably construed, considering substance rather than form, to require the expression in the title of the general object, but not the details or incidents, or means of effecting the object sought, and to include the subject and not the purpose of the act and the reasons which brought about the enactment of it by the Legislature."

The foregoing rule is fully upheld by the following authorities: *Inhabitants, etc., of Montclair Tp. v. Ramsdell*, 107 U. S. 147, 2 S. Ct. 391, 27 L. Ed. 433, 434; *Mills v. Carleton*, 30 Wis. 409; *Hannibal v. Marion Co.*, 69 Mo. 576; *State v. Ranson*, 73 Mo. 86; *People v. Parks*, 58 Cal. 635; *San Francisco, etc., R. Co. v. State Board of Equalization*, 60 Cal. 12; *Abeel v. Clark*, 84 Cal. 228, 24 P. 383; *Ex parte Liddell*, 93 Cal. 636, 29 P. 251; *Ex parte Cohen*, 104 Cal. 530, 38 P. 364, 26 L. R. A. 423, 43 Am. St. Rep. 127; *In re Hoffman*, 155 Cal. 114, 90 P. 517, 132 Am. St. Rep. 75; *Reclamation Dist. v. Superior Court*, 171 Cal. 677, 154 P. 845; *People v. Jordan*, 172 Cal. 394, 156 P. 451; *Bassford v. Earl*, 172 Cal. 660, 158 P. 124; *Estate of Wellings*, 192 Cal. 519, 221 P. 628; 1 *Lewis' Sutherland, Statutory Construction* (2d Ed.) p. 202.

[2-5] In determining whether the subject-matter embraced within the body of a legislative act is sufficiently referred to in its title, in conformity with the foregoing rule of interpretation, we are entitled to look to the history of the particular legislation to which the act in question, when read as a whole, relates. The city of Sacramento is and for many years has been the state capital, and the main structure therein which has during these past years been occupied by the

various offices and activities of the state government which have been located at the state capital, has commonly been known as the "state capitol building." This building, however, is in reality but one of a unit of state buildings at the capital used for the foregoing purposes and known as state buildings. The Legislature adopted in the year 1911 an act (Stat. 1911, p. 1855), reciting the inadequacy of the portion of the state capitol building, so-called, devoted to the accommodation of the state library and the Supreme and appellate courts, and, by the terms of said act, appointed a commission to investigate the necessity for the erection of additional buildings for the housing of these institutions, and to report to the Legislature of 1913. This commission duly reported as required by the terms of said act, and apparently in accordance with its recommendations the Legislature adopted the act of 1913 (Stat. 1913, p. 389) providing for "the erection and equipment of state buildings in the city of Sacramento for state purposes," providing for the issuance and sale of bonds in a sum not to exceed \$3,000,000 for such purposes, and appointing a board consisting of the Governor, the Chief Justice of the Supreme Court, and the state librarian to supervise the construction and equipment of the state buildings to be thus provided. The issuance and sale of said bonds, the acquisition of suitable land adjacent to the state capitol grounds, and the erection of the state buildings contemplated by said act have been carried forward and the buildings are now nearing completion. It is a significant fact that such buildings have been so designed and are being so constructed as to provide new and ample quarters for the state library and for the Supreme and appellate courts, and that the original purpose for which the erection of such state buildings was contemplated has thus been carried forward consistently to the present time. It thus appears to us that the foregoing several legislative acts should be read together and should be construed as intended merely to amplify the unit of structural area to be used for state purposes. That the new buildings still in course of construction are separated by a short space from the old unit is an immaterial circumstance. They occupy lands adjacent to those occupied by that unit and they are as much a part of it as though they had been merely wings or annexes of the original structure. Had they been built as such, no doubt could have arisen that whatever changes were required to be made in the original unit or structure in order to carry to completion the purposes for which the new buildings were designed would be within the legislative purpose as expressed in the acts of 1911 and 1913. The act of 1925, while providing in its title "for the completion of construction and equipment and furnishing state buildings in

the city of Sacramento for state purposes" is by the body of said act expressly declared to be supplemental to the former acts, and the conclusion seems irresistible that said last-named act, both in title and substance, has reference to the unit of state structures used and to be used for state purposes in the city of Sacramento, and that whatever appropriation or expenditure is provided for in said act was intended to be devoted to the same general purpose as that which was contemplated by the preceding legislative enactments. This being so, it would seem to follow that the inclusion in the body of the act of 1925 of a provision for the making of such structural changes in the original unit, commonly known as the state capitol building, as were made necessary by the amplification of that unit and by the removal to quarters in the new and amplified unit of those institutions and activities for the accommodation of which they were from the beginning designed would be germane to the single object and purpose contemplated by the former acts and would be embraced within the title of the final and supplemental act intended, as it obviously was, merely to provide an additional appropriation for the fulfillment of the foregoing original design.

If the foregoing reasoning be correct, it would follow as a necessary sequence therefrom that the subject-matter found in the body of the act of 1925 is fairly embraced within its title; that but one appropriation is provided for therein: and that the clause therein providing for an expenditure in part of such appropriation "for the rearrangement of the state capitol building" is germane to the purpose contemplated by its title, as well as by the provisions of the previous enactments of the Legislature above referred to and having the same general purpose in view. Having arrived at this conclusion, it is unnecessary to determine whether the act in question would or would not be valid if the foregoing clause relating to the rearrangement of the state capitol building were to be stricken from the act.

Let the writ issue as prayed for.

We concur: LENNON, J.; SEAWELL, J.; LAWLOR, J.; CURTIS, J.

WASTE, C. J. I concur in the order directing a writ of mandate to issue, but solely for the reason that the two claims for work done, and which are the subject of our consideration, appear to have been properly incurred in the completion of construction of the two state buildings provided for by the act of 1913 (Stat. 1913, p. 389). I do not agree with my associates that the statute here under consideration should be construed to permit the expenditure of money appropriated by it "for the rearrangement of the state capitol building." We have before us, test-

ed by its title, an act appropriating the sum of \$300,000 for the completion of construction, and equipment, and furnishing state buildings in the city of Sacramento for state purposes, the erection of which was the sole objective of the bond issue provided by the act of 1913, supra. Any matters of legislation contained in the body of the act not bearing on the completion of construction, equipment, or furnishing of those buildings, should go out. Const. art. 4, § 24; *Spier v. Baker*, 120 Cal. 370, 373, 52 P. 659, 41 L. R. A. 196. Unless that be done, the act, in my opinion, falls within the inhibition of article 4, § 34, of the Constitution, which provides that any bill making an appropriation of money, except the budget bill, shall contain only one item, "and that for one single and certain purpose to be therein expressed."

I concur: SHENK, J.

198 Cal. 91

BLETHEN v. PACIFIC MUT. LIFE INS. CO.
OF CALIFORNIA et al. (S. F. 11543.)

(Supreme Court of California. Feb. 1, 1926.)

1. Insurance ⇨199—Wills ⇨5—Insurance policy is property which may be sold or assigned or bequeathed.

An insurance policy, in contemplation of law, is property which may be sold, assigned, or bequeathed by owner.

2. Insurance ⇨586—Named beneficiary's interest, where right to change beneficiary is reserved, is not a vested right.

Named beneficiary's interest in policy, in which insured may change beneficiary, is not a vested right, but an expectancy of an incomplete and inchoate gift, revocable by insured, which does not vest as a right until death.

3. Husband and wife ⇨249—Proceeds of insurance policy, paid for out of community assets, are community property.

Proceeds of insurance policy, premiums on which have been paid out of community assets, are community property.

4. Husband and wife ⇨265—Wife's interest in community property mere expectancy, though protected by statute.

Husband is owner of community property, and wife's interest therein is mere expectancy protected by statutory provisions as Civ. Code, § 172, limiting husband's power of disposal, with right to wife on death of husband to avoid any conveyance necessary to protect her interest in property conveyed in derogation of her rights.

5. Husband and wife ⇨265—Husband's gift of community property without consent of wife is not void but voidable.

Husband's gift of community property, without consent of wife, is not void, but voidable.

6. Husband and wife — 265—Wills — 6—Effect of attempted disposition by will or gift by husband of more than his share of community property stated.

Attempted disposition by will or gift, initiated by husband during his life, but not completed until his death, of more than half of community property vests property in donee subject to being avoided at wife's election.

7. Husband and wife — 265—Insurance company, without notice of wife's claim, may pay proceeds of policy to beneficiary, donee of husband, without wife's consent.

Husband's gift of insurance policy, premiums on which had been paid from community property, to a beneficiary other than his wife and without her consent, is valid, but may be avoided by wife's assertion of her right to one-half of proceeds, and insurance company, without notice of wife's claim, is justified in paying beneficiary proceeds of policy as person rightly entitled thereto, and, after having so done, is not liable for half of such proceeds in suit by wife.

In Bank.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action by Elizabeth B. Blethen against the Pacific Mutual Life Insurance Company of California and another. Judgment for plaintiff, against named defendant, and it appeals. Reversed.

R. S. Gray, of San Francisco, for appellant.

Clinton G. Dodge, of Oakland, for respondent.

H. S. Craig, of Oakland, for respondent Alice M. Scott.

Knight, Boland, Hutchinson & Christin, of San Francisco, amicus curiæ in support of appellant's contention, for Association of Life Ins. Presidents.

LENNON, J. Plaintiff brought this action to recover part of the proceeds of a life insurance policy, upon the ground that the same constituted community property.

Briefly stated, the facts of the case set forth in the record, are these: In 1900, George W. A. Blethen and plaintiff intermarried. Subsequent thereto, in December, 1914, the appellant, Pacific Mutual Life Insurance Company of California, a corporation, issued to Blethen two policies of life insurance in the sum of \$4,000, respectively. One of these policies was permitted to lapse. In the other policy, Blethen's sister, Alice M. Scott, was designated as beneficiary, apparently for the purpose of securing a sum of money loaned to Blethen. This is the policy involved in controversy here. Under a power reserved in this policy to change the beneficiary, Blethen substituted his wife for the sister as beneficiary in February, 1918. The Blethens, however, separated in September, 1919, and subsequent thereto, in October, 1920, in con-

templation of divorce proceedings to be prosecuted by the wife, a property settlement was entered into between the husband and the wife. This settlement provided, among other things, that Blethen's future earnings should be regarded as his separate property. Neither in said settlement nor in the interlocutory decree of divorce, which followed, was any specific disposition made of said policy of life insurance. About the time of the entry of the decree of divorce, however, Blethen substituted his adopted son, Hooper, a minor, as beneficiary under the policy. Some time subsequent thereto, without the knowledge or consent of Mrs. Blethen, said policy was again changed so as to make it payable to Blethen's sister, Alice M. Scott. No final decree was ever entered in the Blethens' divorce action. Blethen died in February, 1922, and a short time thereafter his sister, the beneficiary under the said policy, who had possession thereof, applied for and obtained from said insurance company the necessary blanks to be used in the preparation of the proof of death of the insured and of a claim for the insurance money. Shortly thereafter, a law firm, acting on behalf of Mrs. Blethen, sent said insurance company a letter, under date of March 2, 1922, informing said company of the status of said divorce proceedings, and stating that at the time of the same there was an agreement between Blethen and his wife that the insurance policy proceeds should be applied for the benefit of their adopted son, Hooper, but that they had received information to the effect that the beneficiary named in the policy was Alice M. Scott. Information was requested as to what person was in fact named beneficiary in said policy at the time of the death of Blethen. The letter closed with the sentence:

"We represent Mrs. Betty Blethen, the widow, on whose shoulders now falls the rearing of this boy."

Replying to this letter, the insurance company stated that it was advised of the death of Blethen, and had furnished the necessary blanks to Alice M. Scott, the beneficiary named in the policy at the time of the death of Blethen; that the information contained in the letter with reference to the divorce proceedings of the Blethens was the first it had heard of the same; that it had not seen any agreement made by Blethen with his wife with reference to the insurance policy, and, if there was any such agreement, they would be pleased to have furnished forthwith a certified copy thereof. Receiving no response to this letter, the insurance company again wrote the said law firm and requested to be advised definitely whether or not the widow of Blethen claimed any interest in the policy or proceeds thereof, either in her individual capacity or as the guardian of Hooper Blethen, who, as previously indi-

cated, was the beneficiary named in the policy just prior to the naming as beneficiary of the sister of Blethen, Alice M. Scott. Said law firm, under date of April 6, 1922, replied to the last letter of the insurance company, stating in effect that they did not see what they could do for their client, as the assured had the right to change the beneficiary without the consent of any one, and "there seems to be nothing that we can do except to let you follow your regular course." A short time after the receipt of this letter, on April 11, 1922, said insurance company, in accordance with the terms of the insurance policy, paid all the moneys due thereunder, amounting to the net sum of \$3,431.66, to Alice M. Scott, the beneficiary therein named at the time of the death of Blethen, the insured.

About the middle of February, 1923, after the lapse of some 10 months, Mrs. Blethen, who was then acting upon the advice of her present attorney, wrote said insurance company to the effect that it was no doubt familiar with the recent case of *New York Life Ins. Co. v. Bank of Italy*, 214 P. 61, 60 Cal. App. 602, where it was held that, when the premiums were paid from the funds of the community, the husband could only dispose of one-half of the policy, the remainder being the property of the surviving widow. Under these circumstances Mrs. Blethen, so the letter stated, was entitled to the sum of one-half of the policy, and demand was thereby made for the payment of the same. In response to this letter, the insurance company called attention to the correspondence previously had with Mrs. Blethen's former attorneys, and gave the full details of the settlement made with the beneficiary, Alice M. Scott, but declined to make any additional payments upon the said policy to the plaintiff, Mrs. Blethen. After some further correspondence, the substance of which is not material, Mrs. Blethen, on May 17, 1923, commenced this action against the insurance company and made Alice M. Scott a party defendant thereto. Judgment was rendered in favor of the plaintiff against the insurance company for a share of the proceeds of the policy proportionate with the amount of the premiums paid from the community funds. Judgment of nonsuit was rendered in favor of the defendant Alice M. Scott, from which judgment no appeal has been taken by the plaintiff. Defendant insurance company appeals from the judgment in favor of the plaintiff and the judgment of nonsuit in favor of the defendant Alice M. Scott.

The principal question presented by this appeal is whether or not a surviving wife may maintain an action against an insurance company to recover her community interest in the proceeds of a life insurance policy issued to her husband and made payable to a beneficiary other than the wife, without the wife's consent, the premiums of which have been paid out of community funds, after the

insurance company, in good faith, without notice of adverse claim thereto, has made full payment on the policy to the beneficiary designated in the policy.

At the very outset we are confronted with respondent's contention that this question has been already answered and determined by the recent case of *New York Life Ins. Co. v. Bank of Italy*, 214 P. 61, 60 Cal. App. 602, which will hereafter be referred to as the *Bank of Italy Case*. In that case a policy of life insurance was issued by the New York Life Insurance Company upon the life of one Charles J. Newman. The policy reserved to the insured the power of changing the beneficiary. At the time of the issuance of the policy, and at the time of the death of the insured, the defendant, Ella J. Newman, was the wife of the insured, and Layo Newman, a brother of the insured, was made, without the wife's consent, the beneficiary under the policy. Conflicting claims to the proceeds of the policy having been made upon the insurance company after the death of the insured by Layo Newman, as beneficiary, and Ella Newman, as the wife of the insured claiming her community share of the same, the insurance company impleaded all the claimants and paid the proceeds of the policy into court to be disposed of according to the respective rights of the claimants. The insurance company was thereupon dismissed as a party, and the action thereafter proceeded upon the issue joined between the widow and the brother of the deceased. It was conceded that all the premiums on said policy had been paid out of community property. The court held that the surviving wife was entitled to one-half of the proceeds of the policy, as they were community assets, one-half of which belonged to the surviving widow. It will be noted that the insurance company, having impleaded the claimants and paid out the proceeds of the policy into court, was dismissed from the action, and no question of the rights of the surviving wife against the insurance company was raised or decided. Indeed, in denying a rehearing of the case, the court expressly refused to discuss the right of an insurer to make payment to a beneficiary, provided such payment be made prior to any notice of adverse claims, saying, in this behalf:

"No such question was here involved, as the insurance company had impleaded the parties and paid the proceeds of the policy into court. Whatever our views might be on the subject, the expression thereof would be purely dicta and of no value. * * * Whatever questions other than the ones decided might possibly arise between the different parties to the contract of insurance, they were not before us, and are in no manner affected by the decision."

In the petition for a hearing by the Supreme Court after a decision by the District Court of Appeal, which was denied, the only points presented concerned the paramountcy

of the surviving wife's claim to one-half of the proceeds as against a beneficiary to whom the gift had been made without the consent of the wife.

The respondent, relying upon certain phrases in the *Bank of Italy Case*, argues that the gift of the proceeds of the insurance policy by the husband, without the consent of the wife, was a nullity and that the rights of the beneficiary never vested in more than one-half of said proceeds, inasmuch as the rights of the wife arose immediately upon the death of the husband. In other words, it is insisted that the community interest of the wife in one-half of the proceeds never vested in the beneficiary, Alice M. Scott, and the insurance company was not justified in paying over to the beneficiary the entire proceeds of the insurance policy.

The sole question decided in the *Bank of Italy Case* was that, as between the wife and the beneficiary named without her written consent, the wife was entitled to one-half of the proceeds of an insurance policy the premiums for which were paid out of community funds. This case therefore so strongly stressed by counsel for respondent, cannot be said to be determinative of the question involved in the instant case. On the contrary, the broad scope attempted to be given that case by counsel for respondent was expressly repudiated by the court upon its denial of a rehearing.

A review of the previous decisions of this court, dealing with the respective rights of the husband and wife in community property, and the effect of a husband's attempt to make a gift of more than his share of the community property, will not support the contention of the respondent that the gift to the beneficiary of the proceeds of the insurance policy in the instant case was an absolute nullity, and that the wife's interest in one-half thereof vested in her, eo instante, upon her husband's death. On the contrary, we think that the previous rulings of this court are directly against the contention of respondent as made in the instant case.

[1-3] An insurance policy in legal contemplation is property.

"It could be sold, assigned, or bequeathed by the owner thereof. Its pecuniary value to its owners was as great as though they held a promissory note of the company for that amount, payable upon the same conditions. It was a chose in action, and upon its satisfaction by a payment of the amount specified the title to the money so paid followed the title to the policy." *In re Dobbel*, 38 P. 87, 104 Cal. 432, 43 Am. St. Rep. 123.

The interest of a beneficiary named in a policy in which the insured may change the beneficiary is not a vested right, but merely an expectancy of an incomplete and inchoate gift, which is revocable at the will of the insured and which does not become vested as

a right until fixed by death. *Jory v. Supreme Council*, 38 P. 524, 105 Cal. 20, 29, 26 L. R. A. 733, 45 Am. St. Rep. 17; *Hoeft v. Supreme Lodge, Knights of Honor*, 45 P. 185, 113 Cal. 91, 33 L. R. A. 174. The proceeds of an insurance policy, the premiums to which have been paid out of community assets, are community property. *New York Life Insurance Co. v. Bank of Italy*, supra.

[4, 5] The husband is the owner of the community property, and the interest of the wife therein is but a mere expectancy. *Van Maren v. Johnson*, 15 Cal. 308, 311; *Tolman v. Smith*, 24 P. 743, 85 Cal. 280; *Spreckels v. Spreckels*, 48 P. 328, 116 Cal. 339, 36 L. R. A. 497, 58 Am. St. Rep. 170; *Spreckels v. Spreckels*, 158 P. 537, 172 Cal. 775; *Winchester v. Winchester*, 165 P. 965, 175 Cal. 391; *Estate of Brix*, 186 P. 135, 181 Cal. 667; *Dargie v. Patterson*, 169 P. 360, 176 Cal. 714; *Roberts v. Wehmeyer*, 218 P. 22, 191 Cal. 601. Certain statutory limitations for the protection of the wife have, however, been placed upon his power of disposal.

Thus, by section 172 of the Civil Code, the husband is expressly prohibited from giving away any part of the community personal property without the written consent of the wife. This restriction on the husband's power of disposal does not, however, vest any interest in the community property in the wife. *Spreckels v. Spreckels*, 158 P. 537, 172 Cal. 775. If a gift is made by the husband in contravention of the statute, the gift is not a nullity. On the contrary, the property vests in the donee, subject to a right on the part of the wife to have one-half of the gift revoked. If, after the gift is made, the wife gives her consent, the requirements of the statute are fulfilled, and no further action is required to make it a valid and effective gift. *Spreckels v. Spreckels*, 158 P. 537, 172 Cal. 775; *Dargie v. Patterson*, 169 P. 360, 176 Cal. 714; *McDougald v. First Federal Trust Co.*, 199 P. 11, 186 Cal. 243, 245. In short, a gift of community property by the husband during his lifetime without the consent of his wife is not void but voidable.

"The limitation upon the husband's power to make a gift * * * depends upon two questions of fact: The absence of a valuable consideration, and the absence of her written consent, both of which may have to be proven by collateral evidence. The gift, when made, immediately vests the property in the donee subject to her right of revocation. She may give her consent at any time during her life, and if she does the gift becomes absolute with respect to her. The provision was manifestly intended solely for the benefit of the wife. If she seeks to assert such right, it is incumbent upon her to show that the facts exist upon which it depends. The conclusion seems inevitable that the gift is not absolutely void with respect to her but only voidable by her upon proof of the facts necessary to that end." (Italics ours.) *Spreckels v. Spreckels*, 158 P. 537, 172 Cal. 775. See, also, *Dargie v. Patterson*, supra.

It is insisted by respondent, however, that these cases refer to transfers made by the husband during his lifetime, and that, in the instant case, the transfer takes effect upon the death of the husband. *Jory v. Supreme Council*, supra. We do not think this distinction is substantial or material. Particularly is this true in view of the well-established rule that a gift by a husband by testamentary disposition of more than his half of the community property is not void, but only voidable at the election of the wife. *Spreckels v. Spreckels*, 158 P. 537, 172 Cal. 775.

"The limitation upon the husband's testamentary power contained in the Code was not understood to vest in the wife, during the marriage, any interest or estate whatever in the community property, but merely to constitute a restriction upon the husband's power. If the husband undertook to dispose of all of the community property by will, giving the wife less than one-half thereof, such disposition was not absolutely void, but had the effect of putting her to her election whether to take under the statute or under the will. If she took the latter provision, the disposition in the will of the remaining portion of the property was thereby affirmed and made valid. *Morrison v. Bowman*, 29 Cal. 346; *Estate of Stewart*, 15 P. 445, 74 Cal. 98, 104; *Estate of Smith*, 40 P. 1037, 108 Cal. 119; *Estate of Vogt*, 98 P. 265, 154 Cal. 509. The testamentary disposition in such a case, therefore, was voidable but not absolutely void. If it had been void, in the extreme sense, the logical result would have been that a mere election by the wife would not transfer the remainder of her statutory half to the other beneficiaries under the will, but that a conveyance by her would be necessary. It has always been understood that her election is sufficient for that purpose and that the will, in that event, operates to transfer the property."

[6] An attempted disposition by will by the husband of more than his half of the community property vests the property in the donee subject to being avoided at her election. If this be true, it necessarily follows that a gift initiated during the life of the husband, but not completed and consummated until his death, must be said to take effect, vesting the property in the donee subject to being avoided by the wife at her option. Although it is true that a wife cannot be deprived of her half of the community property without her consent, yet, under the reasoning of *Spreckels v. Spreckels*, 158 P. 537, 172 Cal. 775, until she does declare her intention of refusing to acquiesce in the husband's gift, the property vests in the donee or beneficiary under the will.

Under the California theory of community property, the husband remains the owner of all the community property until his death, at which time the rights of the wife immediately ripen, and she becomes entitled to one-half of the community property, with the right to avoid any conveyance so far as is

necessary to protect her interest in any property conveyed by her husband in derogation of her right to a one-half interest. *Dargie v. Patterson*, supra. However, until the wife elects to establish her community right by the assertion of her rightful claim, the gift by the husband is valid. As to her the gift is a nullity only when she elects to treat the same as a nullity. The rule that the gift of a husband of community property is valid until avoided by the wife, applicable to community property in general, is applicable to the proceeds of an insurance policy, the premiums of which have been paid out of community funds.

[7] It follows that a gift by a husband of an insurance policy to a beneficiary, other than his wife, is a good and valid gift until avoided by the wife by an assertion of her right to one-half of the proceeds, and the insurance company, until it has been made aware of the wife's claim, is justified in delivering to the beneficiary, as the person rightfully entitled thereto, the proceeds of the policy upon the death of the insured husband. The insurance company having contracted with the husband, and having promised to pay the proceeds of the policy to whomsoever he designated, in the absence of notice of any adverse claim, could do nothing but fulfill its contract. In short, until the wife had given notice of her claim to one-half of the proceeds, thereby asserting her statutory right of avoiding the gift ab initio (*Dargie v. Patterson*), all of the parties to the contract of insurance were entitled to deal with the subject-matter thereof as if the gift were absolute.

No notice of any adverse claim to the proceeds of the insurance policy was given by the wife to the insurance company prior to the payment of the proceeds to the beneficiary. The correspondence between the insurance company and the plaintiff's former attorneys shows merely that she was inquiring on behalf of her adopted son, and that she did not purport to claim anything under the policy until some 10 months after the insurance company had paid the money to the beneficiary under the policy.

The insurance company having fulfilled its contract according to its terms, prior to notice of any claim adverse to the beneficiary, has satisfied its obligations under said contract. The wife of the insured has no rights now against the insurance company.

Respondent points out that, as consequences of the rule just enunciated, wives who are ignorant of their husbands' affairs may fail to present their claims adverse to the beneficiary, or a beneficiary, by connivance with officials of the insurance company, may defraud a wife of her one-half share in the proceeds. There must be placed, however, on the other side of the scales, as consequences apt to flow from a contrary rule, the serious impairment of the usefulness of life insur-

ance policies, necessarily resulting from the almost intolerable burden which would be placed upon insurance companies of determining in each instance, prior to the payment of the policy, whether or not the premiums were paid out of community funds, and, if so, what proportion was so paid, as well as the burden of investigating any change which may have occurred in the marital situation and relations of the insured. While judicial conclusions are not ordinarily controlled by the consequences which may flow therefrom, yet, if consequences be weighed, from a practical point of view, the balance is in favor of the conclusion herein reached. This conclusion, which gives effect to the expressed intention of the parties to the contract in controversy, is, we think, in harmony with a sound public policy having for its purpose the promotion of the free writing of life insurance.

Whatever rights the respondent may have as against the beneficiary under the insurance policy under the rule laid down in the case of *Dargie v. Patterson*, supra, need not be discussed here, as no appeal has been taken by the plaintiff from the judgment of nonsuit in favor of the defendant Alice M. Scott. Judgment is reversed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LAWLOR, J.; RICHARDS, J.; SEAWELL, J.

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In re HEARST'S ESTATE.

HEARST et al. v. RILEY, State Controller, et al.

(S. F. 11378.)

(Supreme Court of California. Feb. 1, 1926.)

Taxation — 903—Payments on inheritance tax account cannot subsequently be credited against interest due on date of payment.

Payments by executors, made and accepted on principal amount of inheritance tax, under St. 1917, p. 880, as shown by receipt, before total amount under section 16, subd. 2, or amount of interest under section 7, could be ascertained, held not applicable to interest eventually found due on tax as of date of payment, and where so applied reimbursement under section 11, subd. 3, was authorized.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Phebe A. Hearst, deceased. Petition by William R. Hearst and others, executors, against Ray L. Riley, as Controller of the State of California, and John E. McDougald, as County Treasurer of the City and County of San Francisco, for instructions and order as to

computation of interest on inheritance taxes. From the order fixing the method of computation and the balance of such taxes and interest due, the executors appeal. Modified, and, as modified, affirmed.

Nathan Moran, of San Francisco, for appellants.

Dion R. Holm and Leo C. Lennon, both of San Francisco (Wesley E. Martin, of Sacramento, of counsel), for respondents.

SHENK, J. This is an appeal from an order of the superior court, in and for the city and county of San Francisco, fixing the method of computation of interest on inheritance taxes and the balance of such taxes and interest due.

On the 13th day of April, 1919, Phebe A. Hearst died testate in the county of Alameda, being at the time of her death a resident of the city and county of San Francisco, and leaving an estate in California and elsewhere, including New York, South Dakota, and Mexico. In due time the will was admitted to probate. The inventory was presented by the executors to the appraisers, one of whom was the inheritance tax appraiser, on October 2, 1919. Because of the magnitude of the estate, its scattered properties, and various other problems arising in connection with the appraisal, the report of the inheritance tax appraiser was not filed until August 27, 1923. No question of delinquency, laches, or procrastination on the part of the representatives of the estate or of the inheritance tax appraiser is suggested or involved herein. All parties appear to have proceeded with diligence.

For the purpose of the payment of inheritance taxes the estate was appraised at \$8,418,506.18. By order of court duly made on September 13, 1923, the amount of inheritance taxes due the state, inclusive of the tax on certain transfers made in contemplation of death and exclusive of the tax on the value of a certain contingent interest secured by bond, was fixed at the sum of \$1,020,671.63, of which amount the sum of \$949,101.04 was chargeable against the residuum of the estate. On the same day, to wit, September 13, 1923, the court, upon petition of the executors, made its order fixing the rate of interest to be paid on the inheritance tax. In and by this order the court found that the inheritance tax appraiser had been unable to complete and file his report until the 27th day of August, 1923, by reason of causes of delay which were unavoidable, and that such unavoidable causes of delay would not be removed until such time as the court should make "its order confirming the report of the inheritance tax appraiser with an allowance of a reasonable time thereafter within which to compute the amount or amounts of interest which may be due upon the various de-

vises, legacies, and transfers upon which such taxes may be payable." Also, on the same day, the court made an order:

"That the penalty of 10 per cent. per annum imposed by subdivision (1) of section 7 of the Inheritance Tax Law of the state of California, Statutes of 1917, for nonpayment or delay in payment of the said tax be not charged upon the inheritance taxes found to be due in the above entitled estate, but that interest at the rate of 7 per cent. per annum be charged upon the said taxes from the expiration of 18 months after the death of the said decedent until the cause of delay in such payment be removed, and the date at which such cause of delay will be removed is hereby fixed and specified as 10 days from and after the date whereupon this court shall make its order confirming the report of the inheritance tax appraiser herein, filed on the 27th day of August, 1923."

The report of the inheritance tax appraiser was thereupon confirmed. Within the 10-day period the executors tendered to the treasurer of the city and county of San Francisco the sum of \$52,249.96, which, with simple interest computations, was the amount they claimed to be the balance due the state. The treasurer refused to accept said amount in full settlement and demanded an additional sum in accordance with his method of computation. On the 31st day of October, 1923, the executors filed in said court a petition for instructions and order as to computation of interest. It was alleged in said petition:

"That petitioners have made the following payments on account of inheritance taxes due the state of California, in accordance with receipts on file in the office of the clerk of this court and proceeding, to which receipts reference is hereby made and the same are deemed incorporated by reference herein: September 24, 1920—\$2,260 in accordance with an order of court fixing inheritance taxes on certain money legacies under the will of decedent, the same being within 18 months after her death and no interest accruing thereon. October 13, 1920—\$500,000 for account of William R. Hearst, residuary legatee and devisee, the same being within the 18 months' period and no interest accruing thereon. December 8, 1921—\$100,000 for account of William R. Hearst, residue. April 14, 1922—\$100,000 for account of William R. Hearst, residue. April 20, 1922—\$50,000 for account of William R. Hearst, residue. May 26, 1922—\$100,000 for account of William R. Hearst, residue. September 8, 1922—\$50,000 to pay balance of taxes due from William R. Hearst on residue; remainder to apply on taxes due from various legatees. February 16, 1923—\$1,691.75 for account of Elizabeth S. Apperson. February 27, 1923—\$126,031.96 for account of the five minor grandchildren of decedent and the following legacies: Elbert C. Apperson, Randolph Apperson, A. Flint, Edward R. Clark."

It was further alleged that the above mentioned payments, and each of them, "were made as and for payments on account of principal of tax due from the respective devisees and legatees to the state of California,

and not to apply upon interest, if any, which should thereafter be found due to the state of California; that the receipts issued by the treasurer of the city and county of San Francisco and taken by the executors covering the said payments and each of them" were in the form more fully set forth by reference and incorporated in the record; "that the printed forms of receipt so issued have a line or lines for the entering and charging of interest and that no part of said sums, or any of them, were credited to interest, nor was any claim made that any part of said sums so paid would be credited to interest or otherwise than upon principal," and that the petitioners made such payments and each of them to apply upon the principal amount of said taxes until the same should be fully paid.

The state controller filed his answer to said petition, wherein he admitted that payments were made as alleged by the petitioners, admitted that the receipts issued by the treasurer bore the notations alleged by the petitioners, but averred affirmatively that the treasurer, "when issuing receipts to the petitioners, did so with the understanding that all payments made were to apply first on account of the interest accrued to the date of said payments, and the balance thereof on account of principal." After a hearing upon said petition and answer, the court on the 27th day of February, 1924, made its order, wherein it found that the payments made by and through the executors, as evidenced by the receipts, "were not applicable in the manner intended and claimed by the said executors, nor on account of the particular devisees or legatees specified by the said executors, and that all such payments were applicable generally on account of interest and principal on inheritance taxes due upon devises, legacies, and transfers, made by the said decedent, and that all such payments were properly applied by the treasurer of the city and county of San Francisco, first to the interest that had then accrued as of the date of the installment payment; and, second, the balance, if any, to the reduction of the principal sum of such taxes and all of them." It was further found that the amount tendered by the executors was incorrect, and that the amount due the state at the time of payment as specified by the order of court was the sum of \$60,511.76, whereupon the executors paid the latter sum to the treasurer under protest, and they prosecute this appeal from the order decreeing that said sum was the amount due the state. They here seek to have said order modified by directing the reimbursement to them of the sum of \$8,261.80, the same being the difference between the amount tendered by them and the amount fixed by the court and paid under protest.

The record presents an imposing array of figures, but the problems presented are of

law and not of accounting. It is the contention of the appellants, first, that the method adopted by the city and county treasurer and the state controller for the application of the advance payments by appellants resulted, in effect, in an unauthorized compounding of interest as against the various beneficiaries under said will; and, secondly, that if such a method may be adopted under present law it was not pursued in this instance for the reason that all receipts issued by the treasurer and countersigned by the state controller show that the said payments were at the time of the issuance of said receipts applied exclusively to principal. On behalf of respondents it is conceded that "the state is inhibited from compounding interest, or charging interest on interest" but it is insisted by them that such was not done in this case.

The order fixing 7 per cent. on deferred payments was made in conformity with section 7 of the Inheritance Tax Act of 1917 (Stats. 1917, p. 880), which was in force at the time of the death of decedent. The pertinent portion of that section is as follows:

"Sec. 7. (1) All taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent, and if the same are paid within eighteen months, no interest shall be charged and collected thereon, but if not so paid, interest at the rate of ten per centum per annum shall be charged and collected from the time said tax accrued. * * * (2) The penalty of ten per cent. per annum imposed by subdivision (1) of this section for the non-payment of said tax, shall not be charged in cases where, in the judgment of the court, by reason of * * * unavoidable cause of delay, the estate of any decedent, or a part thereof, cannot be settled at the end of eighteen months from the death of the decedent; but in such cases seven per cent. per annum shall be charged upon the said tax from the expiration of said eighteen months until the cause of such delay is removed. * * *

Concerning the first two payments and their application solely to principal there is no controversy, for the reason that no interest thereon had as yet become chargeable. Receipts therefor were issued, signed by the treasurer and countersigned by the controller, showing application to "Amount of Tax." In the form of receipt was a line to show payment, if any, to "Amount of Interest." This line in each case was left blank so that each receipt indicated unquestionably that the payment was applied to principal. Prior to the order of September 13, 1923, finding that the delays in the ascertainment of the amount of tax were unavoidable, and fixing the rate of interest, seven different advance payments were made on account of said inheritance taxes as above indicated. The aggregate of these payments exceeded the amount of the principal on the tax chargeable against the devisees and legatees under

said will in accordance with the report of the inheritance tax appraiser. Upon each of said seven payments a receipt similar in form to the receipts for the first two payments was issued, also signed by the treasurer and countersigned by the controller, wherein the whole amount of such payment was applied to "Amount of Tax," and the line providing for an application of any portion of the payment to "Amount of Interest" was left blank, showing no application of any portion of said payment to interest at the time the receipts were issued. To their answer filed November 8, 1923, to the petition of appellants "for instructions and order as to computation of interest," the respondents attached a schedule wherein and whereby they sought and do now seek to apply on account of interest, retroactively as of the time of payment of each of the aforesaid seven payments, the portions thereof that would amount to interest at the rate of 7 per cent. per annum, and to apply the balance to the account of principal retroactively as of the date of such payment. They assume to justify their action on the ground that it is the method of procedure followed in ordinary commercial practice.

As defined in the testimony of one of the respondents' witnesses, and upon which testimony the order complained of must largely rest, said commercial method consists in this, that when a payment is made the accrued interest is computed on the entire unpaid balance up to the date of payment, and the payment is applied first to the reduction of interest and the balance, if any, to the reduction of principal. But the undisputed facts disclosed by the record do not permit the respondents to square their action with this definition of said commercial method. In the first place it was not possible to ascertain the amount of the unpaid balance of principal at the time of any of said seven payments, for the reason that the inheritance tax appraiser had not as yet filed his report, and it was upon the confirmation of this report that the amount of the tax first became ascertainable (Stats. 1917, p. 896, § 16 [2]), and, secondly, the rate of interest at the time of any of said payments was not fixed. It is difficult to perceive how a payment could thus be split when neither the unpaid balance of principal, upon which the accrued interest must be computed, nor the rate of interest was possible of ascertainment at the time of payment. It is true that at the time of the respondents' retroactive computation in November, 1923, the total amount of principal and the interest rate were certain, but they were not liquidated nor possible of ascertainment until the court confirmed the report of the inheritance tax appraiser and fixed the rate of interest in September, 1923, which was long after the said seven payments had been made. The same witness testified for respondents that

to constitute compound interest it is necessary that there be stated rests at which the interest is computed and added to the principal. He further testified on cross-examination, after making and comparing computations, that the results in money and in the amount of interest to be paid were exactly the same by the said commercial method as by compound interest.

It is obvious that to apply the compound interest method or the said commercial method there must be available at the time of the application of payment by the debtor an ascertained principal upon which to compute the interest and a certain rate of interest, neither of which was present at the time of the payments by the appellants. Whatever may be the proper definition of compound interest or of the commercial method, the result of the computation of the respondents as made in this case was to charge interest on interest, a result which, if effected, the respondents concede was unauthorized. If the appellants had not been diligent in anticipating the demands of the state and had retained the entire amount of the principal until the amount of such principal became determined by the confirmation of the report of the inheritance tax appraiser and the court fixed the rate of interest under the statute, it would scarcely be contended that they would be liable for more than the amount of the principal and simple interest thereon to the date of payment. Having exercised such diligence, it is clear that they should not be subjected to exactions except the same be clearly authorized by statute or by agreement of the parties, and no such authorization is here shown.

The course of action of the respondents in issuing the receipts for the money when and as paid constitutes another reason why they should not now be permitted to contend that said receipts do not mean what they purport to mean on the face thereof. In each instance they indicated that the payment was applied to the "Amount of Tax" in the full amount paid, and of the application of no portion of the same on "Amount of Interest," although the form of receipt plainly contemplated that if any portion of the payment were to be applied to interest the amount should be stated in the space provided for that purpose. The appellants had the right to rely on the receipts as issued, and when so relied upon under the circumstances here shown, the respondents may not question their effect. See *Seward v. Fiskens*, 210 P. 378, 122 Wash. 225, 27 A. L. R. 1208.

The order appealed from, in so far as it imposes upon the devisees and legatees under said will, whom the appellants represent, the payment complained of, lacks support in the record. On the contrary, the undisputed facts support the appellants' contentions.

The said order is therefore modified by reducing the amount chargeable as against the appellants to the extent of \$8,261.80, and the lower court is directed to order reimbursement to appellants of that sum in accordance with the requirements of subdivision 3 of section 11 of said act. Stats. 1917, p. 891. The said order is otherwise affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; SEAWELL, J.; LAW-LOR, J.

198 Cal. 129

NOBLE v. NOBLE et al. (S. F. 11057.)

(Supreme Court of California. Feb. 1, 1926.
Petitions for Modification and Rehearing Denied March 1, 1926.)

1. Appeal and error ⇨1078(1).

Specification of alleged errors not mentioned in appellants' briefs may be treated as abandoned.

2. Appeal and error ⇨694(1).

Specifications of insufficiency of evidence to support findings are unavailing, where evidence is not produced on appeal.

3. Trusts ⇨373—Findings held not to show that trust property could not be identified.

In action to recover a trust fund, findings that trustee without knowledge, consent, or ratification of cestui que trust sold trust property, and deposited proceeds to his own credit, for which he rendered no accounting, held not to show claim that trust property was so intermingled with property of trustee that identity thereof could not be traced.

4. Trusts ⇨244—Representatives of trustee, leaving a solvent estate, stand in no better relation to trust property than trustee himself would have occupied.

Where trustee leaves a solvent estate with no creditors, his heirs or personal representatives stand in no other or better relation to trust and properties thereof than trustee would have occupied if living.

5. Trusts ⇨354—Depositing of proceeds of trust to personal credit of trustee held not to relieve trustee of duty of rendering account or to relegate trustor to position of general creditor.

The trustee of an express trust, by converting corpus of trust into money and depositing proceeds in own name to his personal credit, cannot thereby relieve himself of duty to render an account of his trust and relegate trustor to position of a general creditor of himself or of his entirely solvent estate.

6. Trusts ⇨359(2)—Beneficiary of trust may proceed in equity to recover trust against fund with which his trust money has been intermingled.

When a trustee mingles trust money with his own funds, the beneficiary is not, on death of trustee, relegated to position of an ordinary creditor of his estate, but may proceed in equity

uity against the fund with which his trust money has been intermingled.

7. Trusts ⚡244—**Liability of trustee for negligence in handling trust property not part of corpus of trust which cestui can impose upon trustee's estate.**

Trustee's responsibilities, arising out of negligent handling of trust property, is a personal liability, enforceable against his estate, but does not form part of corpus of trust property which cestui is entitled to follow into hands of executors.

8. Trusts ⚡348—**Cestui entitled to recover entire amount of proceeds of trust property traced into hands of executors of trustee's estate.**

In action to recover trust property, where trustee, without knowledge, consent, or ratification of cestui que trust, sold trust property, and deposited proceeds to his own credit without rendering an accounting, cestui held entitled to receive without diminution the amount so deposited and traced into hands of executors of trustee's estate.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action to establish a trust by Floride Noble against Edward B. Noble and another, trustees in the stead of Patrick Noble, deceased. Judgment for plaintiff, and defendants appeal. Modified.

See, also, 239 P. 51.

Goodfellow, Eells, Moore & Orrick, of San Francisco, for appellants.

Mervyn R. Dowd and John E. Bennett, both of San Francisco, for respondent.

RICHARDS, J. [1, 2] This appeal is from a judgment in the plaintiff's favor in an action brought by her against the defendants who are sued in the capacity of trustees in the stead of her deceased brother, Patrick Noble, to have a trust impressed upon the properties of his estate in the hands of said defendants as executors thereof. The appeal is upon the judgment roll and bill of exceptions which does not purport to set forth all of the evidence in the case. The appellants specify in said bill 10 alleged errors of law committed by the trial court in the course of the trial of the cause, but, as none of these is mentioned or commented upon in the briefs of appellants' counsel, they may be treated as having been abandoned upon appeal. The appellants also specify a number of respects wherein the evidence is asserted to be insufficient to support the findings of the trial court, but, since the evidence has not been produced upon this appeal, these specifications are also unavailing. The matters to be discussed upon this appeal are thus much simplified, and are in fact reduced

to but two inquiries: First, as to whether the findings support the judgment establishing the trust for any amount whatever, and, second, whether the findings support the judgment to the full extent of the plaintiff's claim; and, if not, to what amount or extent? The facts required to be collated from the findings as necessary to the determination of these two questions are few and simple. The plaintiff was, in the year 1908, the owner of a certain piece of improved real estate in the city of Santa Monica in this state of the admitted value of \$7,500. She was a young and inexperienced woman, and the sister of Patrick Noble, an elder brother, a lawyer, and a man of business and affairs, who came to her in that year with the suggestion that she convey said property to him without consideration, but with the understanding that he was to hold the same in trust for her, to render it productive of good interest, and to return it to her whenever she should want it or he should no longer wish to handle it. He was to have full control of the property to manage as he saw fit, and to sell or exchange for her benefit if he so desired. Having the fullest confidence in her brother, the plaintiff made the conveyance, and thereafter for about two years continued to live upon the property, and to collect and keep for her own use the rents and avails of the property, amounting variously to from \$75 to \$125 a month. In 1910 Patrick Noble exchanged this property for a house and lot in San Francisco, the rents and issues whereof from that time forth he collected and kept. There were other transactions between the parties growing out of the estate of their deceased mother, and also involving the care and support of a younger brother, which it is not necessary here to review for the reason that the findings do not show these to be material to a determination of either of the questions involved in this appeal. In the year 1919 Patrick Noble sold the San Francisco property for the net sum of \$3,684.14, which sum he deposited in his own name in a commercial account which he had theretofore established with the Anglo-California Trust Company, and upon which he drew and made deposits for his own purposes up to the time of his death, which occurred in October, 1920. For some time prior to his death Patrick Noble also maintained both a savings and a commercial account with the Mission Bank, and at the time of his death he had in said savings account the sum of \$462.22, and in said commercial account the sum of \$1,430.47. He was also the owner during his lifetime and at the time of his death of bonds in various corporations of the aggregate value of \$26,112.12 and of real estate of the value of \$5,500. He left no creditors, and by his will devised his estate to his son and heir, with defendants herein named as the executors thereof. For

some years prior to his death the plaintiff had from time to time suggested to Patrick Noble that he convey back to her the trust property in the form in which it then was, but he had always put her off with the statement in effect that everything was all right, and that he did not wish her to be troubled or to be troubled himself about the matter. The plaintiff was aware of the transaction by which the Santa Monica property had been exchanged for the San Francisco real estate, and had consented thereto; but she was entirely unaware that the San Francisco property had been sold by Patrick Noble or that he had received and intermingled with his own accounts and properties the sum received therefor until after his death. She then brought this action, with the result that the trial court determined and decreed that the defendants, as executors of the estate of Patrick Noble, deceased, are trustees of plaintiff's property standing in his stead; that the value of the property of plaintiff originally impressed with said trust was the sum of \$7,500, less certain advances made by Patrick Noble during his lifetime, amounting to \$1,416.43, leaving a balance of \$6,083.57, which the defendants as the trustees and executors of his estate were directed and decreed to pay over to plaintiff in fulfillment of said trust.

[3-5] The first contention which the appellants urge upon this appeal is that, since the findings herein show that Patrick Noble in his lifetime so intermingled the property of the plaintiff held by him in trust with his own properties that the identity thereof can no longer be traced, the plaintiff cannot recover in this form of action, but has thereby been relegated to the position of a general creditor of his said estate, and that, not having filed a claim against his said estate in the capacity of such creditor, as required by law, she cannot recover any sum whatever in the present action. We are not satisfied that the findings herein are susceptible of the interpretation which the appellants would have us place upon them. The answer of the defendants denies in detail and in its entirety the averments of plaintiff's amended complaint as to the creation and existence of any such trust as is set forth therein. The trial court found that the allegations of the plaintiff's amended complaint were true, and that the denials and affirmative allegations of the defendants' answer were untrue. The trial court further found that on or about October 20, 1919, Patrick Noble, without the knowledge or consent or subsequent ratification of said plaintiff, had sold the trust property then situated in San Francisco for the sum of \$4,000, the net of which amount he had deposited in the Anglo-California Trust Company to the credit of his own account in that bank, and for which he had rendered to the plaintiff no accounting. The findings go no further, and much of the argument which the

appellants predicate upon Patrick Noble's subsequent withdrawals of practically the whole of this deposit is based upon fragmentary excerpts from the evidence which has not in its entirety been embraced in the record before us. We would be loath to hold that the mere deposit by a trustee of the moneys of his *cestui que trust* in his own personal account would constitute such an intermingling of the trust funds with his own funds as to obliterate the corpus of the trust and relegate the *cestui que trust* to the position of a mere general creditor of the trustee's estate. We are cited to no authorities that go to the extent of so holding, and we are satisfied that none such exist. But, aside from this insufficiency of the findings to furnish a basis for the appellants' contention, we are not satisfied with their statement of the law governing such a case as this. The appellants strongly rely upon the case of *Lathrop v. Bampton*, 31 Cal. 1733, 89 Am. Dec. 141, as sustaining their contention that, when a trustee has commingled with his own funds the corpus of the trust, the right of the trustor to assert the special lien of the original trust against the general estate of the trustee is thereby lost. We do not so read that case, since in that case it appeared that the estate of the trustee was insolvent, and the utmost that the court can be credited with holding is that the *cestui que trust* under such circumstances could be given no special lien upon the trustee's insolvent estate which would be superior to that of any other creditor therein. It is not necessary to even discuss the obvious equity of such a holding, but such a holding has no application to the facts of this case wherein the trustee left a solvent estate with no creditors, and wherein his heir or his personal representatives cannot be conceived as standing on any other or better relation to the trust and the properties thereof than that which the trustee himself would have occupied if a living defendant in this action. Neither can we conceive of a state of the law by which a trustee of an express trust by the mere process of converting the corpus of the trust into money and depositing the same in his own name and to his personal credit in his bank could thereby relieve himself of his duty to render an account of his trust and relegate his confiding trustor to the position of a general creditor of himself or of his entirely solvent estate. We are cited by the respondent to another very early case in our decisions which seems to set forth the true rule in a situation similar to that presented by the case at bar.

[6] It is the case of *Gunter v. Janes*, 9 Cal. 643. It was therein held that, when a trustee mingles trust moneys with other funds of his own, the beneficiary is not, upon the death of the trustee, relegated to the position of an ordinary creditor of his estate, but may proceed in equity against the fund

with which his trust moneys have been intermingled. In the opinion of the court upon rehearing, the court makes perfectly clear its position with respect to such a transaction on the part of a trustee; and in so doing quotes the language of the Lord Chancellor in the case of *Docker v. Somes*, 2 Myne & Keen, 655, as being distinguished with clearness, justice, and force. The court points out the distinction to be borne in mind in cases where the rights of creditors of the deceased trustee are involved as against those wherein the contest is solely between the cestui que trust and the administrator of the deceased trustee. We find no different rule laid down in any of the later decisions of this court to which we have been referred. The case of *Estate of Harrison Arms*, 199 P. 153, 186 Cal. 554, cited by the appellants, is clearly distinguishable as to its facts from the case at bar, since it appears that the trust property involved in that case was with the full and long-continued consent of the trustor so commingled with the property of the trustee that no part of it could be definitely traced or segregated from that of the trustee, while as to the law the court confines its discussion to the scope of the early case of *Lathrop v. Bampton*, supra, to the effect that the trustor "has in such a case no special lien upon the general estate of the trustee which is superior to that of any other creditor." In the case of *Elizalde v. Elizalde*, 66 P. 369, 70 P. 861, 137 Cal. 634, also cited by the appellants, it appears that the controversy was one between the alleged trustor and other creditors of the deceased trustee, but even in such a case the court cites with approval the following language used in *Lewin on Trusts*, 894:

"If a trustee pay trust money into a bank to the account of himself, not in any way earmarked with the trust and also keeps private moneys of his own in the same account, the court will disentangle the account and separate the trust from the private moneys and award the former specifically to the cestui que trust,"

—and this, says this court, it will do even if the trustee, after so mingling the funds, has drawn therefrom from time to time, since it will be presumed that the moneys so drawn were from his own portion of the fund rather than from the moneys held by him in trust. The most recent utterance of this court touching this subject is that found in *Newport v. Hatton* (Cal. Sup.) 231 P. 987, wherein it was held that—

"When the money or property of the trustor can be traced into a particular fund or deposit, where it remains, though mingled with other money, the beneficiary may seek to follow the specific personal property and enforce the trust. Though the identical pieces of coin cannot be ascertained, yet if there is so much belonging to the trust in a general heap of private and trust funds, the cestui que trust is entitled to take so much out."

That this court evidently thought that the foregoing doctrine was in harmony with its holdings in the case of *Elizalde v. Elizalde* and *Estate of Harrison Arms*, supra, appears from the citation in support thereof. We therefore conclude that the findings in the instant case are sufficient to sustain that portion of the judgment of the trial court which holds that the plaintiff was entitled to have imposed upon the estate of Patrick Noble a trust for some portion of the original corpus of the trust of which he had become the trustee without the necessity of presenting a claim against the estate of such trustee.

[7, 8] A more difficult question is presented when we come to consider the extent to which the plaintiff is entitled to go in her assertion of a right to impose the entire amount and value of the original trust property upon the estate of said trustee. By the findings of the trial court it is expressly found that, while the value of the original property of the plaintiff transferred in trust to Patrick Noble was \$7,500, it has also found that the property so taken in trust was subject to a mortgage to the amount of \$1,416.40, which the trustee had paid off out of his own funds. It has further found that the said trustee had, with the consent of the trustor, exchanged said property for other property situate in San Francisco. The court then proceeds to find that Patrick Noble negligently suffered this last-named property to fall into disrepair to such an extent that the rental value thereof was greatly diminished, and that such disrepair continued to the date of the sale thereof for the gross sum of \$4,000. It is true that the trial court also finds that said Patrick Noble did not intend that the trustor should suffer loss through his negligent handling of the trust property, and that he intended to stand responsible to her for the value of the trust property as he received it, but this latter finding does not change the situation which arises out of the fact that he sold the property for but \$4,000, and that the sum remaining as a result of said sale, viz. the sum of \$3,684.14, constituted all of the corpus of said trust which had come into his hands as a result of such sale, and also constituted all of the money representing such corpus of the trust property which had been deposited by him to his own account in his bank, and which was in any way identifiable as constituting the trust property in his hands. His responsibility to his cestui que trust arising out of his negligent handling of the trust property, while doubtless existent, was a personal liability which would properly form the foundation of a claim against his estate, but it could not be said to form a part of the corpus of the trust property which the plaintiff would be entitled to follow into the hands of the executors of the deceased trustee's estate. As to such a liability the plain-

tiff would be relegated to the remedies provided for the violation of trust obligations in the ordinary course of law. 39 Cyc. pp. 513, 514, and cases cited. On the other hand, we think the plaintiff would be entitled to receive without diminution the entire remaining corpus which she had succeeded in tracing into the hands of those upon whom his estate had devolved. This amount, as we have seen, was the sum of \$3,684.14, which the trial court found to be the net amount deposited to his bank account by the trustee after the sale of the trust property. The judgment should have been confined to said sum. It is therefore so modified as to order, adjudge, and decree that the defendants, as trustees and executors of Patrick Noble, deceased, and his estate pay unto plaintiff in pursuance hereof the sum of \$3,684.14, together with costs taxed at \$78, and that the plaintiff herein recover her costs upon this appeal.

We concur: WASTE, C. J.; LAWLOR, J.; SEAWELL, J.; CURTIS, J.; SHENK, J.

75 Cal. App. 732

DALEY v. IRWIN. (Civ. 5279.)

(District Court of Appeal, First District, Division 2, California. Dec. 23, 1925. Hearing Denied by Supreme Court Feb. 8, 1926.)

1. Principal and agent ⇨177(4)—Buyer of barley held not entitled to consequential damages for breach of warranty, where drivers had knowledge.

Buyer of barley seed was not entitled to consequential damages, where his drivers continued to receive and plant it after discovering breach of warranty of quality, in view of Civ. Code, §§ 2020, 2295, 2316, 2320, 2332, and section 2319, subd. 1; they being his agents and having information as to quality of seed ordered.

2. Appeal and error ⇨1061(3)—Defeat of counterclaim in action for breach of warranty held in effect general damages for plaintiff.

In action for breach of warranty of barley seed where plaintiff was nonsuited but after admitting he received barley defeated defendant on counterclaim for contract price thereof on claim that it was worthless, he was not entitled to nominal or general damages, which he first claimed at time of oral argument, since defendant's defeat on counterclaim was in effect general damages for breach of warranty of quality of personal property as provided in Civ. Code, § 3313.

3. Appeal and error ⇨709, 901—Appellate court not required to make independent investigation, where appellant did not show judgment appealed from contrary to statute.

Where plaintiff complained of provision in judgment awarding costs to defendant, but cited no statutory provisions showing he had been injured, and record did not show whether purported judgment was ever entered or re-

corded, appellate court was not called upon to make independent investigation.

Appeal from Superior Court, San Diego County; Edgar A. Luce, Judge.

Action by George R. Daley against I. Isaac Irwin, doing business under the fictitious name of Irwin & Co. Judgment for defendant, and plaintiff appeals. Affirmed.

Crouch & Sanders, of San Diego, for appellant.

William G. Mirow, J. Clyde Hizar, and Sloane & Sloane, all of San Diego, for respondent.

STURTEVANT, J. This is a second appeal in the above-entitled action. Daley v. Irwin, 56 Cal. App. 325, 205 P. 76. The general facts are fully stated in that decision and need not be repeated. After the first appeal had been decided, the case was tried again in the trial court sitting with a jury. When the plaintiff rested and before the defendant commenced to introduce any proof, the defendant made a motion for a nonsuit. The motion was granted and a judgment was entered in favor of the defendant. From that judgment the plaintiff has appealed and has brought up a bill of exceptions.

Before proceeding further, it becomes necessary to advert to the peculiar condition of the pleadings. In his complaint the plaintiff pleaded the making of the contract with the defendant for the purchase of a large quantity of barley for seed. He pleaded facts showing that the defendant warranted the seed as re-cleaned. Thereupon he pleaded a breach of the contract by delivery of uncleaned barley. He followed those allegations with numerous allegations of consequential damage. However, he did not insert any allegations regarding nominal damages or regarding general damages. The defendant interposed an answer containing certain denials and also certain new matter. He also interposed a cross-complaint alleging by the use of a common count the sale to the plaintiff of goods, wares, and merchandise in the sum of \$1,390.04. The plaintiff answered the cross-complaint by alleging:

"Answering the allegations contained in paragraph 2 of the said cross-complaint, the plaintiff denies that he is indebted to the defendant in the sum of \$1,301.31, or \$88.73 interest. Admits that he has not paid for 292 sacks of barley seed purchased from the defendant at the agreed price of \$1,275.01, but alleges that the said barley seed was valueless for the purpose for which it was purchased as more fully appears from the allegations in the plaintiff's complaint contained."

On the trial of the case the plaintiff assumed the burden of proof. He called witnesses and elicited testimony to prove the allegations of his complaint. To a great ex-

tent the evidence was the same as the evidence on the first trial as reported in *Daley v. Irwin*, supra. However, on the second trial Mr. Daley testified flatly that he did not have a foreman employed; that Romero, Bennett, Ramos, and Long each brought the necessary farming implements and teams, and each was directed to plow the ground and seed it with barley. He further testified that he told each of them that he had purchased the seed from Irwin & Co.; that it was not dirty barley, but was clean barley; and that when they needed barley for seed each one was to direct Daley's truckman, Edge, or another truckman, Cooper, to bring barley or to call up Daley's house and ask Mrs. Daley to have barley sent to the ranch. He also testified that if Ramos, Romero, Bennett, or Long, was going to town, and if the driver should be in need of grain, the person so going to town should bring back barley. The plaintiff also called as witnesses Cooper, Edge, Ramos, and Romero. Each one testified that he opened one or more sacks, and that each sack contained barley that had not been recleaned. Cooper, Ramos, and Romero testified that the barley was so dirty that it would not go through the drills. Complaint was made by the drivers to the truckmen, and the truckmen examined sacks of grain and found the same conditions. Immediately after ordering the seed from Irwin & Co., the plaintiff went to Imperial Valley and did not return to the ranch for three weeks. During that time the dirty barley was received by the planters, and much of it was planted, without any express notice to the plaintiff that the seed that was being delivered was dirty. When the plaintiff returned to his ranch, he found that the drivers were receiving and planting dirty barley and were having a great deal of difficulty in getting the drill to plant. Thereupon he stopped them from using the seed received from Irwin & Co., purchased seed elsewhere, and proceeded to finish the planting.

[1] In getting seed from the defendant the foregoing facts show that the driver was an agent (Civ. Code, § 2295); each agent was bound to use ordinary diligence to inform the plaintiff as to his acts in the course of the agency (Civ. Code, § 2020); each had the actual authority to receive from Irwin & Co. recleaned barley and to plant recleaned barley on the plaintiff's ranch (Civ. Code, § 2316); each had the necessary authority to see that the barley delivered for seeding was recleaned barley or to refuse to plant it (Civ. Code, § 2319, subd. 1); and in so doing to stop work if necessary (Civ. Code, § 2320). In the discharge of the foregoing duties notice to the drivers was notice to their principal. Civ. Code, § 2332; *Barrett v. Metropolitan Contracting Co.*, 172 Cal. 116, 155 P. 645; *Trentor v. Pothén*, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 225, 228; *Daley v. Irwin*, supra. Notwithstanding that the drivers

from the very beginning knew the condition of the seed that was being delivered, they neglected to report the condition to the plaintiff and proceeded to plant it. Under such facts the plaintiff was not entitled to recover consequential damages. *Williston on Sales*, p. 860; *Daley v. Irwin*, supra.

[2] So far as consequential damages are concerned, it is clear that there was no error in granting the motion for a nonsuit. At the time of the oral argument the appellant presented for the first time the contention that the appellant was entitled to recover at least nominal damages. At the same time we understood him to claim that he was entitled to recover general damages. Civ. Code, § 3313. While those contentions might have merit in many instances, we think that the contentions are not supported by the record in this case. Immediately after the nonsuit was granted the court and jury proceeded to hear the issues as presented by the cross-complaint and the appellant's answer thereto, and the jury brought in a verdict in favor of the appellant and against the defendant on the cross-complaint. It will be observed that the appellant's answer to the cross-complaint admitted the delivery to him of 292 sacks of barley and that it had not been paid for and that it was worthless. The verdict of the jury implies a finding in favor of the appellant on each of those allegations. They are in effect a finding in favor of the appellant of general damages in the sum of \$1,275.01. That was the whole demand which the appellant had made in his pleading.

[3] At the time of the argument and in a supplemental brief, the appellant complains of the provision in the judgment of \$353.80 costs in favor of the defendant and against the plaintiff. He cites no statutory provision or authority showing that he has been injured. The record before us shows an appeal from a judgment entered on the 19th day of June, 1922. It shows a document called "Judgment on Verdict in Open Court," recorded June 15, 1922; but said document does not purport to be a judgment except it is so named. The record also discloses what purports to be a judgment of nonsuit, dated June 16, 1922, but it does not appear whether such instrument was ever entered or recorded. The paper last mentioned purports to award costs in favor of the defendant and against the plaintiff. It is merely by argument that we can say that such paper is the judgment appealed from. Assuming that it is, the appellant does not attempt to show to this court that the judgment for costs was not in accordance with the provisions of the statute. *People v. Singh*, 182 Cal. 457, 480, 188 P. 987. This court is not called upon, under such circumstances, to make an independent investigation.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

75 Cal. App. 509

(243 P.)

SPALDING v. SPALDING et al. (Civ. 2966.)

(District Court of Appeal, Third District, California. Dec. 14, 1925. Rehearing Denied Jan. 13, 1926. Hearing Denied by Supreme Court Feb. 11, 1926.)

1. Divorce ⇨276(4)—Letters held to show that parents held property in trust for son in furtherance of fraudulent scheme to defraud divorced wife.

Letters from parents to son held to show that parents, who participated in son's fraudulent scheme to defraud divorced wife held property either in trust for son or pursuant to an agreement that they were to have a life estate therein.

2. Frauds, statute of ⇨118(3)—Trusts ⇨21(1)—Letters from parents to son held sufficient to declare trust or satisfy statute of frauds, if property was held under oral agreement.

Letters from parents to son relative to improving property and acknowledging remittances from son held sufficient declaration of trust, if property was held in trust, and sufficient to satisfy statute of frauds, if property was held under oral agreement that it was to be transferred to son on their death.

3. Judgment ⇨929—Decree of foreign court directing conveyance does not affect title, but is sufficient basis for action to compel conveyance.

While decree of foreign court directing conveyance of property to divorced wife does not of itself affect title to land, it is sufficient basis for an action in courts of state in which land is situated to compel such conveyance.

4. Divorce ⇨275(2)—Divorced wife, having foreign judgment directing conveyance of real estate, entitled to conveyance, where parents had conveyed property to son for valuable consideration, and subsequent conveyance to them was fraudulent.

Divorced wife, having foreign judgment directing husband to convey real estate, held entitled to property conveyed to husband by parents for a valuable consideration, and reconveyed by husband to parents without consideration to defeat wife's rights.

5. Divorce ⇨276(3) — Amendment of complaint to conform to proofs made at trial should have been allowed, in view of letters sustaining proposed amendment.

In action by divorced wife for conveyance of real property under foreign judgment directing conveyance, held, that amendment of complaint, to conform to proofs that husband's parents had agreed to vest title to real estate in him, should have been allowed, in view of letters sustaining amendment.

6. Pleading ⇨127(2)—Answer held not admission that son furnished all money for purchase and improvement of real estate.

Where complaint alleged that defendant delivered to his parents large sums of money for purchase and improvement of real estate, allegation in answer that defendant furnished spec-

ified sums of money as gifts held not an admission that defendant furnished all the money used in purchasing and improving property.

7. Divorce ⇨276(5)—Divorced wife who recovered one-half of real property ordered conveyed by foreign judgment is entitled to deficiency judgment for balance.

Where divorced wife obtained foreign money judgment against husband providing for conveyance of real property in satisfaction thereof, and in action thereon was awarded one-half of real property, she was entitled to deficiency judgment for balance.

8. Equity ⇨39(1)—Court of equity should adjust rights of all when all parties to controversy are before it.

It is the duty of a court of equity when all of the parties to the controversy are before it to adjust the rights of all, and leave nothing open for further litigation.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by Mattie J. Spalding against John B. Spalding, T. B. Spalding, and Dora M. Spalding, wherein John Bostwick Spalding and Robert Blaine Spalding, as executors of Dora M. Spalding, deceased, and Elizabeth Blanche Spalding, as successor in interest of said Dora M. Spalding, were substituted for Dora M. Spalding, and John Bostwick Spalding, as executor of Thos. Benton Spalding, also known as T. B. Spalding, substituted for T. B. Spalding. From a judgment for insufficient relief, plaintiff appeals. Reversed, with directions.

Orville R. Seiter, of Chicago, Ill., and Francis O. Hoover, of Modesto, for appellants.

A. J. Carlson, of Modesto, and W. Coburn Cook, of Turlock, for respondents.

FINCH, P. J. This action was commenced by the plaintiff against defendant John B. Spalding and his parents, T. B. Spalding, and Dora M. Spalding. Both of the parents died prior to the entry of judgment, and their executors were substituted as parties defendant. The pleadings, findings, and judgment cover 288 pages of the printed transcript. A general statement of the case will be taken from the findings, and only such parts of the pleadings will be set out as are necessary to an intelligible discussion of the questions raised by the appeal.

The court found that plaintiff was married to defendant John B. Spalding December 25, 1894; that the issue of the marriage is one child, a daughter; that June 3, 1904, plaintiff filed in the circuit court of Kenosha county, Wis., her petition for a divorce from said defendant; that he was personally served with process in the action, and appeared therein in person and by attorney; that judgment therein was entered July 12, 1904, granting plaintiff a divorce, and requiring

said defendant to pay plaintiff certain sums as alimony and for the maintenance of the child of the parties; that the judgment for alimony and maintenance was modified from time to time by said circuit court; that on the 16th day of December, 1918, the plaintiff filed her petition in said court and cause, praying for a division of the property of said defendant; that said defendant "entered his general appearance in said cause, and by his attorneys filed an answer to the merits of plaintiff's said petition"; that a trial of the issues raised by said petition and answer was had, and said circuit court entered judgment and decree ordering said defendant forthwith to pay plaintiff the aggregate sum of \$30,016.60 and in full satisfaction thereof, "within five days from the date of said judgment and decree to execute, acknowledge, and deliver to plaintiff, Mattie J. Spalding, a valid conveyance under the laws of the state of California * * * of and to the hereinafter described real estate"; that said defendant has not paid any part of the judgment or executed said conveyance; that said judgment and decree has not been "set aside nor reversed on appeal nor amended nor modified." The real estate referred to consists of 53.9 acres of land in the county of Stanislaus, state of California, standing of record in the names of T. B. Spalding and Dora M. Spalding. The court in this case further found:

"That defendant John B. Spalding, on or about September 1, 1906, conceived the fraudulent scheme and intention of hindering, delaying, and defrauding plaintiff of all rights, demands, claims, and causes of action accruing and to accrue to plaintiff against said defendant John B. Spalding under said judgment of July 12, 1904, entered by said circuit court of Kenosha county, Wis., and such amendments as might subsequently be made thereto; and in pursuance of said fraudulent scheme, intent, and purpose, and with the actual knowledge of and participation therein by defendants T. B. Spalding and Dora M. Spalding, parents of defendant John B. Spalding, defendant John B. Spalding, between May 1, 1909, and July 1, 1915, and while defendant John B. Spalding was insolvent, and without consideration, transferred and delivered to the defendants T. B. Spalding and Dora M. Spalding large sums of money, to wit, thousands of dollars, which said moneys were transferred and delivered as aforesaid, to be used, and which were used, in the part payment of the purchase price of certain hereinafter described real estate, and for the payment of certain hereinafter mentioned mortgage notes evidencing money borrowed and used in the payment of part of the purchase price of the said property, and for improvements thereon; * * * that the total amount of money so expended by and through the said T. B. Spalding and Dora M. Spalding for the pur-

chase of the said property and for improvements thereon as hereinabove set forth was \$15,000; and that the total amount of money given, transferred, and delivered to T. B. Spalding and Dora M. Spalding by the defendant John B. Spalding in pursuance of said fraudulent scheme, intent, and purpose of defrauding plaintiff, Mattie J. Spalding, as aforesaid, and with the knowledge of and participation therein by defendants T. B. Spalding and Dora M. Spalding, as hereinabove set forth, and in the manner hereinbefore stated in this paragraph, was the sum of \$7,500; and that the said \$7,500 so paid, transferred, and delivered by the said John B. Spalding to the said T. B. Spalding and Dora M. Spalding, in the manner and for the purposes hereinabove set forth, constituted and amounted to one-half of the total amount of money so expended by and through the said T. B. Spalding and Dora M. Spalding for the purchase of the said real property and the improvement thereon as hereinabove set forth"; that the present value of said real estate is \$26,000; "that on the 20th day of May, 1917, defendants T. B. Spalding and Dora M. Spalding executed and delivered their deed of grant, bargain and sale, under seal, for a recited money consideration, conveying said real estate to the defendant John B. Spalding. And that thereafter, on the 20th day of May, 1917, defendant John B. Spalding, in the furtherance of his fraudulent scheme, intention, and purpose to defraud the plaintiff, Mattie J. Spalding, as aforesaid, and with the actual knowledge and acquiescence thereof and participation therein by defendants T. B. Spalding and Dora M. Spalding, executed and delivered his deed of grant, bargain, and sale, attempting to convey said real estate to the defendants T. B. Spalding and Dora M. Spalding in joint tenancy; that said deed of John B. Spalding was executed and delivered without consideration therefor, and while defendant John B. Spalding, was insolvent; that at all times from September 1, 1906, to the date hereof, defendant John B. Spalding, in pursuance of his fraudulent scheme, intention, and purpose to defraud plaintiff, Mattie J. Spalding, as aforesaid, and with the knowledge and acquiescence thereof and participation therein by T. B. Spalding and Dora M. Spalding, has secreted and concealed, and is now secreting and concealing, the title to all of said defendants' property by having the legal title to same taken and stand in the name or names of a third person or persons, with the result thereof that during all of said time, and particularly during the time said real property was being purchased, as aforesaid, and on May 20, 1917, and at the date thereof, none of the property of defendant John B. Spalding was or is subject to legal process and, by reason thereof John B. Spalding was and is insolvent; that at all times from July 12, 1904, to the date hereof, plaintiff was and is an exist-

ing creditor of the defendant John B. Spalding; that said defendant has no property or assets of any kind within the state of Wisconsin or the state of California, or elsewhere, other than the said real property"; that neither T. B. Spalding nor Dora M. Spalding at any time "made, executed, published, declared, or delivered in writing any declaration in substance or in effect that they or either of them were holding the legal title in the said real property or any part thereof for the use or benefit of the defendant John B. Spalding subject to a life interest in the favor of T. B. Spalding and Dora M. Spalding or either of them; * * * and that neither the said T. B. Spalding nor Dora M. Spalding in any manner accepted any express trust as last above referred to; and that the equitable beneficial title or right to the said real property has not nor has any equitable beneficial title or right to any part thereof become vested in the defendant John B. Spalding by reason of any alleged express trust as last hereinabove referred to; and that all the rights of the said John B. Spalding and of the plaintiff herein in and to the said real property arise out of the matters and things hereinabove stated other than said alleged express trust;" and that said judgment of said circuit court "was, at the time of the trial of this action, and is, a valid, subsisting and final judgment in all respects." Judgment was entered on the findings, adjudging that defendant Elizabeth Blanche Spalding, as successor in interest of Dora M. Spalding, is the owner of an undivided half of said real property and that defendant John B. Spalding is the owner of an undivided half thereof, and directing the latter to convey his interest therein to plaintiff in accordance with the provisions of the Wisconsin judgment. Plaintiff has appealed from the judgment in so far as it adjudges Elizabeth Blanche Spalding to be the owner of a half interest in the property, and fails to adjudge that John B. Spalding is the owner of the whole thereof, and to direct that he convey the whole thereof to plaintiff, and also in so far as it fails to direct the entry of a deficiency judgment in favor of plaintiff against John B. Spalding.

T. B. and Dora M. Spalding were residing in the state of Illinois in the year 1907 and prior thereto. During that year T. B. Spalding went to Mexico, and later in that year his wife joined him there. From Mexico they removed to Victoria, British Columbia, and later to California, where, November 8, 1909, they entered into an agreement to purchase the land involved in this action for the sum of \$5,309. The sum of \$1,000 was paid upon the purchase price at the time of the execution of the contract, and the remainder was to be paid in three equal installments, payable two, three, and four years, respectively, after the date of the agreement. An expen-

sive dwelling house and other valuable improvements were placed upon the land during the succeeding years, and on March 7, 1915, T. B. Spalding wrote the defendant John B. Spalding that "the ranch has all been paid for, the debt is all wiped out."

Dora M. Spalding testified that she and her husband paid for the land with their own money; that they had about \$9,000 when they came to California; that she carried \$6,500 in "large bills" in a belt around her waist; that defendant John B. Spalding sent his parents money "the same as the other children did. He never sent it expecting to ever get it back, and there was no account made of it, and never gave him anything to show that he had given him (T. B. Spalding) money, and it was put in the main lot of money that we had, and there was no thought we would ever have to account for what he gave him nor how much. * * * We have never made any profit to amount to anything; nothing like the land—that much land ought to pay. We have made something, but that was very little." Robert B. Spalding, a son of the last-named witness, testified that shortly before the purchase of the land he saw at least \$5,000 in the possession of his parents, and that he made his father a gift of \$500 in 1911 and \$1,000 in 1912. Defendant John B. Spalding testified, in substance, that he had owned no property subject to execution, in his own name, since the year 1908, except an automobile; that "there was no understanding between himself and his father and mother * * * that the property at Turlock was being purchased for him or that he should ever have any greater interest in the same than the other children; that from 1908 to 1916 he practiced medicine at Kenosha, Wis.; that he had a large and lucrative practice; that he sent from time to time sums of money to his parents * * * in California; that he did not keep any record of the money he sent to his parents; * * * that, since his parents left Decatur, Ill., they had been in need of financial assistance, and he had continuously from 1908 up until the time of the trial contributed to their support"; that he could not approximate the amount of money he had sent them; that he sent them \$500 in 1910, "hardly any" in 1911, and that "purely as a guess" he would say that he sent them \$1,500 in 1912 and \$1,500 in 1913. There is undisputed testimony to the effect that, after the judgment of divorce was granted, defendant John B. Spalding stated that he would never own any property in his own name; that he would put his property in his parents' names, and that in the year 1916 he stated to the daughter of himself and plaintiff, "I have been making a good deal of money, and I have put it in some property out west; my parents are living there. * * * It will be your home some day." From numerous letters admitted in

evidence, written to defendant John B. Spalding by his parents, it appears that he sent them, in round numbers, \$3,600 in 1912, \$3,100 in 1913, \$1,000 in 1914, and \$300 in 1915. He admitted having sent them \$500 in 1910. There are no letters covering the years 1910 and 1911, and he testified that he sent them "hardly any" money in 1911. He and his parents seem to have written each other frequently, but only the letters of the parents appear in the record. These letters cover nearly 300 pages of the transcript, and only the most material parts thereof will be quoted.

The father wrote the son, at the times indicated, as follows: February 10, 1909:

"We rely on your ability to manage our affairs as we are helpless to do it."

January 20, 1912:

"I need not assure you that we turn to you as the sunflower turns to the sun. Your health and happiness and prosperity are our bounty and blessing. The deep divine love and obligation I feel inspire me with an energetic ambition to build here a home that will be a haven and home and bounteous support and solace for you and yours as soon as possible. * * * I am shaping everything for your future convenience and comfort—because our age and enfeebled health admonish us that the end is but a few years ahead. * * * The development of this place is my remaining life work, and I am all the time distressed by the consciousness that the load you are compelled to carry across the thin ice may result in all our ruin."

February 23, 1912:

"As soon as debt is paid must inclose tank. * * * The yard is neglected from not being piped. * * * These two necessary things you have ordered done frequently, but we could not spare money from other pressing necessities. * * * It is our purpose to develop it (the property in controversy) and hold it as your country seat after we shall pass away."

April 17, 1912:

"Mattie's letter amuses me. * * * Don't answer her letters nor let her know anything about you or yours. If she knew about this place and this beautiful house and ranch, she would try to make you trouble."

August 12, 1912:

"I shall be very economical in the expenditure of every dollar you remit."

October 20, 1912:

"I deeply feel your amazing nobility and goodness to us, and when, in a very short time we shall be laid to eternal rest we hope to have reared in the beautiful home a monument that will doubly endear us to your memory."

October 23, 1912:

"As soon as all hay is removed will give you an itemized statement of everything. * * * You make suggestions about banking and keeping stub records. Why, don't you think all that

is alphabet to me? I can trace by my bank books every dollar since I left Mexico. * * * Be careful of your health—for you and I must not lie down till we get things established."

November 5, 1912:

"Your interest here is sacred and will be safeguarded by any legal instrument you dictate. * * * You certainly merit solace and sympathy, and you can trust us for all both imply and everything material besides that we possess."

November 25, 1912:

"I wrote you a few days ago advising first the purchase of cows and sows, but since the rec't of this reinforcement I have decided to go to Modesto to-morrow and pay \$500 on the mortgage."

Undated letter:

"We haven't spent a dollar from the proceeds of the place, but applied all on the place and all we have and could get, and four years of unremitting menial toil with never a dollar we could call our own, and now your letter criticizes and condemns because we don't buy cows with an occasional remittance of \$25. * * * I never had and will never submit to a nagging boss. If you don't want to furnish money for this place—don't want to stock it so something can be derived from it, then don't do it. I would vastly prefer death to perpetual servitude. I can get me a salaried position that will be an infinite relief to me both physically and financially. You can have my job whenever you want it."

March 23, ———:

"Will give you acct of everything in full in a few days. * * * Your dream about Bob and Myrtle, like all dreams, may be taken by reverse. * * * They know the place is to pass to you, and that fact is settled, and will never be questioned. Mom is as loyal to you and your interest as I am, and both of us are too honorable and grateful to you to entertain any other thought than the one that has been settled and always since existed. When you come out we will execute instruments in writing—which I have always insisted as the proper and more business like way to transact important business. * * * I want to live long enough to see you comfortably fixed raising hens, hogs, hay, and dairy products."

March 7, 1915:

"There isn't one man in one hundred, if indeed any other besides yourself, so handicapped as you, who could have carved out of an overburdened profession the surplus thousands you have saved and sent out and invested here in this place. * * * I shall within a few weeks execute a deed or document defining our mutual status and understanding conveying to yourself and heirs this ranch after the death of myself and wife. It should have been done a long time ago."

T. B. Spalding rendered to John B. Spalding frequent itemized accounts of expenditures made upon the place, and apparently

followed the latter's directions relative to the improvement and management thereof.

In undated letters to defendant John B. Spalding, but evidently written during the period of time covered by the foregoing letters, Dora M. Spalding stated:

"I ask myself many times each day, what we would have done if it hadn't been for you, and what you are doing for us, and I hope you will feel the time and work that we have put in on the home will at least pay you back in cents and dollars, if nothing else, if you decide not to live in it in years to come."

"Why haven't you answered my letter about fixing the bathroom up-stairs? Pop (T. B. Spalding) won't let me have it done without you write and tell me to have it done. Also about the fence. The chickens are eating up everything now."

"I am sorry you wrote to Pop the way you did, for it has stirred him all up, and he didn't sleep all last night, and thinks maybe it would be best to sell the place so you could get your money out of it, as you don't seem to be satisfied the way he has been doing and has been working and doing more than he is able to do. All for what? Something to eat and a place to sleep."

"Nothing could provoke me under any circumstances to use my position to transfer any part of the place to anybody for any price. I haven't a relative that would be low and mean enough to countenance it. All Pop and I have done here from the beginning has been done with a view to your finally owning and making this your home."

In a letter to her daughter, dated April 13, 1913, Dora M. Spalding stated:

"He (John B. Spalding) certainly has been very noble to put in all his earnings for a home for us in our old age, but I don't feel that he is losing anything by it, as it will be worth considerable more money when it will be turned over to him that what he has put in it."

There are no letters from John B. Spalding to his parents in the record, and what he may have written them can only be inferred from their letters to him.

[1-3] In the light of the court's finding, based upon ample evidence, that the parents knowingly participated in their son's fraudulent scheme to defraud plaintiff of her rights and claims under the Wisconsin judgment, the foregoing letters point unerringly to the conclusion that the parents held the property either in trust for their son or pursuant to an agreement and understanding, based upon a sufficient consideration, that they were to have a mere life estate therein, and that the whole thereof was to pass to the son upon their deaths. If they held the property in trust for the son, the letters are a sufficient declaration thereof. *Lynch v. Rooney*, 112 Cal. 279, 44 P. 565; *Taber v. Bailey*, 22 Cal. App. 617, 135 P. 975. If the parents held the property under an oral agreement that it was to be transferred to the son upon their death, then their letters were sufficient to satisfy the statute of frauds. *Cal. Jur.* 902

to 905. Such a contract may be specifically enforced. *Barry v. Beamer*, 8 Cal. App. 200, 96 P. 373. If the defendant John B. Spalding is the equitable owner of the property, it may be subjected to the claims of the defendant. *Williams v. Coleman* (Cal. App.) 233 P. 397. While the decree of the Wisconsin court directing a conveyance of the property does not of itself affect the title to the land in this state, it is a sufficient basis for an action in the courts of this state to compel such conveyance. *Redwood Investment Co. v. Exley*, 64 Cal. App. 455, 221 P. 973.

[4] The complaint alleges that—

"On the 20th day of May, 1917, defendants T. B. Spalding and Dora M. Spalding for a good and valuable and adequate consideration, conveyed said real estate to said defendant, John B. Spalding; and that in the furtherance of the fraudulent designs and intentions of the defendant John B. Spalding, as aforesaid, and with the actual knowledge and acquiescence thereof and participation therein by defendants T. B. Spalding and Dora M. Spalding, as aforesaid, the defendant John B. Spalding on the 20th day of May, 1917, without consideration, conveyed said real estate to the defendants T. B. Spalding and Dora M. Spalding."

It was stipulated by the parties that these allegations be deemed denied. John B. Spalding and Dora M. Spalding testified that both of said deeds were executed without consideration and as parts of a single transaction, "and for the purpose of creating in T. B. Spalding and Dora M. Spalding a joint tenancy with the right of survivorship in said lands and premises instead of a tenancy in common." The written conveyance from the parents to their son is presumptive evidence of a consideration. The court failed to find upon this issue, but found merely that the deed was executed and delivered "for a recited money consideration." If there was a "good and valuable and adequate consideration" for the conveyance from the parents to the son, as alleged, then the whole title to the property thereby became vested in him, and the parents acquired no interest therein by the subsequent fraudulent conveyance to them, and consequently the judgment should have awarded the plaintiff the whole property.

[5] Plaintiff duly moved the court for an order permitting her to amend her complaint, to "conform to the proofs made at the trial," by alleging that "on or about January, 1909, defendants T. B. Spalding and Dora M. Spalding, orally contracted and agreed with defendant John B. Spalding, * * * in consideration of defendant John B. Spalding furnishing the necessary money to complete the purchase of the hereinbefore described real estate and to make the improvements to be created thereon, * * * the defendants T. B. Spalding and Dora M. Spalding would execute and deliver to defendant John B. Spalding such document or instrument in writing as would vest the fee-simple title to

all of the hereinbefore described real estate in defendant John B. Spalding upon the death of defendants T. B. Spalding and Dora M. Spalding"; that John B. Spalding furnished large sums of money for the alleged purpose; and that, subsequent to said oral agreement, and in consideration of the furnishing of said money, T. B. Spalding and Dora M. Spalding "promised and agreed in writing that the defendants T. B. Spalding and Dora M. Spalding would execute such document or instrument in writing as would vest the fee simple title to said real estate in defendant John B. Spalding upon the death of defendants T. B. Spalding and Dora M. Spalding." The motion was denied by the court. The statements quoted herein from letters written by the parents are amply sufficient to support the allegations of the proposed amendments to the complaint. While the trial court has a wide discretion in granting or refusing leave to file amendments to conform to the proofs, it is deemed that, in view of the necessity of a retrial, it will be in the interest of justice to permit plaintiff to amend her complaint by alleging the facts set forth in the said proposed amendments.

[6] Appellant contends that the answer admits that all the money used in the purchase and improvement of the property was furnished by John B. Spalding. This contention cannot be upheld. The complaint alleges that John B. Spalding delivered to his parents "large sums of money, to wit, thousands or dollars," for the purposes of and which were used by his parents "in the payment of the purchase price of certain hereinafter described real estate and * * * for improvements thereon and for cultivating and raising crops thereon, * * * and for the general operation and development of such property." Clearly this is not an allegation that John B. Spalding furnished all the money which was used for such purposes. The answer denies that John B. Spalding furnished said sums of money for the purposes alleged and alleges "that said ——— sums of money constituted gifts from the defendant John B. Spalding" to his parents "to be used by them as they saw fit." This affirmative allegation in the answer is not an admission that John B. Spalding furnished all the money used for the alleged purposes. For like reasons, appellant's contention that the findings show that John B. Spalding furnished all the money used in purchasing and improving the property is not sustained by the record.

[7] Appellant further contends that since the court found that defendant John B. Spalding was the owner of only an undivided half of the property, she should have been given a deficiency judgment for the difference between the amount of the Wisconsin judgment and the value of such undivided half of the property. In her complaint plaintiff prayed for a judgment to the effect that

said defendant was the owner of the property, and that he be required to convey the same to her, and for "such other relief as may seem just and equitable." Prior to the entry of judgment she was granted "leave to file brief upon the question of entry of deficiency judgment." That question, therefore, was properly before the court for decision. The Wisconsin court found that the value of the property here involved was \$30,000, and that "both the beneficial and equitable title" thereto was vested in said defendant, and the judgment therein provides:

"First. That defendant John B. Spalding forthwith pay to the plaintiff, Mattie J. Spalding, the sum of \$25,000 as a judgment of and for final division and distribution of the estate of said John B. Spalding; that the costs of this proceeding, taxed against defendant John B. Spalding in the sum of \$16.60 be paid by defendant to plaintiff forthwith; and that defendant John B. Spalding also forthwith pay to plaintiff, Mattie J. Spalding, as suit money in this behalf the sum of \$5,000, \$3,500 of said amount being for attorney fees and \$1,500 of said amount being for disbursements; that this order shall have the same force and effect as a judgment at law, and shall vest in plaintiff, Mattie J. Spalding, the vested and unconditional right to have and recover from defendant John B. Spalding the aggregate sum of \$30,016.60, together with interest thereon at the rate of 6 per cent. per annum from the date hereof.

"Second. That in full satisfaction of the aggregate sum of money heretofore ordered to be paid by defendant to plaintiff, to wit, \$30,016.60, as and for a judgment for final division and distribution of the estate of defendant John B. Spalding, including costs and suit money, defendant John B. Spalding shall, within five days from the date hereof, execute, acknowledge, and deliver to plaintiff, Mattie J. Spalding, a valid conveyance under the laws of the state of California, in form according to schedule at the foot hereof, of and to the hereinbefore described real estate of defendant John B. Spalding, situated in the county of Stanislaus, state of California, and that, on the default and failure of defendant John B. Spalding to execute said conveyance in manner and form as herein provided, execution may issue on this judgment without further order of court."

[8] It thus appears that plaintiff was given a money judgment for \$30,016.60 and interest thereon, and that defendant was ordered to convey the property to plaintiff in full satisfaction of the money judgment. If the defendants in this action had succeeded in establishing their allegation that John B. Spalding had no interest in the property, he could not have satisfied the money judgment by executing a mere empty form of conveyance. It seems equally clear that, if he is the owner of only an undivided half of the property, a conveyance thereof to plaintiff cannot operate as a full satisfaction of such money judgment, but in such case a money judgment in favor of plaintiff should be given. "It is, indeed, the duty of a court of equity, when all the parties to the controversy are before

it, to adjust the rights of all and leave nothing open for further litigation." *Swan v. Talbot*, 152 Cal. 142, 147, 94 P. 238, 240 (17 L. R. A. [N. S.] 1066); *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 P. 360. If it finally be determined that John B. Spalding is the owner of only an undivided half of the property, then, in addition to a judgment requiring him to convey such undivided half to plaintiff, she will be entitled to a money judgment for the difference between the amount of the Wisconsin judgment and the value of such undivided half of the property as fixed by the Wisconsin court.

The parts of the judgment appealed from are reversed, and the trial court is directed to permit the plaintiff to amend her complaint as herein indicated.

We concur: PLUMMER, J.; HART, J.

75 Cal. App. 769

PEOPLE v. HART et al. (Cr. 1255.)

(District Court of Appeal, Second District, Division 1, California. Dec. 21, 1925.)

Criminal law §1131(4)—Where appellant, at whose request argument of case was continued, failed to appear, held that appeal would be dismissed.

In view of Pen. Code, § 1253, where case on appeal was set twice for oral argument and continued on request of defendant, who on third call failed to appear, and appeal had not been perfected by filing statement and application required by section 1247, appeal will be dismissed.

Appeals from Superior Court, San Diego County; E. A. Luce, Judge.

George Hart and Myrtle Kinney were convicted of burglary, and they appeal. Appeals dismissed.

Edward J. Kelly, of San Diego, for appellant Kinney.

PER CURIAM. No briefs were filed on behalf of defendants. The case was set twice for oral argument, and was continued because of letters of request from defendant Hart. On the third call of the case no appearance was made on behalf of defendant Hart, but Edward J. Kelly, appearing for defendant Kinney, was granted time, which has expired, in which to file a brief. Mr. Kelly informs the court by letter that he admits that the appeal of Kinney has not been perfected by the filing of the statement and application required by section 1247 of the Penal Code. Apparently, so far as the record shows, the same defect exists in the appeal of Hart.

Because of the facts above stated, and be-

cause of the failure of defendant Hart to appear when the case was called for argument (Pen. Code, § 1253), the appeals are dismissed.

75 Cal. App. 705

NORMAN v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 5242.)

(District Court of Appeal, Second District, Division 1, California. Dec. 22, 1925.)

1. Mandamus §167—In absence of denial of material facts alleged in petition or new matter, no issue of fact is raised by the pleadings.

Where answer to writ of mandamus contained no substantial denial of any material facts alleged in petition, and did not set forth any new matter, which, if true, would defeat petitioner's right, the only question is whether facts alleged in petition are sufficient to entitle petitioner to writ.

2. Divorce §221—Court has no power to compel wife to pay costs of producing prisoner in another county at trial of divorce action.

The court has no power, in divorce action, to order a wife, whose husband is in prison under conviction for felony, to pay expense of producing him at trial of the action.

Original application for writ of mandate by Jennie L. Norman to compel the Superior Court of California in and for the County of Los Angeles, and Ira F. Thompson, Presiding Judge thereof, to proceed forthwith with the trial of a certain case. Writ granted.

T. J. K. MacGowen, of Los Angeles, for petitioner.

E. Neal Ames, of Los Angeles, for respondents.

CURTIS, J. Application for writ of mandate, prayed to be directed to the superior court of the county of Los Angeles, Ira F. Thompson, judge, to compel respondent to forthwith proceed with the trial of a certain action pending in said court.

[1] Petitioner, Jennie L. Norman, instituted, in the superior court of the county of Los Angeles, an action for divorce against her husband, John W. Norman. Subsequently, the defendant in said action was convicted of an assault with a deadly weapon, a felony, and sentenced by the court to confinement in the state prison at San Quentin for the period prescribed by law. Thereafter, and while said defendant was still confined in said prison under said judgment of imprisonment, said divorce action came on for trial. After two short continuances, said action was again set for trial on the 2d day of October, 1925, at which time the defendant, through his attorney, moved the court, after due notice of the hearing of said motion had been given to the plaintiff in said action, for an order requiring

plaintiff to pay to the sheriff of the county of Los Angeles the sum demanded by said sheriff for the necessary expense in bringing the defendant from said state prison to the county of Los Angeles and for his return to said prison, on the ground that said defendant was a necessary witness at said trial and a party to said action. Thereafter and on the 27th day of October, 1925, the court granted said motion, and further ordered that the defendant, John W. Norman, be brought from said prison to be present at the trial of said action, and that at the conclusion thereof he be returned to said prison. Said order provided that said action be continued from day to day until the money required for the transportation of said defendant from said prison and return was paid by plaintiff to the sheriff as provided by said order, and that, upon its payment, after proper notice given, the court would set said divorce action for trial. The plaintiff refused to pay the money to the sheriff, as ordered by the court, or any money whatever, but has requested the court to set said cause for trial, and the court has refused to do so. The matter comes before us on an original petition for writ of mandate, directed to the trial court, before which said action is pending, and the judge thereof, requiring said court to forthwith proceed with the trial of said action. Said petition sets forth the facts substantially as recited above. To this petition respondents have interposed a demurrer. The only real issue raised by the demurrer is as to the sufficiency of the petition to entitle the petitioner to the relief prayed for. The answer contains no substantial denial of any of the material facts alleged in the petition, nor does it set forth any new matter which, if true, would defeat petitioner's right to the writ if she is entitled to the same upon the facts stated in the petition. There is therefore no issue of fact raised by the pleadings. The proceeding, therefore, will be considered by us on the facts as alleged in the petition. The only real question presented is whether such facts are sufficient to entitle petitioner to the relief prayed for.

Petitioner contends that the court was without authority to make the order of date October 27, 1925, and that her failure to comply therewith furnishes no legal reason for the court's refusal to proceed with the trial of said divorce action.

[2] Assuming for the purpose of this proceeding only that the court has power in a civil action to order a prisoner, confined in a prison or jail situated in a county other than the county in which said action is pending, to be produced at the trial of said action, either as a witness or for the reason that he is a party thereto, yet we think it well settled that the court has no power to order in a divorce action the wife to pay the costs of producing such a prisoner at the trial of said

action. The precise question was before the court in the case of *Eisenring v. Superior Court*, 34 Cal. App. 749, 168 P. 1062. The trial court in a divorce action had made its order "requiring the wife at a time specified therein to pay the husband suit money and alimony pendente lite." On her refusal to do so, she was cited to appear and show cause why she should not be punished for contempt. She then instituted prohibition proceedings against the superior court, in which the action was pending, to restrain the enforcement of said order. In such proceedings the district court held that said order was void and issued a permanent writ of prohibition against said superior court enforcing the same. The court said:

"The contention of petitioner is that this order is void, and hence the court had no jurisdiction to proceed against her as for contempt for failure to comply therewith. We are in full accord with this contention. Concededly authority to make such order finds no support at common law; hence, if authority therefore exists, it must be by virtue of some statutory provision. Section 137 of the Civil Code provides that, 'when an action for divorce is pending, the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself and her children, or to prosecute or defend the action.' Clearly the power of the court under this provision is restricted in the exercise thereof to the wife, and no similar provision is made in favor of the husband. To our minds, this section measures the power of the court in the matter of allowing suit money and alimony pendente lite; and, as said in [State] *Hagert v. Templeton*, 18 N. D. 525, 25 L. R. A. (N. S.) 234, 123 N. W. 283, 'was intended to be exclusive and to embrace the entire subject-matter of the allowance of alimony pendente lite.' In *Groth v. Groth*, 69 Ill. App. 68, it is said: 'If alimony from a wife to a husband is a proper thing upon circumstances, legislation is necessary to authorize it. * * * The statute gives her—not him—alimony. To give it to him is not to administer existing, but to make new law.' To like effect is *Greene v. Greene*, 49 Neb. 546, 59 Am. St. Rep. 560, 34 L. R. A. 110, 68 N. W. 947; *Glynn v. Glynn*, 8 N. D. 233, 77 N. W. 594; *Brenger v. Brenger*, 142 Wis. 26, 135 Am. St. Rep. 1050, 19 Ann. Cas. 1136, 26 L. R. A. (N. S.) 387, 125 N. W. 109; *Hoagland v. Hoagland*, 19 Utah, 103, 57 P. 20."

A hearing of the *Eisenring* Case in the Supreme Court was denied, and it has never been reversed or modified to our knowledge, and we think it contains a correct expression of the law as to the power of the court to make an order in a divorce action, requiring the wife to advance funds to the husband for the purpose of the latter prosecuting or defending said action.

Let a peremptory writ issue.

We concur: CONREY, P. J.; HOUSER, J.

75 Cal. App. 785

McARTHUR v. KLUCK et al. (Civ. 5280.)

(District Court of Appeal, First District, Division 2, California. Dec. 26, 1925. Hearing Denied by Supreme Court Feb. 18, 1926.)

1. Landlord and tenant ☞213(5)—Tenant failing to pay rent accruing cannot recover advance rent paid covering last five months of term.

Tenant defaulting in rent payments under lease for years, who, on receipt of three days notice demanding rent, surrendered premises, may not recover rents covering last five months of term paid in advance on execution of lease.

2. Appeal and error ☞1071(6)—Failure to make findings of fact as to counterclaim held harmless.

In action for rent due under lease, in view of finding that defendants could not recover advance rent paid to cover last five months of term, any error in trial court's failure to find facts with reference to defendant's counterclaim for such advance was harmless.

Appeal from Superior Court, Imperial County; Edgar A. Luce, Judge.

Action by Ethel S. McArthur against William Kluck and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Harry W. Horton, of El Centro, for appellants.

E. R. Simon, of Los Angeles, for respondent.

LANGDON, P. J. Defendants appeal from a judgment against them for the amount of rent due under a lease in which they were lessees. The plaintiff was the lessor. While defendants were in possession of the leased farm land, which is situated in Imperial county, Cal., they defaulted in the payments of rent for several months, amounting to about \$800. In response to a notice preceding an unlawful detainer action, they surrendered possession of the premises to the lessor.

By the terms of the lease the lessees agreed to pay \$8,000 for the land from April 1, 1920, to July 31, 1923. The provision of the lease which is pertinent to the only substantial issue upon the appeal is as follows:

"Parties of the second part shall pay to party of the first part, as rental for the land hereinbefore described, the sum of \$8,000, payable as follows: \$1,650.00 in cash at the date of the execution of this lease, receipt of which is hereby acknowledged, to be applied as follows: \$400.00 to apply on the rent accruing during the first year of said lease, and the sum of \$1,250 as full payment of the rent accruing for the last five months of said term, the remainder of said rental being payable in monthly installments. * * *

[1] There was no dispute between the parties as to the amount of rent due from the

defendants at the time the premises were surrendered up to the lessor, but defendants set up a counterclaim for the \$1,250 paid by them at the time of the execution of the lease, and which was paid "as full payment of the rent accruing for the last five months of said term." Defendants' claim is in effect: Where, at the time of the execution of a written lease, the tenant pays to the lessor a certain sum, which is stated in the lease to be in full payment of the rent for the last five months of the term, and thereafter, upon the tenant's failure to pay rent accruing, the lessor serves a three days' notice, demanding the payment of the rent due or the surrender of the premises, and the tenant thereupon surrenders the premises, and the lessor takes possession thereof, the tenant may recover the advance rent so paid covering the last five months of the term.

The trial court decided against the defendants and appellants upon this proposition, and such determination is supported by the case of *Curtis v. Arnold*, 43 Cal. App. 97, 184 P. 510, in which it is said:

"From the facts of the present case, and our review of the foregoing authorities, we reach the conclusion that plaintiff in this action is not entitled to recover any portion of the fund of three thousand dollars paid at the time of the execution of the lease. If the money be regarded as given in consideration of the covenants of the lease when paid, the title thereto passed to the lessor (*Ramish v. Workman*, supra [33 Cal. App. 19, 164 P. 261]; *Dutton v. Christie*, supra [63 Wash. 372, 115 P. 856]); if it is to be regarded merely as an advance payment of rent, the lessor is entitled to retain it (*Galbraith v. Wood*, supra [124 Minn. 210, 144 N. W. 945, 50 L. R. A. (N. S.) 1034, Ann. Cas. 1915B, 609]. See, also, citations under this case, found in 50 L. R. A. [N. S.] 1034; Ann. Cas. 1915B, 609, 613)."

In the case of *Harvey v. Weisbaum*, 159 Cal. 265, 267, 113 P. 656, 657 (33 L. R. A. [N. S.] 540, Ann. Cas. 1912B, 1115), it was said:

"The fact that rent was to be paid in advance might have been the controlling factor in the mind of the lessor when he executed the lease and delivered the possession of the premises to the lessee. The consideration for the advance payment is not only the use of the premises for the month during which the lessee is to use them under the lease, but the conveyance by way of lease and the obtaining possession of the premises. The lease is an interest in real property passing from the lessor to the lessee. In many cases the landlord may have expended more money than the advanced rent, and for the very reason that he is receiving rent in advance. It may have been the very inducement to the lease."

There are also numerous authorities in other jurisdictions which are cited in the briefs which are in harmony with the foregoing decisions in this state.

[2] The only other point raised upon the appeal is that the trial court made no findings of fact with reference to the counterclaim of defendants. The trial court treated it as a cross-complaint, and granted plaintiff's motion for a nonsuit as to it. If it be regarded as a counterclaim, it is obvious that no harm was done appellants by the failure to find thereon in view of the above determination as to the law applicable to the facts alleged therein. *Blochman v. Spreckels*, 135 Cal. 662, 664, 67 P. 1061, 57 L. R. A. 213; *People v. Center*, 66 Cal. 551, 564, 5 P. 263, 6 P. 481.

The judgment is affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

75 Cal. App. 776

In re GADINA'S ESTATE.

McKENZIE v. McLEAN.

(Civ. 5415.)

(District Court of Appeal, First District, Division 2, California. Dec. 24, 1925. Rehearing Denied by Supreme Court Feb. 18, 1926.)

Wills  465—Separation of unpunctuated holographic will into sentences by trial court held to express intent of testatrix.

Separation of a holographic will, neither punctuated nor capitalized, into sentences by trial court, so as to transfer bonds and money to nephew instead of niece, *held* to express intent of testatrix, especially in view of evidence as to relationship between each of them and testatrix.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Petition for final distribution of the estate of Hannah Gadina, deceased, by John R. McLean, individually and as executor of the last will and testament of deceased, contested by Annabell McKenzie. From decree of final distribution, contestant appeals. **Affirmed.**

A. B. Bianchi, A. R. Cotton, and John M. Lewis, all of San Francisco, for appellant.

J. J. Paulsell and Frederick W. Crawford, both of San Francisco, for respondent.

LANGDON, P. J. This is an appeal from a decree of final distribution. The respondent John R. McLean was the executor of the last will and testament of Hannah Gadina, deceased, and a legatee and devisee thereunder. His petition for distribution was contested by the appellant here, who is also a legatee under said will and who contended for a construction of the will different from that announced in the petition for final distribution. The issue upon that question is the only matter involved upon the appeal.

Deceased was the aunt of both parties hereto. Her holographic will was neither punctuated nor capitalized. In constructing it the trial court separated it into sentences and announced that such separation seemed the natural and proper one beyond any doubt. The will is as follows:

"In the name of God amen I Hannah Gadina with good health and sound mind do declare this to be my last will and testament I am not under the influence of any one I give to all my nephews and nieces to each one fifty Dollars five hundred Dollars liberty Bonds I give to the masonic home in Decota California I give five hundred Dollars to the Nazarene Church in San Francisco I ive all my wering aperial to Mrs Ida McMillan of Los Gatos, I give two musical instruments to my nephew John R. McLean, I give all my jewelry to my niece Christy to her youngest daughter, my watch and chain all family pictures and navil Banner to my nephew John R. McLean all my furniture I give to my niece AnBell McKenzie all money in Banks Gass and Electric Bonds all my real estate of every description I give to my nephew John R. McLean I name said John R. McLean excuter without bonds I put my hand and Seal this day third of January 1922 Colma San Mateo County State of California Hannah Gadina."

About all the bequests, through and including the one of "two musical instruments to my nephew John R. McLean," there is no dispute between the parties. Following that bequest the trial court, in effect, punctuated the will so that it read as follows:

"I give all my jewelry to my niece Christy; to her youngest daughter, my watch and chain. All family pictures and naval banner to my nephew John R. McLean. All my furniture I give to my niece, Annabell McKenzie. All money in banks, Gas and Electric bonds, all my real estate of every description, I give to my nephew, John R. McLean. I name said John R. McLean executor without bonds."

We can only say with the trial court that this seems to us the natural and obvious intent of the instrument and to express the intent of the testatrix. This impression of the document itself is strengthened, we think, by the testimony in the record. Contestant and appellant sought to prove, by testimony regarding the relationship of the parties, that it was more reasonable to suppose that the testatrix intended to express herself thus:

"I give all my jewelry to my niece Christy; to her youngest daughter, my watch and chain, all family pictures and naval banner. To my nephew, John R. McLean, all my furniture. I give to my niece, Annabell McKenzie, all money in banks, Gas and Electric bonds. All my real estate of every description I give to my nephew John R. McLean."

We think she did not succeed in so proving. She testified that the relationship between herself and her aunt was always friendly and cordial, and she narrated incidents which

would have a tendency to prove this. On the contrary, the respondent introduced a letter to himself in which the testatrix stated that contestant was keeping herself very busy about her (testatrix's) affairs, but that it would not do her any good; that she (testatrix) thought less of her every day. There was also the testimony of respondent that contestant and deceased had not been congenial, and this was corroborated by the testimony of the minister and friend of deceased, who visited frequently at her home and appears to have had her confidence. There was evidence that the deceased depended upon her nephew for advice in her affairs, and that he wrote to her frequently and often, at her request lived at her home and did repair work upon her property. Her letters to him show confidence and affection.

Although there is a conflict in the evidence upon the relationship of the parties, there is a preponderance of evidence in favor of respondent, and this also supports the determination of the trial court.

There are no other matters requiring discussion, and the judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

75 Cal. App. 709

SOUTHERN CALIFORNIA EDISON CO. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (Civ. 5167.)

(District Court of Appeal, Second District, Division 1, California. Dec. 22, 1925.)

1. Master and servant ⚡385(18)—Employee cannot take advantage of own delay in refusing operation.

Under Workmen's Compensation Insurance and Safety Act 1917, § 11, subd. (e), an employee cannot take advantage of his own delay in refusing to be operated on for injuries which militates against probable beneficial results of operation so as to penalize his employer, who was willing to provide for treatment as advised by competent, expert medical authority.

2. Master and servant ⚡385(18)—Commission must determine reasonableness of employee's refusal to submit to operation.

Under Workmen's Compensation Insurance and Safety Act 1917, § 11, subd. (e), injured employee cannot have benefits of compensation, unless he submits to medical treatment that may reasonably be regarded as offering some benefit, if not entire relief, and hence it is the duty of the commission to determine whether employee's refusal to submit to an operation is reasonable or not.

3. Master and servant ⚡405(6)—Finding on issue of reasonableness of employee's refusal to submit to operation must be based on expert testimony.

In determining question whether employee's refusal to submit to operation, required by

Workmen's Compensation Insurance and Safety Act 1917, § 11, subd. (e), was reasonable, there must be a finding on this issue, based on expert medical or surgical advice.

4. Evidence ⚡19—Industrial Commission cannot take judicial notice of what is involved in "Hibbs" or "Albee" treatment.

The Industrial Accident Commission, in hearing to determine compensation for injuries to employee, cannot take judicial notice of what is involved by the "Hibbs" or "Albee" treatment, since such treatment is not a matter of common knowledge, and since Workmen's Compensation Insurance and Safety Act 1917, § 11, subd. (e), requires finding on reasonableness of refusal to submit to operation to be based on expert testimony.

5. Master and servant ⚡405(6)—Rules of evidence before Industrial Commission same as in trial courts.

The rules of evidence which obtain in hearings before the Industrial Accident Commission in determining reasonableness of employee's refusal to submit to an operation, required by Workmen's Compensation Insurance and Safety Act 1917, § 11, subd. (e), are the same as those which prevail in trial courts.

6. Evidence ⚡19—Judicial knowledge may be taken on issues of medical treatment, where they are subjects of common knowledge; but, where known only to medical experts, they must be proved by competent evidence.

Where issue pertains to medical or surgical treatment, the nature or effect of which are subjects of common knowledge, such matters are within the rule of judicial knowledge; but, where the matter is not one of common knowledge, but known generally only to medical experts, it must be proven by competent evidence like any other issue of fact.

7. Master and servant ⚡405(6)—Evidence held insufficient to justify finding refusal by compensation claimant to submit to operation was not unreasonable.

Without compliance with Workmen's Compensation Insurance and Safety Act 1917, § 19, subd. (c), as to use by Industrial Commission of excerpts from expert testimony in other cases, and without evidence as to risk involved in submitting to "Albee" or "Hibbs" operations, advised by medical experts, there was no competent evidence on which commission could base award on finding that refusal of employee to submit to operation was not unreasonable.

Certiorari to review an order of the Industrial Accident Commission.

Proceeding under the Workmen's Compensation Insurance and Safety Act by Oliver R. Harris, employee and claimant, opposed by the Southern California Edison Company, employer. To review an order of the Industrial Accident Commission awarding compensation for injuries, the employer brings certiorari. Award annulled, and case remanded to Commission, with directions.

Roy V. Reppy and E. W. Cunningham, both of Los Angeles, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondents.

HAHN, Justice pro tem. Upon application of the petitioner, a writ of review was issued by this court for the purpose of reviewing an award made by the Industrial Accident Commission of the state of California, in favor of one Oliver R. Harris and against the Southern California Edison Company, the petitioner herein.

The record includes a stipulation of facts, from which it appears that on March 6, 1923, while in the employ of the petitioner herein as a lineman, Oliver R. Harris fell from a high tension electric pole, thereby suffering an injury to his back. Hospital and medical attention was promptly furnished by his employer. Within 3 weeks Harris had recovered sufficiently to engage in light work for his employer, in which work he continued for some 4 weeks when he suffered a wrench to his back which caused him to desist from further labor. From that time, which was about May 1, 1923, and until his hearing before the Industrial Accident Commission, which took place in February, 1925, Harris was incapacitated for work due to the condition of his back. At intervals during this period of almost 2 years Harris was examined by some four or five surgical experts, and for limited periods received more or less irregular medical and surgical attention.

It further appears from the record that in May, 1923, an expert surgeon, one Dr. John Dunlop, gave Harris a most careful examination, apparently calling to his aid all that was known to modern surgery in the treatment of such cases. Dr. Dunlop unhesitatingly advised that Harris submit to a surgical operation, which in the doctor's opinion would result in considerable relief, if not entire recovery, to Harris. A short time after the examination made by Dr. Dunlop, one Dr. W. W. Richardson, a surgical expert, was called in to examine Harris, and he confirmed the finding of Dr. Dunlop and joined in Dr. Dunlop's recommendation that an operation be performed. Again in January, 1924, Dr. Dunlop was consulted, and upon making a further examination recommended that Harris submit to the proposed surgical operation, which was known in the profession as the "Albee" operation. Also, during the year of 1924, Harris was given a careful examination by Dr. H. W. Spiers and Dr. W. B. Bowman, eminent orthopedic surgeons, both of whom recommended that Harris submit to the Albee operation.

In February of 1925, another expert surgeon, one Dr. John C. Wilson, was called in, apparently by the Industrial Accident Commission. His findings in the case corresponded with those of the other experts; however, in the matter of the proposed operation, Dr. Wilson's report contains this statement:

"A permanent disability very frequently follows an injury of this type, but I believe that the patient could be improved by treatment. Complete recovery depends entirely upon the treatment that is followed. A spinal fusion by either the Hibbs or Albee method would not in ordinary circumstances be advisable in a case of as long standing as this. In view of the fact that this man is totally disabled and has not, according to his statements, improved with the ordinary conservative treatment, I believe that a spinal fusion should be done in this case. The patient has nothing to lose and everything to gain. He could not be any worse after an operation than he is at the present time, and fixation, as you know, does benefit these cases very much."

It will be noted that, while Dr. Wilson advised the operation proposed by the other experts, he attaches a qualification as to its efficacy, based upon the fact that at the time he made his examination and report the case was one of long standing. The report made by Dr. H. E. Southworth, assistant medical director of the Industrial Accident Commission, who apparently was in close touch with the case from its inception, and who was advised of the findings and recommendations of the various experts called in to examine Harris, also recommended that Harris submit to the proposed operation. The only qualification contained in Dr. Southworth's report is that found in the following sentence:

"It must be borne in mind that a Hibbs or Albee operation is not always followed by prompt and satisfactory relief."

[1] It appears from the record that the petitioner herein repeatedly offered to provide, and urged the recommended operation, but from the outset Harris refused to consent to the operation. Apparently these offers by his employer were more or less coincident with the examinations made by the several experts, hence Harris must justify his refusal, if at all, upon the conditions as they existed at the time of his first or early refusal, and not upon the conditions as they existed in January, 1925, 22 months after the injury occurred, and at which time, by reason of the "long standing of the case," Dr. Wilson expressed some doubt as to the extent of the beneficial results that might be obtained from the operation at that time. For if the delay in the operation militated against the probable beneficial results, Harris cannot take advantage of his own conduct and thus penalize his employer, who stood ready at all times to provide him with such treatment as competent expert medical and surgical authority advised.

Subdivision (e) of section 11 of the Workmen's Compensation Insurance and Safety Act of 1917, p. 842, reads as follows:

"No compensation shall be payable in case of the death or disability of an employee if his death is caused, or if and so far as his disability is caused, continued or aggravated, by an un-

reasonable refusal to submit to medical treatment, or to any surgical treatment, the risk of which is, in the opinion of the commission, based upon expert medical or surgical advice, inconsiderable in view of the seriousness of the injury."

Measured by the provisions of the foregoing section, the petitioner herein urges that the following finding made by the commission is not supported by the evidence in the record:

"(3) The refusal of the employee to submit to surgical treatment offered by the employer was not unreasonable."

It must be admitted that there is nothing in the record which can support the conclusion that there was any risk involved in the proposed operation. Aside from the report of Dr. Wilson, the expert medical and surgical advice offered in evidence is unanimous in the opinion that Harris would benefit by the operation. Some of the experts go so far as to express confidence that there would be an entire recovery from the injury. Dr. Wilson's report, while recommending the operation, does throw some doubt upon the probability of beneficial results, but it must be kept in mind that this doubt is based upon the fact that some 22 months had elapsed between the time of the injury and Dr. Wilson's examination, and the fact that an operation had not been performed previous to Dr. Wilson's examination is wholly due to the refusal of Harris.

[2, 3] Apparently the Legislature in enacting the compensation law did not intend to permit a person to secure its benefits, unless he submitted to medical and surgical treatment that might reasonably be regarded as offering some benefit if not entire relief; hence it became the duty of the commission, under subdivision (e) of section 11 of the act, to determine whether Harris' refusal to submit to the operation was reasonable or not. But in determining this question, which is of a judicial nature, the commission is not permitted to arrive at its conclusion from any preconceived ideas of the members of the commission. There must be a finding upon this issue, based upon "expert medical or surgical advice." The only "expert medical or surgical advice" before the commission, so far as the record discloses, holds to the opinion that the "Albee treatment" or "Hibbs operation" would prove beneficial to Harris even if it did not result in his entire recovery; that no injurious consequences would flow from the operation even if the expectant hopes were not fully realized. There is no suggestion in this "expert surgical and medical advice" in the record that there is any risk involved in the operation, unless, as urged by the learned counsel for the respondent, the commission may take judicial knowledge of what is involved in the operation known as the "Albee" or "Hibbs" treatment.

The record nowhere discloses the nature or character of this proposed treatment, nor whether it could be classified as a major or a minor operation; nor is there any evidence to show what if any inconvenience or pain would be suffered by the patient, or to what extent, if at all, he would be confined to his bed as a result of the operation.

Counsel for respondent concedes that the record furnishes little aid for the determination of these questions, for his brief contains the following statement:

"The record is unfortunately meager, so that we are troubled at times with a dearth of evidence upon crucial points. One of the important questions which the record is silent upon is as to the nature and seriousness of the Hibbs or Albee operation. These matters are within the judicial knowledge of the respondent commission inasmuch as a considerable number of cases of this sort have come before it in the past. We believe we are justified in informing the court, through its judicial knowledge, of the nature of the operations, and accordingly submit the following statement which has been prepared by the office of the medical director of respondent commission for this purpose."

Following this statement appears a detailed explanation of the nature and character of the operation known as the "Albee" treatment.

[4-6] We cannot agree with respondent's contention that the commission may take judicial cognizance of what is involved in the "Hibbs" or "Albee" treatment. The rules of evidence which obtain in hearings before the Industrial Accident Commission, so far as the present instance is concerned, are the same as those which prevail in the trial courts of this state. *William Simpson Construction Co. v. Industrial Accident Commission* (Cal. App.) 240 P. 58.

Where the issue pertains to medical or surgical treatment, the nature, effect, or result of which are the subjects of common knowledge, such matters are within the rule of judicial knowledge, as for instance, the court will take judicial notice of the nature, purpose, and effects of vaccination. *Viemeister v. White*, 179 N. Y. 235, 72 N. E. 97, 70 L. R. A. 796, 103 Am. St. Rep. 859, 1 Ann. Cas. 334. Also that syphilis is a serious disease. *Metropolitan Life Ins. Co. v. Goodman*, 10 Ala. App. 446, 65 So. 449. But where the matter is not one of common knowledge, but known generally only to medical experts, it must be proven by competent evidence just as any other issue of fact. 15 R. C. L. p. 1129; 23 C. J. p. 148; *Jacobson v. Massachusetts*, 197 U. S. 11, 25 S. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765; *Royer v. Pennsylvania R. Co.*, 259 Pa. 438, 103 A. 276. That the nature, character, and effects of the treatments known as the "Hibbs" or "Albee" treatment are not matters of common knowledge cannot well be refuted.

Another answer to respondent's contention

that the finding in question will have support in the judicial knowledge which the commission will take as to the "Hibbs" or "Albee" treatment is the fact that the Legislature saw fit in adopting the "Compensation Act" to provide that the basis for such a finding must be "expert medical or surgical advice." Section 11, subd. (e) Compensation Act.

[7] It is suggested by respondent that, while no testimony was offered on this question at the hearing in the instant case, the commission was in other similar cases, advised by medical authority of the nature and character of the "Hibbs" or "Albee" treatment, and calls attention to subdivision (c) of section 19 of the Compensation Act, which reads as follows:

"(c) The commission may receive as evidence, either at or subsequent to a hearing, and use as proof of any fact in dispute, the following matters, in addition to sworn testimony presented in open hearing: * * * (7) Excerpts from expert testimony received by the commission upon similar issues of scientific fact in other cases and the prior decisions of the commission upon such issues; provided, however, that transcripts of all testimony taken without notice and copies of all reports and other matters added to the record, otherwise than during the course of an open hearing, be served upon the parties to the proceeding, and opportunity be given to produce testimony in explanation or rebuttal before decision is rendered."

But the record does not show that there was a compliance with the provisions of the foregoing section, for, manifestly, to meet its requirements it would be necessary to attach to or make a part of the record in the instant case any such excerpt of expert testimony received in any other case, and in addition it would be necessary to have it appear in the record that copies of such testimony were served upon the parties in this proceeding.

Hence the conclusion seems inevitable that, for the purpose of supporting the finding in question, there was no competent evidence before the commission as to the nature, character, or risk involved in either the "Albee" or "Hibbs" treatment, and, in fact, no evidence from which the commission could properly find that—

"The refusal of the employee to submit to surgical treatment offered by the employer was not unreasonable."

The able brief filed on behalf of the respondent cites a number of cases from other states which deal with the question here involved. However, in examining these cases, we find little of aid, for the reason that, where the court sustained the refusal of the claimant to submit to the proposed medical or surgical treatment, there is evidence in the record which either shows conclusively or in conflict that the proposed treatment involves

risk or suffering. While some of these cases arise in states having provisions similar to subdivision (e) of section 11 of our Compensation Act, others are from states which have no such provision, and the question is considered entirely from the general standpoint of the reasonableness of the claimant's refusal.

In view of the provisions of the California Compensation Act, we do not feel that it will be of aid in the instant case to consider or discuss in detail any of the authorities cited in respondent's brief. For the reasons heretofore indicated, the award is annulled and set aside. The case is referred back to respondent commission, with the instruction that, in making its award, there be excluded therefrom any compensation for disability, so far as caused, continued, or aggravated by unreasonable refusal of the employee to undergo the recommended operation.

We concur: CONREY, P. J.; CURTIS, J.

75 Cal. App. 666

**SILVA-BERGHOLDT CO. v. J. H. FLICK-
INGER CO. (Civ. 2955.)**

(District Court of Appeal, Third District, California. Dec. 19, 1925.)

1. Sales ☞77(2)—Contract calling for payment of season's opening price of association for fruit held not to require buyer to pay service charges of association.

Where contract required buyer of pears to pay season's opening price of certain association, to which seller belonged, plus specified percentage, and resolution of association establishing opening price designated certain sum per ton as service charge, which went to association, in view of fact that pears in question were released from association contract and sold by seller to buyer without rendition of any service by association, buyer was not bound to pay such service charge, in absence of evidence that seller had to pay such charge to association.

2. Sales ☞181(12)—Trial court not bound to accept figures of buyer as to amount of defective pears among those sold to it, in view of evidence.

In action by seller against buyer to recover purchase price of pears, in view of evidence as to amount of pears which were defective, court was not bound to accept buyer's figures, based on records of its factory as to amount of defective pears, and finding that 3½ tons were unfit for canning purposes was not error.

3. Sales ☞360(2)—Allowing buyer credit for freight paid on defective pears held proper.

In action by seller against buyer to recover price of pears sold, allowing defendant credit for money paid as freight on defective pears, which expense was incurred before defendant was required to inspect them, was proper.

4. Sales $\S$ 360(2) — Refusal to allow buyer credit for expense and labor in peeling defective pears for canning held proper.

In action by seller against buyer to recover price of pears, on court's finding on sufficient evidence that defect in pears could have been detected by inspection and examination at time of delivery, refusal to allow buyer credit for expenses and labor in peeling defective pears for canning was proper, regardless of provision in contract of sale that buyer might charge all costs paid or incurred in connection with delivery of defective fruit thereof back to seller.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by the Silva-Bergtholdt Company against the J. H. Flickinger Company. From the judgment for plaintiff, defendant appeals. Modified and affirmed.

Bohnett, Hill & Campbell, of San José, for appellants.

Raglan Tuttle, of Auburn, for respondent.

FINCH, P. J. The defendant has appealed from the judgment of the trial court herein in favor of the plaintiff.

The complaint alleges that the plaintiff sold the pears growing upon its lands in the year 1923 to the defendant at the agreed price, of 25 per cent. "over season's opening price of the Pear Growers' Association"; that "the Pear Growers' Association's opening price for the season of 1923 was \$50 per ton for said pears, plus \$2.50 a ton service charge," and that plaintiff delivered to defendant 65½ tons of pears; that the total purchase price of such pears was the sum of \$4,263.68, of which only \$3,174.61 had been paid. The prayer is for judgment in the sum of \$1,089.07.

The answer admits the contract and the opening price of \$50 a ton, but denies that the service charge of \$2.50 a ton, fixed by the association, is applicable to the contract of the parties to this action, and alleges that only 129,206 pounds of pears were delivered; that, of such quantity, 20,460 pounds "were wormy, or otherwise defective, were not according to contract, were not fit for use, and could not be, and were not used by defendant"; that "defendant incurred expense, by way of freight and labor upon said defective pears * * * in the sum of" \$248.72; that defendant deducted from the purchase price of the pears the sum of \$36.99 for the rental of fruit boxes to the plaintiff; and that the defendant has overpaid plaintiff \$100.76. Defendant filed a cross-complaint for the recovery from plaintiff of the said sum of \$100.76.

The court found that "the Pear Growers' Association's opening price for the season of 1923 was \$50 per ton for said pears, plus \$2.50 a ton service charge"; that plaintiff delivered to defendant 65½ tons of pears;

that the total purchase price thereof was \$4,257.50; that the pears, upon their arrival at defendant's cannery were by defendant "inspected, examined, accepted, and weighed"; that "the presence of worms in said pears and the wormy condition of the same could, at the time of the delivery of the same and at the time when they were examined and accepted by defendant, have been detected and discovered by an inspection and examination of said pears"; that at the time of such delivery 3½ tons of the pears were "wormy and unfit for canning purposes" and that the defendant is entitled to credit therefor at the purchase price thereof; that the remainder of the pears were "in accordance with the terms of the contract"; that the defendant paid out freight on the wormy pears in the sum of \$17.09 and is entitled to credit for that sum; that it paid out for labor upon the wormy pears the sum of \$77.21, but is not entitled to credit therefor; and that it is entitled to credit for \$36.99 for rental of lugboxes. Judgment was entered in favor of the plaintiff for \$801.31.

[1] The plaintiff is a member of the California Pear Growers' Association. It appears that members are under contract to market their fruit through the association, but that it may release specified fruit of a member, in which case he may sell direct to the buyer. A witness, who was assistant secretary of the association, testified: That a service charge of 5 per cent. is made on the selling price of fruit marketed through the association. That all members of the association and all canneries were notified of the opening prices of 1923. That "the price to the members is \$50 net. That is the price that the members get. The association gets the \$2.50. The original notification to the members would have been exactly the same thing — \$50. The notification to the canneries carries the \$52.50, notification. * * * The members know there is a charge of 5 per cent. * * * There is no sale by a member to a cannery only on the special grade and special price. * * * The pear growers' agreement calls for a release for eastern shipment, or release to special cannery at a special grade and a special price." The pears involved in this suit were released by the association, and the plaintiff made the sale thereof directly to the defendant, "without the interposition of the Pear Growers' Association, or any of its agents." Plaintiff notified the association that the sale had been made, but the association had no "communication with the Flickinger Company relative to these pears." Another witness, who was secretary and manager of the plaintiff and also a director of the association, testified:

"The season's opening price of the Pear Growers' Association was later established, subsequent to the date of the contract, as \$50 per

ton, plus a service charge of \$2.50 per ton, f. o. b. point of shipment."

This testimony is substantially in the language of the complaint and of the findings. Since the sum of \$2.50 mentioned in the resolution of the association establishing the opening price of pears for the season of 1923 is designated as a service charge, which the evidence shows goes to the association where pears are marketed through it, and since the pears here in question were released and sold by the plaintiff directly to the defendant, without the rendition of any service relative thereto by the association, it does not appear upon what theory it can be held that such service charge is a part of the "season's opening price of the Pear Growers' Association." In respondent's brief it is said:

"As a member of the association, respondent was compelled to pay over this \$2.50 a ton to said association."

There is no evidence, however, to support this assertion. The opening price of "\$50 per ton, plus \$2.50 service charges," was fixed as the price of pears which were not released, and had no application to such pears as were released from the pooling agreement. It cannot be presumed, in the absence of evidence upon the question, that members were required to pay the association a service charge upon the sale of pears which had been released, and with which sale the association had nothing to do. The appellant therefore is entitled to have the sum of \$155 deducted from the amount of the judgment.

[2] The evidence is conflicting as to the total weight of the pears delivered, but, since there is ample evidence to support the court's finding in favor of plaintiff upon that issue, the finding cannot be disturbed.

The defendant introduced evidence sufficient to support a finding that 20,460 pounds of the pears were defective and unfit for canning and were a total loss. Such evidence was to the effect that the defective condition of the pears could be discovered only by cutting them in half, and hence was not discovered until they were in process of preparation for canning. A few of the defective pears were spotted, but "most of them were wormy." Plaintiff introduced evidence to the effect that the pears were carefully inspected before shipment and the defective ones thrown out, that the presence of worms in pears may be readily detected by inspection, and that those shipped were in good condition and free from worms. Shipments were made July 31st and August 1st, 2d, 4th, and 6th. Defendant's superintendent inspected the pears upon their arrival at the cannery. He testified that he "gave them the regular inspection"; that "the pears themselves looked very good, and, as we had always had satisfactory pears from Mr. Bergholdt, I did not really search for wormy holes in

the stem end"; that he was "not sure" that he could have detected the evidence of the worms by "the right kind of search"; that "you have to make a pretty close inspection" to detect them. Four carloads of the pears were stacked in the ripening shed and one was placed in cold storage. As the pears in the shed ripened, they were sorted from day to day, and the riper ones were weighed and taken into the cannery. On some days all or a part of those taken to the cannery were not packed immediately, but were held over until the following day. Defendant's records show that from the 7th to the 18th days of August the pears which had been placed in the ripening shed were taken into the cannery as follows: 7th, 1,153 pounds; 8th, 2,649; 9th, 8,688; 10th, 6,687; 13th, 11,547; 14th, 16,266; 15th, 16,224; 16th, 19,070; 17th, 7,541; 18th, 4,236. Defendant's superintendent testified that a few worms were discovered in the pears on the 7th, but that no record was kept of the weight of the wormy pears prior to the 13th, "because we did not think there would be very many." Commencing with the 13th, defendant's records show the weights of defective pears as follows: 13th, 404; 14th, 697; 15th, 1,695; 16th, 2,874; 17th, 1,082; 18th, 5,988; 20th, 365. The record for September 4th and 5th shows that the pears which had been placed in cold storage, weighing 22,055 pounds were taken to the cannery, and that 3,469 pounds of them were unfit for canning and were thrown out. On the 8th of August the defendant wired plaintiff that there was "quite a large proportion of wormy pears" and on the 13th wrote to the same effect. Plaintiff thereupon sent one of its foremen to investigate the matter. The foreman testified that he arrived at defendant's cannery on the 15th; that he there looked at the pears in several lug-boxes, and that they "did not show the sign of worms," but that he saw worms in some pears "they said were our pears out in the wastage department. They figured up the percentage up to the date I had been there; it ran between 5 and 7 per cent."

The court found that 3½ tons, or about 5½ per cent. of the pears were defective. Appellant contends that there is no contradiction of the evidence produced by defendant to the effect that 20,460 pounds of the pears were defective. The court, however, was not bound to accept those figures. At the time plaintiff's foreman visited the cannery, nearly half of the pears had been weighed and taken into it. If the defective pears then "ran between 5 and 7 per cent." it would not be unreasonable to infer that the remainder would probably run in about the same proportion. No satisfactory explanation was given of the steady increase in the percentage of defective pears from August 7th to September 5th. The court may have believed, and reasonably so from the evidence, that pears which were 15 per cent. wormy

could not pass the inspection of experienced fruit men.

[3, 4] The court properly allowed the defendant credit for the amount paid as freight on the defective pears, because that expense was incurred before defendant was required to inspect the fruit. The court found, on sufficient evidence, that the presence of worms in the pears could have been "detected and discovered by an inspection and examination" thereof at the time of delivery, and refused to allow the defendant credit for expense and labor thereafter incurred in peeling the 3½ tons of defective pears for canning. If, as the court found, an inspection of the pears would have disclosed their wormy condition, no reason appears for thereafter incurring expense in preparing them for canning. Appellant relies on a provision of the contract between the parties that the "buyer may reject * * * any delivery, containing fruit * * * not complying with specifications, * * * and may charge the same and all costs, freight, or expenses paid or incurred in connection with the delivery thereof back to seller, and deduct such amounts from any amount due to seller." It is a sufficient answer to say that the expense of peeling the pears for canning is not an expense "paid or incurred in connection with the delivery" thereof.

The judgment is modified by deducting from the amount thereof the sum of \$155, and, as so modified, it is affirmed; appellant to recover costs of appeal.

We concur: PLUMMER, J.; HART, J.

75 Cal. App. 642

PEOPLE v. ATTEMA. (Cr. 1267.)

(District Court of Appeal, First District. Division 1, California. Dec. 18, 1925. Hearing Denied by Supreme Court Feb. 15, 1926.)

1. Criminal law ☞742(3)—Weight of testimony of state's witness, intoxicated at time of murder, held for jury.

Evidence of mental condition of state's eye-witness when murder was committed *held* such that jury might reasonably conclude that he was not incapacitated by intoxication to receive correct impressions of facts, so that weight of his testimony was for jury.

2. Homicide ☞214(3)—Statements in dying declaration held admissible, though not strictly *res gestæ*.

Declaration by deceased, containing material facts concerning dispute with defendant, circumstances leading to murder, and expressions of belief that he could not recover, *held* to justify admission of statements therein as to subject of dispute, though not strictly *res gestæ*.

3. Criminal law ☞655(4)—Court held not to have prejudiced defendant nor unduly restricted examination of jurors by admonishing counsel against undue prolongation.

In murder prosecution, remarks of court during examination of jurors, admonishing counsel against undue prolongation thereof, but assuring them that all time necessary would be allowed, *held* not prejudicial to defendant or his counsel, nor erroneous as unduly restricting examination.

4. Criminal law ☞823(9)—Instruction partially stating rule as to burden of proof in homicide cases held not prejudicial error.

Instruction, during examination of jurors, that when prosecution proves homicide beyond reasonable doubt, burden shifts to defendant to show alleged self-defense, *held* not prejudicial error, though but partial statement of rule as to burden of proof in homicide cases, where court stated rule fully and correctly in language of Pen. Code, § 1105, in instructions at conclusion of trial.

5. Criminal law ☞822(1)—Charge free from error, if as whole it correctly states law.

If entire charge as a whole correctly states the law, it is free from error, though selected passages therefrom state a proposition, without setting forth exceptions or qualifications in its application to particular case.

6. Homicide ☞339—Error in excluding evidence of deceased's statements contradicting subsequent dying declaration cured by subsequent admission.

Error in excluding testimony that deceased made statements to witness contradicting statements in subsequent dying declaration admitted in evidence was cured by subsequent admission of such testimony when witness was recalled.

7. Criminal law ☞730(8)—Remark of prosecuting attorney that it was unfortunate for accused to have to manufacture story held prejudicial error.

In murder prosecution, where counsel for accused asked leading question of accused's wife as witness for defense, in effort to elicit answers to questions she did not understand because of her imperfect knowledge of English, prosecuting attorney's remark, "It is unfortunate for them to have to manufacture a story here," *held* prejudicial error, notwithstanding its retraction and court's instructions.

8. Criminal law ☞730(8)—Refusal of instruction that facts, referred to in argument, that defendant was arrested and charged with offense, could not be considered as evidence, held reversible error.

In murder trial, involving close questions of fact, on which evidence was sharply conflicting, statement by attorney for prosecution in argument that, "a crime is committed; the officers * * * arrest the man, just as they did in this case; * * * he is brought before a committing magistrate upon a complaint, and the magistrate passes upon whether * * * there is sufficient evidence to believe

that the defendant charged is guilty"—had prejudicial effect, which could only be removed by instruction, which court refused, that facts that defendant had been arrested and charged with offense and information filed could not be considered as evidence and created no presumption against him.

9. Criminal law ⚡715—Permitting state's attorneys to illustrate course of bullet by pointing revolver held not abuse of discretion.

In murder prosecution, trial court did not abuse its discretion in permitting prosecution's attorneys to illustrate their contention as to course of bullet, by placing themselves in certain positions before jury, with one pointing revolver, which was in evidence, at an angle toward the other.

10. Criminal law ⚡823(9)—Instruction on burden of proving self-defense held not error, in view of instructions on reasonable doubt and presumption of innocence.

In murder prosecution, instruction that if proof tended to show defendant guilty of first or second degree murder, burden of proving self-defense devolved on him, *held* not error, where court fully instructed as to reasonable doubt, presumption of innocence, and necessity of proving every essential fact beyond reasonable doubt, exclusive of every reasonable hypothesis consistent with innocence.

11. Criminal law ⚡761(16)—Instruction held erroneous, as assuming that deceased's statement was dying declaration.

In murder prosecution, instruction that jury could consider evidence as to dying declaration and its effect and meaning *held* erroneous, as assuming that statement was dying declaration, and not clearly advising jury as to their power to determine such fact and weight and credit to be given it.

12. Homicide ⚡18(1)—That shooting was accidental would not exculpate accused, if it occurred in course of attempt to commit felony.

While accused was entitled to have theory of accident considered by jury in murder case, fact that pistol was discharged accidentally while in his possession would not exculpate him, if it occurred in course of attempt to accomplish felonious purpose; and instruction to acquit him if fact of accidental discharge was found was properly refused.

13. Criminal law ⚡1144(14)—Refusal of instruction not to consider fact of accidental discharge of pistol on issues of intent to kill, motive, or self-defense, held not assumed to be prejudicially erroneous.

Though fact of accidental discharge of pistol while in defendant's possession was irrelevant in murder case on questions of intent to kill, motive, or self-defense, instruction not to consider such fact in determining such issues was not required, and appellate court cannot reasonably assume that it was applied to them or that its refusal was prejudicially erroneous.

14. Criminal law ⚡1163(1)—Injury requiring reversal must appear affirmatively after examination of entire cause or from nature of error itself.

Mere fact of error or misconduct does not make prima facie case for reversal, which must be overcome by showing that no injury could have resulted, but such injury must appear affirmatively after examination of entire cause, including evidence, or from nature of error itself.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Atte Attema was convicted of manslaughter, and he appeals. Reversed.

E. D. Crawford and Randall O'Neill, both of Gilroy, for appellant.

U. S. Webb, Atty. Gen., C. C. Coolidge, Dist. Atty., and J. P. Fitzgerald, Deputy Dist. Atty., both of San Jose, for the People.

CASHIN, J. Appellant was charged in the superior court in and for the county of Santa Clara with the crime of murder, was convicted of manslaughter, and from the judgment and order denying a new trial has appealed, urging as grounds for reversal that the evidence was insufficient to justify the verdict, that the conduct of the court and the prosecuting attorney was prejudicial to the substantial rights of the appellant, and assigns as error rulings of the court in admitting and rejecting evidence and in giving and refusing to give instructions.

Appellant, with his wife, Carrie Attema, was, on November 8, 1924—the date of the commission of the crime charged—residing in the city of Gilroy. On that day the funeral of their minor child took place, and among those in attendance were Patty Sheridan—with the murder of whom appellant was charged—and Terry Sheridan, his brother. After the funeral appellant and his wife returned to their home, being followed shortly thereafter by the Sheridan brothers, both of whom were, according to the evidence, under the influence of intoxicants. While all were gathered in the kitchen of the dwelling, a dispute arose between appellant and the deceased, the subject of which and the exact position and movements of the parties present are questions on which the evidence is conflicting. The surviving eyewitnesses of the affair agree that, following the dispute, appellant ordered the deceased and his brother to leave the dwelling, which they refused to do, whereupon appellant went to an adjoining room, the floor of which was several inches higher than the kitchen, being reached by a step from the latter, and reappeared at the door between with a revolver in his hand and repeated the order to leave. A struggle for the possession of the revolver followed, in which the deceased and his brother participated. Either immediately before or during

the scuffle the revolver was discharged, inflicting injuries upon deceased, from which he died during the evening of the same day.

[1] The only witness for the prosecution who was present at the time of the infliction of the injuries was Terry Sheridan, whose testimony was marked by many uncertainties, attributed by appellant to an incapacity to receive at the time correct impressions of the facts as they occurred, and which, he contends, were of such a character as to destroy as a matter of law the credibility of the witness. The latter admitted the fact of his intoxication on the occasion mentioned, but gave in the main a coherent account of the events as he remembered them. While he could not recall the subject of the dispute, he testified to the fact of its occurrence, the orders by the appellant that the witness and the deceased leave the dwelling, their failure to obey, followed by appellant's act in procuring the revolver, that the weapon was discharged from the doorway mentioned while the deceased was standing within the kitchen, a distance of two or three feet from appellant, but making no aggressive movement toward the latter, and that the struggle for the possession of the weapon occurred after its discharge. With the above exceptions he was unable to recall the position or movements of those present immediately before or after the shot was fired, nor with certainty the place where the struggle occurred, whether in the kitchen or the room adjoining.

It is contended in connection with the testimony of this witness that the course of the bullet, as described by the physician who performed the autopsy, shows conclusively that the revolver was discharged during the struggle for its possession, the discharge, according to the testimony of appellant and his wife, following an attack by the deceased, thus refuting the testimony of the witness Sheridan and corroborating that of the defendant. According to the physician, the bullet entered the body of the deceased to the right of and below the navel, its course being downward and in the direction of the median line. This testimony, however, is not inconsistent with that of the witness Sheridan, who did not testify that the deceased was facing appellant directly at the time of the shot, and does reasonably support the conclusion that appellant was then standing in the doorway mentioned some inches above the position of the deceased.

We cannot say that the circumstances related by the witness were improbable, or that his inability to remember the subject of the dispute or in detail the position or movements of all the parties present indicated a degree of intoxication rendering him incapable of receiving correct impressions of the facts or an intention to mislead by falsely stating his recollection thereof. The evidence of his mental condition at the time was such that the jury might reasonably conclude

that the witness was not incapacitated in the particulars mentioned, and the weight to be given to his testimony was a question for their determination. *People v. Willard*, 150 Cal. 543, 553, 89 P. 124; *People v. Niino*, 183 Cal. 126, 190 P. 626.

[2] Certain statements by the injured man, made shortly after the occurrence, as testified by Neyens, a witness for the prosecution, were admitted in evidence as the dying declaration of the former. It is urged by appellant that this testimony was incompetent, in that the statements related were not of material facts concerning the cause and circumstances of the homicide, or made under the belief of impending death. While the statements referred to certain facts connected with the subject of the dispute which were not strictly a part of the *res gestæ*, and which might, upon specific objection or motion, have been rejected (*People v. Farmer*, 77 Cal. 1, 18 P. 800; *People v. McFarlane*, 138 Cal. 481, 71 P. 568, 72 P. 48, 61 L. R. A. 245; *Est. of Huston*, 163 Cal. 166, 124 P. 852), the declaration made, as testified by the witness, contained the material facts concerning the dispute, with the circumstances leading to the infliction of the fatal wound, which, taken in connection with expressions of his belief that he could not recover, were sufficient to justify the admission of the statements in evidence. *People v. Yokum*, 118 Cal. 437, 50 P. 686; *People v. Lee Sare Bo*, 72 Cal. 623, 14 P. 310; *People v. Lem Deo*, 132 Cal. 199, 64 P. 265.

[3] During the course of the examination of the jurors as to their qualifications the court admonished counsel in the case against the undue prolongation thereof, assuring them, however, that all the time necessary would be allowed; and thereafter during such examination, upon objection by appellant to the correctness of a statement by the prosecuting attorney of the rule as to the burden of proof in homicide cases, instructed the jury as to such rule as follows: "I am telling you in advance that in a murder case, when the prosecution has proved the homicide beyond a reasonable doubt and to a moral certainty to your minds, then the burden shifts to the defendant to show, if his defense is self-defense, the burden shifts to him to show the self-defense"—the admonition as to the restriction of the examination and the instruction being assigned as errors.

[4, 5] The remarks of the court in the first instance contained nothing which can reasonably be said to have prejudiced appellant or his counsel in the minds of the jury, nor did the court thereby unduly restrict the examination. The instruction, being but a partial statement of the rule as to the burden of proof in homicide cases (*Pen. Code*, § 1105), would, standing alone, in view of the inference which might reasonably have been drawn from the proof offered by the prosecution supporting the conclusion that the crime was

manslaughter, without the qualifying words of the section, have been prejudicially erroneous (*People v. Elliott*, 80 Cal. 296, 22 P. 207), had not the court in its instructions at the conclusion of the trial stated the rule fully and correctly in the language of the section. In determining the propriety of an instruction the entire charge must be considered, and if as a whole it correctly states the law it is free from error, notwithstanding that selected passages therefrom may state a proposition without at the same time setting forth the exceptions or qualifications to which it is subject in its application to the particular case. *People v. Del Cerro*, 9 Cal. App. 764, 100 P. 887; *People v. Warren*, 130 Cal. 678, 63 P. 87; *People v. Besold*, 154 Cal. 363, 97 P. 871.

[6] Objection by the prosecution to the testimony of the witness Butrone that the deceased, approximately 15 minutes before the declaration admitted in evidence as his dying declaration, made certain statements to the witness tending to contradict the facts stated in the subsequent declaration mentioned, and to show that the latter was not made under a sense of impending death, was sustained. Upon the witness being recalled the testimony was admitted without objection. While this evidence was admissible in the first instance (*People v. Lawrence*, 21 Cal. 368), the error was cured by its subsequent admission (*People v. Woody*, 48 Cal. 80; *People v. Ross*, 115 Cal. 233, 46 P. 1059).

[7] The wife of appellant was sworn as a witness for the defense. It appears from the record that an effort was made to conduct her examination in the English language, which she understood imperfectly, and in which she expressed herself with difficulty, finally making necessary the employment of an interpreter. In the course of her direct examination and before the interpreter was sworn, counsel for appellant, in his efforts to elicit answers to questions which the witness seemed not to understand, asked a question which in form was leading, and to which an objection upon that ground was sustained; whereupon the prosecuting attorney interjected the remark, "It is unfortunate for them to have to manufacture a story here." Appellant's counsel immediately objected to the remark, and, without expressly assigning it as misconduct, requested the court to admonish the attorney and to instruct the jury to disregard the remark, which request the court granted.

The foundation for appellant's complaint of the conduct mentioned was by the objection and request sufficiently laid, and it remains to be considered whether such conduct was prejudicial. The testimony as to the circumstances of the shooting was sharply conflicting, and, had the version of appellant and his wife been accepted by the jury, the trial might fairly have resulted in an acquittal. The statement tended to discredit the only

witness for the appellant who was present at the homicide, and whose testimony in corroboration of that given by the accused might reasonably, other things being equal, have been sufficient to convince the jury that the shot was fired in self-defense, or to create in their minds the reasonable doubt which would have necessitated a verdict in his favor. The remark was of a character and made under such circumstances as to fairly support the contention that its effect was not only prejudicially harmful, but was one not removed by its retraction or the instructions of the court. *People v. Frank* (Cal. App.) 236 P. 189; *People v. Derwae*, 155 Cal. 592, 102 P. 266; *People v. Caldwell*, 55 Cal. App. 280, 203 P. 440; *Smith v. Rothschild & Co.*, 13 Ga. App. 293, 79 S. E. 88.

[8] Appellant contends that he was in other respects prejudiced by the conduct of the attorneys for the prosecution. During the argument by the latter, in referring to appellant, it was said:

"A crime is committed; the officers go out and arrest the man just as they did in this case; they take him to jail; he is brought before a committing magistrate upon a complaint, and the magistrate passes upon whether or not a crime has been committed, and whether or not there is sufficient evidence to believe that the defendant charged is guilty, and if there is he holds that defendant to answer before the superior court for trial."

Appellant excepted thereto, pointing out that the foregoing was not a statement of the evidence, and requested the court to so instruct the jury, the prosecuting attorney stating in reply, "The pleadings are in the case, and that is a part of the pleadings." The court not having instructed the jury as requested, appellant at the close of the trial offered an instruction in effect that the fact that the defendant had been arrested and charged with an offense and that an information had been filed could not be considered as evidence and created no presumption against him. This instruction was refused. The only apparent purpose of the statement was to suggest that the jury might properly infer from the determination of the committing magistrate and the preliminary proceedings described that a crime had been committed of which appellant was guilty. The only case called to our attention wherein the effect of the refusal of such an instruction has been considered is that of *People v. Delucchi*, 17 Cal. App. 96, 118 P. 935, in which it appeared that the proposed instruction was in substance included in others given at the trial, the court, by fair implication from its opinion, holding such an instruction to be proper. In cases where, as here, close questions of fact are to be determined on which the evidence is sharply conflicting, suggestions that matters without the record should be considered by the jury may reasonably be said to have had a prejudicial effect, which could

only be removed by an instruction of the court which, in the instant case, was not given.

[9] The attorneys for the prosecution in their argument illustrated before the jury their contention that the course taken by the bullet after striking the body of deceased proved that the shot was fired while the deceased was standing in the position described by the witness Sheridan, by placing themselves in certain positions before the jury, one pointing the revolver at an angle toward the body of the other. Appellant objected to the illustration, and requested an instruction that the jury disregard the argument. The court overruled the objection, refusing the instruction. Appellant urges that the methods of the prosecution constituted prejudicial misconduct, and that the court erred in its ruling in that connection. Whether the method of argument described should be used is a question within the sound discretion of the court (*State v. Simmons*, 78 Kan. 852, 98 P. 277; *State v. Williams*, 168 N. C. 191, 83 S. E. 714; 16 Corp. Jur. 894). Unlike the object used in *People v. Durrant*, 116 Cal. 179, 221, 48 P. 75, for the same purpose, the revolver was here in evidence, and the use of the body of the assistant district attorney as a figure in the illustration cannot reasonably be said to have misled the jury. We perceive nothing prejudicial therein in view of the evidence in the case, and cannot say that the court abused its discretion in permitting it.

[10] As stated above, the court instructed the jury as to the burden of proof in trials for murder in the language of section 1105 of the Penal Code, adding that if the prosecution in its direct case established the killing of the deceased by the defendant, and the proof tended to show that the defendant was guilty of murder either of the first or second degrees, then the burden of proving that he took the life of the deceased in self-defense devolved upon him; further stating that the proof might shift back to the people if the testimony of the defendant—if he should establish that he had done the killing in self-defense. Appellant urges that the foregoing incorrectly stated the law, in that it is not incumbent upon the defendant in such cases to prove or establish the defense, but only to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt of the offense charged. *People v. Roe*, 189 Cal. 548, 564, 209 P. 560. The court, however, fully instructed as to reasonable doubt, the presumption of innocence, and that every fact and circumstance essential to establish guilt must be proved beyond a reasonable doubt exclusive of every reasonable hypothesis consistent with innocence. These instructions fully covered the point urged by appellant, and have been held to be sufficient. *People v. Anderson*, 105 Cal. 32, 34, 38 P. 513; *People v. Hawes*, 98 Cal. 648, 653, 33 P. 791; *People v. McClure*, 148 Cal. 418, 83 P.

437; *People v. Hopper*, 42 Cal. App. 505, 183 P. 836; *People v. Bannon*, 59 Cal. App. 50, 209 P. 1029.

[11] Instructions proposed by appellant and refused, stating the rule as to the right of one to maintain by force the possession of his own premises against aggression, and that he is not bound to retreat therefrom to avoid the aggressor, while proper, were substantially given by the court in its instructions to the jury, the latter covering every material portion of those proposed. The court instructed as follows with reference to the statements of the deceased admitted in evidence as his dying declaration:

"You may likewise take into consideration the evidence concerning the declaration, the dying declaration of the deceased, and you may take into consideration in contradiction of that dying declaration and what effect it has and what was the meaning of it."

Appellant in this connection offered instructions correctly stating that, whether statements admitted as a dying declaration were in fact made under a sense of impending death, or entitled to credit and weight, were questions for the jury (*People v. Singh*, 182 Cal. 457, 476, 188 P. 987; *People v. Thomson*, 145 Cal. 717, 723, 79 P. 435), and that such declaration might be impeached by evidence of other statements of the deceased inconsistent therewith (*People v. Lawrence*, 21 Cal. 368, 372; *People v. Amaya*, 134 Cal. 531, 538, 66 P. 794). The testimony was such that, from the declaration itself, together with the circumstances under which it was made, the jury might reasonably have inferred that the declarant was not under a sense of impending death, or that his statement was not entitled to full weight and credit. The court's instruction assumed that the statement was a dying declaration, and did not clearly advise the jury as to their power to determine the fact and the weight and credit to be given it, instructions as to which appellant was entitled.

[12] Requested instructions by appellant, first, that if the jury found that the revolver was accidentally discharged by him such fact should not be considered in determining his intent or motive or on the issue of self-defense; and, second, the fact being found, that he should be acquitted were refused. While appellant was entitled on the theory of accident to have the question considered by the jury (*People v. Hubbard*, 64 Cal. App. 27, 32, 220 P. 315), as there stated, the mere fact that the shooting was accidental would not necessarily exculpate him (*People v. Searle*, 33 Cal. App. 228, 164 P. 819; *People v. Sidwell*, 29 Cal. App. 12, 154 P. 290; *People v. Sellar*, 57 Cal. App. 195, 207 P. 396), the homicide not being excusable though caused by the accidental discharge of the pistol while in his possession if such discharge occurred in the course of his attempt to accomplish a felonious purpose. The second proposed in-

struction was, therefore, properly refused. *Wheatly v. State* (Tex. Cr. App.) 39 S. W. 672; *State v. Benham*, 23 Iowa, 154, 92 Am. Dec. 417; *Hollywood v. State*, 19 Wyo. 493, 120 P. 471, 122 P. 588, Ann. Cas. 1913E, 218; *Sanders v. State*, 16 Ala. App. 511, 79 So. 504; *Ford v. State*, 71 Neb. 1042, 98 N. W. 807, 115 Am. St. Rep. 591.

[13] Though the fact of the possession of the weapon was relevant in connection with the other evidence in the case in determining the question of intent to kill, the fact of its accidental discharge was without relevancy on the issues mentioned; and in this connection the first proposed instruction might properly have been given. The latter fact, however, if found, was one requiring no special direction by the court as to its proper consideration by the jury; and we cannot reasonably assume that it was applied to the issues mentioned, or that the refusal of the instruction was prejudicially erroneous. Other rulings and instructions given or refused are urged as grounds for reversal, all of which we have considered, and conclude without discussion here that the rulings were correct, that the instructions complained of state the law, and that those refused were fully covered by those given.

[14] It remains to be considered whether the errors and conduct heretofore discussed were of such character and effect as to require the reversal of the judgment; it being the rule that the mere fact of error or misconduct does not make out a prima facie case for reversal which must be overcome by a showing that no injury could have resulted (*People v. O'Bryan*, 165 Cal. 55, 130 P. 1042), but such injury must appear affirmatively after an examination of the entire cause, including the evidence, or from the nature of the error itself (*People v. Mazzurco*, 49 Cal. App. 275, 193 P. 164; *People v. Chapman*, 55 Cal. App. 192, 203 P. 126).

In the instant case, as stated, the evidence was sharply conflicting as to the acts of the participants immediately preceding the discharge of the weapon, the questions of fact to be decided being close and difficult, and, with weight and credit given to the testimony for the defense, unaffected by remark or argument not finding support in the evidence, might fairly have led to an acquittal; or as against such testimony, had the jury been instructed as to their power to determine whether the statements of the deceased received in evidence constituted his dying declaration, and, if so found, the weight and credit to be given thereto, the same verdict might reasonably have been the result. After a careful examination of the entire cause, including the evidence, we are of the opinion that the conduct hereinbefore considered, with the refusal of the instructions mentioned, did as a reasonable probability have

a determinative effect upon the jury in arriving at their verdict, and resulted, the whole case considered, in a miscarriage of justice.

The judgment is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

75 Cal. App. 724

RATTO v. BOARD OF TRUSTEES OF CITY OF SOUTH SAN FRANCISCO et al.
(Civ. 5441.)

(District Court of Appeal, First District, Division 1, California. Dec. 23, 1925.)

1. Municipal corporations ⚡159(1)—**Clerk's certified determination of sufficiency of recall petition final.**

City clerk having certified, under St. Ex. Sess. 1911, p. 128, that recall petition "has a sufficient number of qualified electors or voters," his determination is final.

2. Municipal corporations ⚡159(1)—**Clerk's determination of sufficiency of recall petition not judicial, and court of equity may be resorted to in case of fraud.**

City clerk's duty, under St. Ex. Sess. 1911, p. 128, being to ascertain solely from records of registration whether recall petition is signed by requisite number of qualified voters, is not judicial, and court of equity may be resorted to in case of fraud.

3. Municipal corporations ⚡159(1) **Trustees without discretion as to calling election on submission of certified recall petition.**

St. Ex. Sess. 1911, p. 128, vests no discretion in city trustees as to calling special election, if petition for recall submitted by clerk states grounds for recall, and sufficiency of number of signatures is properly certified by clerk.

4. Mandamus ⚡154(5)—**Allegation of petition for mandamus to compel calling of recall election that recall petition stated grounds for recall sufficient.**

Allegation of petition for writ of mandate to compel city board of trustees to call special election for their recall that recall petition "contained a statement of the grounds on which the recall was sought" held sufficient; sufficiency of grounds, which are intended solely for information of electors (St. Ex. Sess. 1911, p. 128), not being question for trustees or courts.

5. Mandamus ⚡3(4)—**Petitioner held without plain, speedy, or adequate remedy at law, and proceeding entertained, in exercise of appellate court's original jurisdiction to avoid delay.**

Petitioner for writ of mandate to compel city board of trustees to call a special election to determine whether they shall be recalled, have no plain, speedy, or adequate remedy at law, and appellate court, to avoid delay, will entertain proceeding in exercise of its original jurisdiction.

Original application by D. W. Ratto for writ of mandate to the Board of Trustees of

the City of South San Francisco and the members thereof. Demurrer to petition overruled, and fact questions referred to the superior court to take testimony and report.

See, also, 245 P. 1112.

J. W. Coleberd, of South San Francisco, and Ross & Ross, of Redwood City, for petitioner.

Leo R. Friedman, of San Francisco, John F. Davis, of South San Francisco, and A. J. Scampini, City Counsel, of San Francisco, for respondents.

KNIGHT, J. A petition has been filed herein for a writ of mandate to compel respondents, as members of the board of trustees of the city of South San Francisco, to call a special election to determine whether respondents, as such members of said board of trustees, shall be recalled. Respondents have demurred to the petition upon grounds of insufficiency of facts, uncertainty, ambiguity, unintelligibility, and want of jurisdiction of the court. An answer has also been filed.

In support of the demurrer respondents contend that the petition fails to allege the specific number of votes cast at the last general municipal election or the number of valid signatures attached to said recall petition, and that, therefore, it cannot be determined from said petition whether or not a valid recall petition has been filed; that there is a failure to set forth the grounds on which the recall was sought; that respondents, as members of such board of trustees, are not subject to mandamus, for the reason that they are vested with "a power of determination, coupled with an exercise of discretion in the calling of recall election"; that the petition fails to allege that petitioner is without a plain, speedy, or adequate remedy at law, and, furthermore, does not set forth the reasons which warrant the exercise of the original jurisdiction by this court.

[1] The city of South San Francisco is organized under the general law as a city of the sixth class. The general law relating to the recall of elective officers of incorporated cities and towns (Stats. Ex. Sess. 1911, p. 128) provides that—

Within 10 days from the filing of the recall petition "the clerk shall examine and from the records of registration ascertain whether or not said petition is signed by the requisite number of qualified voters, and he shall attach to said petition his certificate showing the result of said examination."

[2] This, the petition alleges, the city clerk has done, and a copy of his certificate is set forth in the petition, showing that said recall petition "has a sufficient number of qualified electors of voters * * * as required by law." Having so certified, his determination upon this point is final. *Watts v. Superior Court*, 36 Cal. App. 692, 173 P. 183; *Good v. Common Council*, 5 Cal. App. 265,

90 P. 44. But in this connection it should be stated that his duty is not judicial (*Wright v. Engram*, 186 Cal. 659, 201 P. 788); he is not clothed with authority to receive extraneous evidence of the contents of the petition, his duty being to ascertain from the records of registration whether or not the petition is signed by the requisite number of qualified voters (*Beecham v. Burns*, 34 Cal. App. 754, 168 P. 1058; *Williams v. Gill*, 65 Cal. App. 129, 223 P. 559; *Chester v. Hall*, 55 Cal. App. 611, 204 P. 237); and if fraud has been committed, a court of equity may be resorted to as the proper forum to determine such questions under appropriate proceedings (*Williams v. Gill*, supra).

[3] The statute further provides that—

"If the petition shall be found to be sufficient, the clerk shall submit the same to the legislative body of the city or town without delay, whereupon that body shall forthwith cause a special election to be held. * * *"

It will be observed that under the statute no discretion is vested in the trustees as to the question of calling such election (*Good v. Common Council*, supra; *Sidler v. City Council of Bakersfield*, 43 Cal. App. 349, 185 P. 194), providing the petition contains the statements required by the statute (*Sidler v. City Council of Bakersfield*, supra), and is properly certified by the clerk as to the number of signatures. The only statement the statute requires to be contained in said petition is one showing:

"The grounds on which the removal or recall is sought, which statement is intended solely for the information of the electors."

[4] The petition before us alleges, "That said (recall) petition contained a statement of the grounds on which the recall was sought," and since, as already pointed out, the grounds of recall are intended solely for the information of the electors, the question of the sufficiency of those grounds is not one for the trustees or the courts. *Laam v. McLaren*, 28 Cal. App. 632, 153 P. 985. Consequently, the form of allegation adopted by the petitioner herein is legally sufficient.

[5] Answering the other points raised by the demurrer, it appears from the nature of the proceeding that petitioner has no plain, speedy, or adequate remedy at law; and, in order to avoid delay, this court has already concluded to entertain the proceeding in the exercise of its original jurisdiction. For the foregoing reasons the demurrer is overruled.

Certain affirmative allegations are made in the answer, however, which raise questions as to matters of fact upon which findings are necessary to be had before this proceeding may be finally determined. It is therefore ordered that the matter of ascertaining the truth of those allegations of fact be referred to the superior court of the state of California in and for the county of San Mateo

wherein said city of South San Francisco is situate, and, when the findings of that court are entered thereon, that the same be forthwith transmitted to the clerk of this court for further proceedings by this court.

The ultimate questions of fact thus referred to said superior court for trial and decision are embodied in the affirmative allegations set forth in subdivisions (a), (b), (c), (d), and (f) of paragraph V of said answer, and are as follows:

(a) How many, if any, of those who have signed said recall petition are not qualified electors in and of said city of South San Francisco?

(b) Was that section of said recall petition purporting to have been circulated by one Eugenio Lombardi, and containing 28 signatures, circulated by him or by some other person, and how many, if any, of the names attached thereto were signed out of the presence of said Lombardi?

(c) How many, if any, of the purported qualified electors whose names appear on said recall petition, exclusive of those referred to in the two preceding paragraphs, did not add to their respective signatures their occupations, and places of residence by street and number or other designation thereof?

(d) How many, if any, of the purported signatures to said recall petition were not signed by qualified electors of said city of South San Francisco, but were signed to said petition by persons other than those bearing said names?

(f) How many, if any, of the signers to said petition in writing, withdrew their names therefrom prior to the time said city clerk affixed his certificate thereto?

Lastly, if any of the signatures challenged by respondents upon the grounds hereinabove stated are found to be illegal, is the number remaining equal to at least 25 per cent. of the entire vote cast within said city at the last municipal election for the office of trustee?

The allegations contained in subdivision (e) of said paragraph V of said answer are too indefinite to warrant findings being made thereon.

It is further ordered that the clerk of this court certify to copies of the petition and the answer herein, which copies shall be furnished by petitioner herein and that said certified copies attached to a certified copy of this order be forthwith transmitted to the clerk of the superior court of said county of San Mateo.

It is further ordered that the submission of all other matters connected with this proceeding in this court be and the same is hereby set aside, and matter continued until the further order of the court.

We concur: TYLER, P. J.; CASHIN, J.

BICE v. HAROLD L. ARNOLD, Inc., et al.
(Civ. 4110.)

(District Court of Appeal, Second District, Division 2, California. Dec. 17, 1925.)

1. Sales ~~467~~—Conditional sale contract expressly reserves title, and does not confer mere lien, lost by negligence in taking possession after default.

Conditional sales contract expressly reserves title, with absolute forfeiture of right to possession on breach of any condition specified therein, and does not confer mere lien, which may be lost by negligence in tracing or taking possession of property after default in payment of installments and removal of property from state.

2. Sales ~~473(1)~~—Bona fide purchaser from vendee under conditional sale contract gets no valid claim to property.

Even bona fide purchaser from vendee under conditional sale contract before performance of conditions gets no valid claim to property.

3. Sales ~~469~~—Plain provision reserving title in seller until payment of price controlling, unless qualified or set aside by other clear and unambiguous language.

Plain and definite provision in contract for purchase of automobile that title shall remain in seller until purchase price is paid is controlling, unless, by clear and unambiguous language, it is elsewhere qualified or set aside.

4. Sales ~~468~~—Conditional vendor retains title, while conditional vendee receives only forfeitable right of possession.

Vendor under conditional sale contract retains title, not a mere lien, while vendee receives only forfeitable right of possession, until he has performed conditions precedent to passing of title, and, under Penal Code, § 504a, is guilty of embezzlement, if he attempts to dispose of property by bill of sale to another; such contract not being a sale, but only an agreement to sell.

5. Chattel mortgages ~~6~~—Agreement of conditional vendee to pay deficiency if owner retook possession and sold car held not to make contract a mortgage.

Agreement by purchaser of automobile on installments, evidenced by notes, to pay any deficiency if owner retook possession of and sold car as authorized by contract under certain circumstances, held not to require that instrument be construed as mortgage; transaction being no less an agreement to sell upon condition because promise to pay purchase price is absolute or evidenced by vendee's note.

6. Sales ~~480(4)~~—Owner of car removed from state by conditional vendee held not negligent in failing to locate and recover it promptly.

Evidence held to show that agents to whom owner of automobile, removed to California from another state by conditional vendee, intrusted collection of installments and recovery of property, used every known available means

to assert owner's rights, and that neither they nor owner were appreciably negligent in failing to locate and recover property promptly after becoming aware of its presence in California, so as to preclude owner from reclaiming it on discovery in hands of purchaser from such vendee, where owner complied with all legal requirements of state from which it was removed.

7. Estoppel — 75—Owner of car removed from another state by conditional vendee held not estopped to assert claim against purchaser from vendee by failure to place name as legal owner on attached certificate.

Where buyer of automobile on conditional sale contract removed it to California from another state, contrary to contract, owner cannot be held accountable for failure to place his name upon certificate attached to car as legal owner, in compliance with Motor Vehicle Act 1915, § 8, as amended by St. 1919, p. 199, § 7, and is not thereby estopped to assert claim to car as against purchaser from such buyer, who had no bill of sale, though he had license in his own name as "registered owner"; mere possession of car being no indicia of ownership.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by D. F. Bice against Harold L. Arnold, Incorporated, and others. From a judgment for plaintiff against certain defendants they appeal. Affirmed.

C. L. Kilgore, of Los Angeles, for appellants.

Ford & Bodkin and Jos. J. Herlihy, all of Los Angeles, for respondent.

CRAIG, J. On June 16, 1920, the respondent and one James A. Gallagher, both residents of the state of Washington, entered into a contract in writing, at Yakima, in said state, for the purchase by Gallagher of a Hudson automobile, by virtue of which agreement the latter sold to respondent another machine for \$800, which amount was credited as initial payment upon the Hudson. Gallagher made no further payments, but soon absconded, and, when respondent ultimately located his car, it was in the possession of appellant Rider, who claimed to have purchased it from Harold L. Arnold, Incorporated, at Los Angeles, under a conditional sale contract, which, in turn, the Arnold Company had transferred to the Pacific Finance Corporation. Respondent thereupon instituted an action against Rider and said corporations for possession of the Hudson car, or its value, and damages. Gallagher was also made a party defendant, but, failing to locate him, the plaintiff dismissed as to him. Judgment was rendered for the plaintiff, and this is an appeal therefrom.

The contract between respondent and Gallagher constitutes the principal grounds of controversy, and we quote the material portions thereof, as follows:

"Studebaker Conditional Sale Contract.

"Date—June 16, 1920.

"Town—Yakima.

"State or Province—Wash.

"To Dr. D. F. Bice:

"I, the undersigned, purchaser, do hereby acknowledge having this day received from you one Hudson motor car cabriolet model, * * * for which I agree to pay you \$1,700.00 of which I now pay you \$800.00 and agree to pay you \$900 as the balance of the purchase price of same, said balance being payable in installments evidenced by promissory notes. * * *

"* * * It is agreed that the title to, ownership in and right of possession of said motor car are vested in you until said indebtedness and all other sums of money payable to you * * * shall have been fully paid to you in money, at which time ownership shall pass to me.

"It is further agreed that * * * if any of my indebtedness shall become due and remain unpaid in whole or in part, or if said motor car is removed or attempted to be removed from the state in which I now reside, or to be disposed of or if I shall sell or incur or shall attempt to sell or incur said motor car, or in case of misuse or abuse thereof, or whenever you shall deem the debt insecure, the full amount unpaid hereunder, including any notes given, shall become due and payable forthwith, and you may, without any previous notice or demand, and without legal process, enter any premises where said motor car may be found and take possession thereof, after which you may, at your option, make such disposition of said motor car as you shall deem fit, and all payments made by me may be retained by you as liquidated damages for the use of said motor car while in my possession and not as a penalty. Or said motor car may be sold with or without notice either at public or private sale and the proceeds, less the expense of taking, removing, holding, and selling said motor car, shall be credited upon the amount unpaid hereunder; or without such sale there may be credited upon the amount unpaid the fair market value of said motor car at the time of repossessing same, and in either event, in consideration of the use and depreciation of said motor car, I promise and agree to pay the balance forthwith. * * *

[1] Appellants' first point is that this contract conferred upon respondent no more than a lien upon the Hudson car, and that he was negligent in tracing or taking possession of the machine, after the breach of contract as to payment of installments, and removal from the state, as a consequence of which the alleged lien was lost. They cite authorities in attempting to support this claim, each of which involve contracts in the nature of chattel mortgages or leases, and which for apparent reasons are not in point. In these cases the contracts were given to secure the payment of deferred installments, or else they provided that, in the event of default, the vendor should be obligated to sell the property "rendering to the borrower all surplus" of the proceeds of such sale after satisfying his lien. The vital distinction between such

instruments and that here under consideration is that they passed title to the vendee, whereas in conditional sales the title is expressly reserved, with absolute forfeiture of the right to possession upon a breach of any condition specified in the contract. *Palmer v. Howard*, 72 Cal. 293, 13 P. 858, 1 Am. St. Rep. 60, is illustrative of this distinction, though relied upon by appellant herein. It was there said:

"Palmer and Rey were bound to resell the property if they repossessed themselves of it. They could not have kept it as an owner; and not only so, but they were bound to resell for the benefit of the St. Clairs. The provision is, that if they retake they shall sell 'to the best advantage, rendering to said borrower all surplus, if any, after paying the price agreed upon and the expenses of removal and sale.' This is not a feature of an executory contract of sale. It is the chief characteristic of a mortgage, and is the very sum and substance of proceedings for foreclosure." (*Italics in original.*)

[2] And it was further said:

"It is settled in this state that even bona fide purchasers from the person to whom personal property is delivered under an executory contract of sale get no valid claim to the property. (*Kohler v. Hayes*, 41 Cal. 455; *Hegler v. Eddy*, 53 Cal. 598.) This is in accordance with the great preponderance of authority elsewhere. *Harkness v. Russell* [118 U. S. 663] 7 S. Ct. 51 (30 L. Ed. 285). The reason is, that in such cases the title to the property does not pass, and the maxim, *Nemo plus juris, etc.*, applies."

Marker v. Williams, 39 Cal. App. 674, 179 P. 735, also held:

"It is the established law, under our court decisions, that the vendee under a conditional sale of personal property, until the conditions are performed, has no interest in the property which he can transfer, as against the vendor, even to an innocent purchaser, for value. He cannot divest the conditional vendor of his interest by any act or omission to act not authorized by such vendor."

The same rule is announced in the following cases: *Rodgers v. Bachman*, 109 Cal. 552, 42 P. 448; *Van Allen v. Francis*, 123 Cal. 474, 46 P. 339; *Lundy Furniture Co. v. White*, 128 Cal. 179, 60 P. 759, 79 Am. St. Rep. 41; *Harter v. Delno*, 49 Cal. App. 729, 194 P. 300.

[3] The contract in suit expressly provided that Bice should have any one of three alternatives upon Gallagher's breach of its conditions, to wit, that (1) he might retake the car and retain all amounts previously paid as liquidated damages for its use; (2) sell the car with or without notice and apply the proceeds as a credit upon any remaining unpaid balance; or (3) allow the fair market price of the car as such credit, without a sale. In neither of these events would Bice be required to pay Gallagher any amount. This agreement expressly provides that the title shall remain in the conditional vendor until

the purchase price shall have been paid, with interest. This plain and definite provision is controlling, unless by clear and unambiguous language it is elsewhere qualified or set aside.

[4, 5] The right of the conditional vendor upon a conditional sale contract such as that before us is not a mere lien. He retains title, while the conditional vendee receives only a forfeitable right of possession until he has performed the conditions required as precedent to its passing, which is usually the payment of the purchase price. It may not be inappropriate to say here that, strictly speaking, this form of contract is not a sale of any kind, but only an agreement to sell. The conditional vendee gets nothing more than a conditional right of possession. If he attempts to dispose of the property by executing a bill of sale to another, he is guilty of embezzlement. Penal Code, § 504a. The security retained by the seller is not a lien, but is a reservation of title. 35 Cyc. p. 653. The transaction is not less an agreement to sell upon condition because the promise to pay the purchase price is absolute, or is evidenced by a note of the conditional vendee, just so it is not given in payment. *Van Allen v. Francis*, supra. This meets the contention of appellants that, because the conditional vendee has agreed to pay any deficiency resulting in case the owner should repossess himself of, and sell, the car, as provided by the sale contract, the instrument must be construed as a mortgage. Many other authorities to the same effect are cited therein.

[6] But appellants insist that they were innocent purchasers for value, and that respondent, well knowing that his property had been removed to the state of California, did not attempt to recover it for a period of about five months after becoming aware of its presence in California, and six weeks after locating it in this state; further, that respondent enabled Gallagher to perpetrate a fraud upon appellants, in that he failed to require the registration of the car in the name of the legal owner in this state, and that because of this alleged gross negligence respondent should be estopped to assert his claim upon the car. It should be noted at the outset that, although respondent was advised through his agents, the automobile sales company, at Yakima, that the automobile had been transported to San Francisco, yet there is nothing to indicate that he at any time knew how to locate it. Gallagher surreptitiously left the state of Washington with the machine, without any mention of such intent, but on arrival in this state he opened correspondence with the sales company, and repeatedly wrote them, promising "from day to day and from week to week" that he would make payments required by his contract, and offering various excuses for having failed in the past to do so. Each time he wrote he intimated that he had been in different parts

of the state of California. When it became apparent that Gallagher was not acting in good faith, the sales company wired him at his last-known address in San Francisco that he must make a payment of at least \$300 by return mail, or the car would be taken up, and inquiry was then made as to its whereabouts. After some delay, they received a telegram from Gallagher, stating that he had been away, and that upon his return he found two telegrams from them. He assured them that he was not attempting to avoid payment, and that he would soon remit or return the car. Soon thereafter it was learned that he had checked out of his hotel at San Francisco, and search was immediately instituted by all the means available to respondent to locate both Gallagher and the machine. The car had been insured against loss by theft, transportation, embezzlement, pilferage, fire, robbery, and contract sale. The sale contract by which respondent retained title had been duly filed with the county recorder in accordance with the laws of Washington, and the insurance policy bore a record of said contract and of the legal ownership of the Hudson car. The sales company at Yakima, the prosecuting attorney, and the insurance company were enlisted in the search. An attorney at San Francisco and a detective agency, as well as the police of both states, were also employed to assist in locating the machine and its missing driver, and the motor vehicle department of California, who were also notified, finally located the car at Los Angeles, where it developed that Gallagher had sold it to appellant Harold L. Arnold, Incorporated, who, in turn, had transferred it to appellant Rider, under a conditional sale contract.

From the foregoing facts it is apparent that respondent's agents with whom he entrusted the responsibility for collection, and, later, recovery of the property, exercised every known available means to assert his rights and to enforce the terms of the contract, and that no appreciable degree of negligence could be held to have been attributed to either of them. As we have heretofore stated, respondent was the owner of more than a mere lien on the property—he retained the absolute title, the automobile was his property, and his contract constituted a valid conditional sale. Had Gallagher stolen respondent's machine in Washington and transported it to California, it could not successfully be contended that the latter would be precluded by any failure to locate it from reclaiming the same upon discovery; and, having complied with all legal requirements of the state of Washington in protecting his title to the car, he is in no different or less advantageous position.

[7] But it is asserted by appellants that the Arnold Company should be protected as an innocent purchaser, because, it is claimed, the respondent failed and neglected to place

his name upon the certificate attached to the Hudson car as legal owner, in compliance with the provisions of section 8 of the California Motor Vehicle Act of 1915, p. 402, as amended by Stat. 1919, p. 199, § 7. We fail to understand how Bice can be held accountable for an omission or fault in an instrument of whose existence he not only had no knowledge, but had every reason to suppose would never be executed as long as his title to the property in question lasted. He did not know that the car would ever be brought into California. In fact, he had expressly forbidden Gallagher from taking it from the state of Washington, and hence under no circumstances could he be expected to perform a duty imposed only by the laws of this state. Of course, he had nothing to do with the securing of the certificate here, or with any omission therefrom. It is true that for about six weeks before he took steps to secure possession of the car Bice was apprised of the fact that Gallagher claimed to be living at the Stewart Hotel in San Francisco, but knowing of Gallagher's hotel address is quite a different thing from information as to the whereabouts of the Hudson machine. Besides, it cannot be said as a matter of law that the mere fact having been known to Bice that the car was in California was notice to him that it was being operated on the highways, and, if not so operated, it did not require a license. In the absence of definite information respondent might reasonably infer that, should Gallagher secure a license, he would comply with the law and fill in the blanks properly and truthfully. On the other hand for aught Bice knew, the Hudson was in storage or at a repair shop.

In each of the cases cited by appellants some act of the owner who was held to have been estopped in some way participated in the deception of the estoppel asserter.

"In order that the real owner of personal property may be estopped to assert his title against one who has dealt with the apparent owner on the faith of his apparent ownership or authority over it, something more is required than mere possession on the part of the apparent owner since merely intrusting a third person with possession does not constitute holding him out as owner. The owner must go further and do or omit to do some act of a nature such as to mislead persons as to their true possession of the title. The person alleging estoppel must have acted and parted with value upon the faith of such apparent ownership or authority so that he will be the loser if the appearances to which he trusted are not real." C. J. pp. 1178, 1179.

Mere possession of the Hudson car by Gallagher constituted no indicia of ownership. That possession was not profitably affected by way of making out an apparent title in him by his having a certificate without the name of the legal owner stated therein, and with an utter absence of the customary bill of sale from Gallagher's alleged vendor. Noth-

ing which Bice did or omitted to do could have deceived the Arnold Company, had they used ordinary care to inquire into Gallagher's title before purchasing the car from him. Considering the law heretofore stated regarding the futility of attempting to alienate the owner's title by the conditional vendee, and in view of the prevalence of interstate transportation of stolen automobiles, we do not think that appellant Arnold Company displayed that degree of vigilance that would warrant it in charging negligence against one who had legally retained and protected his title to the property, and sought by every available means to locate and reclaim it, as did respondent.

As we have shown above, Gallagher agreed in writing with respondent that the automobile should not be removed from the state of Washington. Soon thereafter he absconded with the machine, and it appears that he was apprehended by an inspector of the motor vehicle department, who required that he register the vehicle as a nonresident. Gallagher thereupon obtained a license in his own name as "registered owner," but no mention was made to the department, or appeared on the application or license, of the name of the legal owner. It was testified that the Arnold Company "would assume" from the license that the registered owner was the legal owner. However, it appears that, when said company negotiated the trade with Gallagher, he stated that he had exchanged a carload of oil for the Hudson car in Washington, but, when asked if he had a bill of sale, he frankly replied that he had none. No further inquiry was made as to the name of the person from whom he acquired the machine; nor did the Arnold Company attempt to ascertain whether or not Gallagher was then in fact its legal owner.

In *Parke v. Franciscus*, 194 Cal. 284, 228 P. 435, it was held that the claimant was estopped to recover possession of an automobile which his conditional vendee had transferred to an innocent purchaser. It there appeared that one McNabb delivered to Green the possession of a Buick automobile, under a conditional sale contract, and retained the registration certificate. Green thereafter sold the machine to Franciscus, and McNabb sold and assigned his contract to Parke and Brown, but did not give them a bill of sale, nor the registration certificate. Green and an agent of McNabb caused the car to be re-registered in the name of Franciscus, who thereafter received a certificate from the motor vehicle department, with no knowledge that Parke and Brown claimed any interest in the Buick. Failing to collect on said contract, the latter instituted a claim and delivery action against Franciscus, who answered, alleging that he was an innocent third party purchaser, for value, and that the plaintiffs had conferred upon McNabb and Green apparent title and

power of sale, and that therefore they were estopped from asserting title or right of possession as against the defendant, Franciscus. In affirming judgment for the defendant, the Supreme Court quoted section 8 of the Motor Vehicle Act of 1915, as amended by Acts 1919, p. 191, and then said:

"The nature of motor vehicle traffic requires that there be a more certain indicia of ownership than mere possession for the protection of the general public in case of accidents or violations of the law and to prevent fraud upon innocent purchasers. In order to effectuate this purpose registration and identification of motor vehicles is required. The 'legal owner' and the 'registered owner' upon the face of the certificate identify the vehicle. Upon the sale and transfer of 'ownership' in a vehicle already registered the act requires the transferor and transferee to enter into a joint statement of the transfer endorsed upon the reverse side of the certificate of registration. It is also provided that the *legal owner* sign such statement which shall be forwarded to the department and upon the payment of a fee the vehicle shall be registered in the name of the transferee. * * *

"Therefore, the failure of appellants to obtain the certificate of registration properly indorsed by themselves and McNabb and to forward it together with an application for re-registration to the department within ten days renders their title invalid as against the respondent.

"* * * There is no authority in this jurisdiction on the point whether a claimant in an action for claim and delivery must show compliance with the provisions of the Motor Vehicle Act. The cases in which the section is involved assume that the effect of the provision is to preclude the passage of title, but refuse to allow it to be invoked where the facts justify the application of estoppel. *Boles v. Stiles*, 188 Cal. 304 [204 P. 848]; *Chucovich v. San Francisco Securities Corp.*, 60 Cal. App. 700 (214 P. 263).

"* * * It is well settled that negligence, that is, careless and culpable conduct, is as matter of law equivalent to an intent to deceive and will satisfy the element of fraud necessary to an estoppel. *Venice v. Short Line Land Co.*, 180 Cal. 447 (181 P. 658). Of course, *the neglect, to operate as an estoppel, must be in respect to some duty owing to the party asserting it.*" (Italics ours.)

In the case at bar there was nothing in the nature of a bill of sale to Gallagher or signature of the legal owner upon the certificate which he held; nor did he sign as legal owner the certificate by means of which the machine was re-registered to Arnold. The sole indicia of ownership possessed by Gallagher or transferred by him was his nonresident certificate as "registered owner," to which respondent was a stranger. At that time the act required that:

"Upon a transfer of the title or interest of a legal owner or owners in or to a vehicle registered under the provisions of this act as hereinbefore required, the person or persons whose title or interest is to be transferred and the transferee shall write their signatures with pen

and ink upon the certificate of ownership issued for such vehicle, together with the address of the transferee, in the appropriate spaces provided upon the reverse of said certificate."

It was held in *Parke v. Franciscus*, supra, that the requirements of the act last quoted amounted to more than safeguards to the people at large, and that they must be observed, else the transfer of title is incomplete. But the only title or interest in the Hudson car which could be conveyed was in Bice, since Gallagher had but the possession, the right to which he had forfeited by his own fraud and flight. It should at once have become apparent to the Arnold Company that the space provided for signature of the legal owner was blank, yet even the admission of Gallagher that he had no bill of sale did not prompt them to seek the source of his asserted interest in the property. Hence Arnold, and in turn the Pacific Finance Corporation, as did Parke and Brown in the cited case, purchased and received merely a valueless form of conditional sale contract. And this, too, while Bice was in diligent search of his car, which refutes any contention that his "neglect" operated to estop him from claiming the machine through any duty that he owed appellants. Rider therefore acquired no interest from Arnold, since Gallagher, who had defaulted to Bice, could convey no interest to Arnold.

We conclude that the judgment appealed from should be affirmed, and it is so ordered.

We concur: FINLAYSON, P. J.; WORKS, J.

75 Cal. App. 623

PACIFIC HOME BLDG. REALTY CO. v. DAUGHERTY, Commissioner of Corporations. (Civ. 5031.)

(District Court of Appeal, Second District, Division 2, California. Dec. 17, 1925.)

1. Certiorari ☞49—Answer to petition not permissible.

Return is required to petition for writ of review; mere answer not being permissible.

2. Certiorari ☞42(8)—Filing demurrer proper. Filing demurrer to petition held proper.

3. Certiorari ☞70(5)—Question raised by demurrer decided, where judgment of dismissal rendered.

Where judgment of dismissal was rendered after hearing on petition for certiorari, questions which might have been determined on demurrer could be decided on appeal; such questions being presented on motion to dismiss.

4. Certiorari ☞28(3), 29—When writ will issue stated.

Writ of certiorari will issue where there is shown excess of jurisdiction by officer, board,

or tribunal whose action is sought to be reviewed, and never to correct mere error in exercise of jurisdiction legally existent.

5. Licenses ☞22—Commissioner of corporations will not be compelled by certiorari to issue permit for sale of contracts.

Where commissioner of corporations had granted permits as to sale of contracts by certain corporation, certiorari will not lie to compel issuance of permit for further sale; his action not being in excess of his jurisdiction, as set out in Corporate Securities Act, §§ 3 and 4, which is only question to be determined in such proceeding.

6. Licenses ☞22—Ground for refusal of permit by commissioner of corporations not considered in application for certiorari.

Where corporation sought certiorari to compel commissioner of corporations to issue additional permits to sell contracts after other former permits had been granted, question of whether any change had occurred which warranted refusal would not be considered by court; such decision being within jurisdiction conferred on commissioner by law.

Appeal from Superior Court, Los Angeles County; C. W. Guerin, Judge.

Certiorari by the Pacific Home Building Realty Company to review an order of Edwin M. Daugherty as Commissioner of Corporations. From an adverse judgment, petitioner appeals. Affirmed.

Andrews & Brooks, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney and John W. Maltman, Deputy Attys. Gen., for respondent.

WORKS, J. Petitioner made his application to the superior court for a writ of review against defendant. The writ issued, but judgment was rendered dismissing it, upon answer to the petition for the writ and after hearing thereon. Petitioner appeals from the judgment.

So far as its averments are material to a disposition of the appeal, the petition for the writ alleged that appellant is a corporation organized and existing under the laws of this state; that it was organized on November 18, 1922, for the purpose of engaging in the real estate and building business, and particularly for the purpose of operating under what is known as the Ritchey simplified and combined features plan in selling real estate and in the building of homes on the installment plan, under which the company sells to the home purchaser contracts in units of \$1,000, and agrees within a specified time, and upon a certain amount being paid in, to purchase for him a lot, and thereafter to build for him a home, expending for him practically the amount of money paid by him into the company, less a commission for its work; that prior to the incorporation of ap-

pellant those who organized it had incorporated an earlier corporation, with a capitalization of \$20,000, for the same purposes as those for which appellant was later organized; that this earlier corporation had applied to respondent, the commissioner of corporations, for a permit to sell its stock and to dispose of its contracts; that respondent ruled that the capital stock of the earlier corporation was too small, and that a new corporation must be formed with a capital of at least \$50,000, from which capital the new corporation would be required to set aside \$10,000 as a reserve fund, to be held subject to the written order of respondent; that thereafter, and in accordance with this ruling of respondent, appellant was organized; that thereafter, and on November 22, 1922, pursuant to application therefor, respondent issued to appellant a permit to sell its stock and \$20,000 worth of its contracts; that on May 10, 1923, respondent issued to appellant an amended permit directing the establishment of a reserve fund in accordance with the previous ruling of respondent and providing for its accumulation; that thereafter the reserve fund was duly accumulated; and that thereafter, and on October 8, 1923, respondent, upon application for leave to sell an additional \$1,000,000 worth of its contracts, issued to appellant a permit authorizing it to sell \$250,000 worth thereof; that at the time of the issuance of this latter permit an officer of the corporation department notified appellant that its plan was just and legal, but that it was advisable to see whether its contracts could be sold successfully to the public; and that, if they were so sold successfully, then a permit would be granted to sell the additional \$750,000 worth of contracts mentioned in the application; that, relying in good faith upon this representation, appellant proceeded immediately to employ, and did employ, trained salesmen, opened an office, and solicited business from the public, with the result that between October 11 and December 29, 1923, it had sold all the contracts authorized by respondent's two permits to be sold, and was unable to do further business until a supplemental permit was granted allowing it to proceed therewith; that on October 28, 1923, appellant filed with respondent its application for a permit to sell the remaining \$750,000 worth of its contracts specified in its previous application for leave to sell \$1,000,000 worth thereof; that on January 21, 1924, and without any further examination into appellant's business than such examination as was made in connection with appellant's earlier application, respondent refused the permit requested by the application of October 28, 1923; that respondent, through his investigation, and by the permit granted by him on November 22, 1922, and by the amended permit granted by him on October 8, 1923, found that the business carried on by appellant is not unfair, unjust, or in-

equitable; that appellant intends fairly and honestly to transact its business; and that the certificates it proposes to issue and the methods it proposes to use were not such as in the opinion of respondent would work a fraud upon the purchaser; that nothing has occurred since the granting of the amended permit above mentioned that would work a fraud upon the public, nor have any improper acts been committed by appellant or its officers; that the contract for which application to sell securities was made is the same contract that has been passed upon by respondent; and that appellant is in a solvent financial condition and able to carry out all of the agreements by it made in its contract with the home purchasers; and that, by reason of the refusal of respondent to grant the last permit applied for by appellant, it has been forced to discontinue its business, having completed the sale of all its securities under the permits previously granted by respondent, its business force is being disorganized, and great loss is threatened to its stockholders by its failure to be able to continue the business. Attached to the petition as exhibits were copies of the various papers mentioned in it. The prayer of the petition was that a writ of review issue commanding respondent to certify to the court all of the proceedings had in the matter of the application which respondent refused to grant, and that, upon a hearing, respondent be ordered to grant the permit requested.

[1-3] It is not necessary to state the nature of the return which respondent made to the writ, or to determine whether it was sufficient as a return, or was a mere answer, the latter not being permissible in a proceeding for a writ of review. 4 Cal Jur. tit. "Certiorari," § 65. The questions argued in the briefs all turn upon the sufficiency of the petition for the writ, and we shall determine them as if a demurrer to the petition had been interposed. Under the practice in such a proceeding the filing of demurrer is proper. Id. § 59. In fact, questions which may be determined on demurrer may also be presented on motion to dismiss the proceeding (Id.), and a judgment of dismissal was rendered here.

[4-6] The writ of review will issue where there is shown an excess of jurisdiction by the officer, board, or tribunal whose action is sought to be reviewed, and never to correct mere error in the exercise of a jurisdiction which is legally existent. Id. § 4. It is contended by appellant that respondent's lack of jurisdiction to make the assailed order is demonstrable on several grounds. The first of these is thus stated in appellant's brief:

"When the commissioner of corporations has rendered a decision, that a business is fair, just, and equitable, and that the intention is to fairly and honestly transact it, and that the securities to be issued and the methods to be used will not work a fraud upon the purchasers

thereof, and has issued a permit to a company to carry on its business and, relying upon the decision and permit, property rights have become involved, a contract has been made which cannot be broken by the state without cause."

In answering this contention little more is necessary than to state a part of the provisions of sections 3 and 4 of the Corporate Securities Act. Stats. 1917, p. 673; Deering's Gen. Laws, Ed. 1923, Act 3814. Section 3 provides:

"No company shall sell, * * * or offer for sale, negotiate for the sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner [of corporations] a permit authorizing it so to do. * * *"

A part of section 4 follows:

"Upon the filing of such application, it shall be the duty of the commissioner to examine it and the other papers and documents filed therewith, and he may, if he deems it advisable, make or have made a detailed examination, audit, and investigation of the applicant and its affairs. If he finds that the proposed plan of business of the applicant is not unfair, unjust, or inequitable, that it intends to fairly and honestly transact its business, and that the securities that it proposes to issue and the methods to be used by it in issuing or disposing of them are not such as, in his opinion, will work a fraud upon the purchaser thereof, the commissioner shall issue to the applicant a permit authorizing it to issue and dispose of securities, as therein provided, in this state, in such amounts and for such considerations and upon such terms and conditions as the commissioner may in said permit provide. Otherwise, he shall deny the application and refuse such permit and notify the applicant in writing of his decision. * * *"

It will be observed that appellant does not contend that a corporation need not apply to the commissioner, successively and as frequently as it may desire to sell blocks of its securities, for a separate permit to sell each block, or that the commissioner has not jurisdiction to receive such successive applications. The contention is, in effect, that he has jurisdiction to grant or refuse the first of such a chain of applications, but only to grant those which may follow the first. This is, without doubt, the contention made, considering solely the question of jurisdiction, and that is all we can consider in determining whether appellant was entitled to the writ of review. It will not do to say in such a proceeding as this that the commissioner may not refuse later permits, after granting the one first made, unless conditions affecting a disposition of the first application have later changed. It is for the commissioner to determine whether the conditions have changed. If he reaches an incorrect conclusion upon that question, it is obvious to us that his determination is merely error, and is not in excess of his jurisdiction. Plainly, he may reject applications which follow the first upon

some grounds, and whether those grounds exist is a matter for him alone, so far as the mere question of jurisdiction is concerned. No matter how flagrantly he may err upon such a point, he is utterly free from check or interference by means of the writ of review. If we traverse appellant's statement of its first point, it appears conclusively that our estimate of the situation is correct. After a corporation is granted a permit to make sale of its first block of securities, upon due ascertainment of its standing by the commissioner, its business may become unjust, unfair, and inequitable. Such a change might easily come about, without making a search for other possibilities, because the capitalization of the corporation is too small to sustain the burden of a further sale of its securities. Here, for instance, was a \$50,000 corporation which had already "sold" \$270,000 worth of its contracts, and was desirous of negotiating them to the further extent of \$750,000. Further, after its first application a corporation might abdicate its original intention fairly and honestly to transact its business. This could transpire, for instance, by its directorate falling under the control of a majority composed of persons of notorious dishonesty or want of capacity. It is not necessary to pursue the traverse further. The petition here alleges that none of these imagined changes had occurred in the present instance, but the averment boots nothing. Whether they had occurred was, again, for the commissioner to say, under the exercise of the jurisdiction conferred upon him by law, and the allegation that they had not occurred is not for us in such a proceeding as this. Appellant was not justified in arranging its business upon the supposition that further permits would be granted to it merely because some permits had already been granted. Necessarily, there must be a cessation of such grants somewhere, and the law has conferred jurisdiction upon the commissioner to determine when the point of saturation has been reached. Under all these circumstances it is plain to us that the state made no contract with appellant when the commissioner granted its earlier applications for leave to sell its securities.

Another point made by appellant is thus couched:

"The respondent exhausts his power after once deciding as to whether a business is unjust and cannot reverse his decision without cause. His action in ruling on this matter is a judicial decision and the rule of stare decisis and res adjudicata applies."

It is argued, also, under a separate head, that appellant's petition presented grounds for the granting of the writ of review. These points are answered by what we have said above.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

75 Cal. App. 672

PEOPLE v. INDRIERI. (Cr. 1292.)

(District Court of Appeal, First District, Division 2, California. Dec. 21, 1925.)

1. Embezzlement — 44(1).

Evidence *held* sufficient to sustain conviction of embezzlement.

2. Criminal law — 1169(1)—Admission of evidence that alleged embezzled money was not repaid not limited to time before arrest was not prejudicial, in absence of showing that jury misunderstood it.

Testimony that money alleged to have been embezzled by accused had never been paid, not in terms relating to what had been done after arrest of accused, *held* not prejudicial, in absence of showing that jury understood it as being addressed to time subsequent to arrest and of application to have testimony limited.

3. Criminal law — 1137(5)—Objection to evidence held waived by defendant later testifying to same facts.

Objection to testimony that accused had never paid money alleged to have been embezzled, not in terms relating to what had been done after arrest, *held* waived, where defendant later testified that he had not repaid money.

4. Criminal law — 755½.

Reading by trial court of Pen. Code, § 512, while instructing jury in embezzlement prosecution, *held* not contrary to constitutional inhibition to instructing concerning matters of fact.

5. Criminal law — 1172(7)—Altering Instruction as to owner's demand of money embezzled to include demand by others, left it more favorable to accused than he deserved.

In prosecution for embezzlement, where requested instruction required jury to find demand had been made for money alleged embezzled by its owner or his wife, addition of words or any one acting under their authority *held* not prejudicial error; altered instruction being more favorable than accused was entitled to, as proof of demand is not always necessary.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

A. F. Indrieri was convicted of embezzlement, and he appeals. Affirmed.

Penn Cummings and Thomas F. Lopez, both of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Charles A. Wetmore, Jr., Deputy Atty. Gen., for the People.

STURTEVANT, J. The defendant was convicted on a charge of embezzlement. He made a motion for a new trial, the motion was denied, and he has appealed from the judgment of conviction and the order denying him a new trial.

On the 28th day of January, 1925, and for some time prior thereto, Mr. J. O. Traber

was an attorney at law located at Fresno and engaged in the practice of the law at that place. The defendant was not an attorney at law admitted to practice in the courts of record of the state of California, but he had offices with Mr. Traber. As stated in testimony by the defendant, he was not a law partner of Mr. Traber, but he was a business partner. Mrs. Markese, a daughter of Mr. and Mrs. Zero, was one of the clerks in the office. The defendant is an Italian, but speaks the English language, as shown by his testimony contained in the transcript. Some time prior to the 28th day of January, 1925, an action was commenced in the superior court of Fresno county entitled Louis F. Ryan v. Jack Zero and Lucy Zero, His Wife. It was a suit in equity brought by the plaintiff to obtain a decree declaring terminated a certain contract for the purchase and sale of real property. Among other things, it was alleged in the complaint that the purchaser had made default in the payment of an installment of \$300 which had become due and payable under the terms of the contract. Shortly after the defendants in the civil action had been served with a copy of the summons and complaint, they called at the office where the defendant was located. Mr. Zero is an Italian, and so little informed that he testified through an interpreter. Mrs. Zero also testified through an interpreter. Christine Delicci, a daughter, and Mr. Simone, a friend, both speak English, and testified without the assistance of an interpreter. The conversations held in the lawyer's office were conducted at least in part in English and in part in Italian. Mrs. Delicci in those conversations acted as interpreter, as she understood what was said in the Italian language and also what was said in the English language. The negotiations included several calls at the office occupied by the defendant. Mrs. Delicci testified that on one occasion Mrs. Zero, Mr. and Mrs. Delicci, and Mr. Simone attended. There they found the defendant, Mr. Traber, and Mrs. Markese. All participated in the conversation that followed. At that time the defendant advised Mrs. Zero that it would be necessary to deposit in court \$300. Thereupon Mrs. Zero borrowed the money from Mr. Simone on a promissory note. Mr. Simone handed the money over to the defendant. The defendant put the money in his pocket. She also testified that this visit was brought about by reason of a message which the Zeros had received from the defendant on the previous day. Mrs. Delicci repeatedly stated that in reply to questions propounded to him the defendant said that he would take the money up to court "in just a minute," and "right in a minute." Mr. Delicci testified regarding the same conversation. He said that the defendant told Mr. Simone to give the Zeros \$300

so they could give it to the defendant to take up to court. Mr. Simone gave the money to Mrs. Zero, and she gave it to the defendant. The defendant said he was going up to court to deposit it "at that moment, just within five minutes of that time." The defendant said he wanted the money in cash. The witness asked the defendant if he wanted the witness to go with him to court, and the defendant said he would go alone. He said he would go himself in five minutes; he would deposit it. Several of the witnesses present stated that on each visit that the Zeros made to the office that Mr. Traber was present. Mr. Traber testified that he was present when Mr. and Mrs. Zero called regarding the defense of the civil case Ryan v. Zero. Among other things, he testified as follows:

"We had been employed in that case. Mr. Indrieri at that time was working in my office. He wasn't a lawyer, but he was working out of my office. He brought in the business, and I attended to it. In preparing our answer in that matter there was \$300 yet to be paid on the contract. At that time I was acting as the attorney for the Zeros, and am yet. After looking over the pleadings in the case, I told Mr. Indrieri that it would be necessary in order that we could win out in the case that \$300 be procured by the Zeros and turned over to us so that we could deposit that with the clerk of the superior court in the case of Ryan v. Zero. At that time I told Indrieri to have the Zeros come into the office and arrange the payment of the money. On the 28th or 29th they came in. After some talk in Italian, the defendant told me that Mr. Simone was willing to loan these people the \$300 to deposit with the court. Later Mr. Simone drew his check for \$300, and the defendant said, 'No, I don't want that, I want cash money.' Thereupon Mr. Simone and another gentleman went out and brought back \$300 in currency, and placed it in front of Indrieri. He took out his billfolder, and put the \$300 into it. February 2, 1925, the defendant told me that he was going to Los Angeles to bring his wife and children up to Fresno. During the afternoon of that day I said, 'Well, now Alec,' that is what I called him 'I got to appear in this case for the Zeros before you will get back, and I have got to deposit that with the clerk.' The defendant said, 'Well, I will be back by Thursday, and you will not have any use for that money before Thursday, and then I can pay it to you.' He didn't give me the money. The answer was due on the 2d of February, but I had gotten two days' extension to the 4th day of February. I never saw Mr. Indrieri after that day until to-day. I never got the money from him."

On cross-examination he testified:

"I never deposited the money in court because it never came into my hands. Mr. Indrieri took it. The answer was filed on the 11th of February."

On the evening of the 2d day of February the defendant left Fresno for Los Angeles, and thereafter, on the 23d day of February, he was arrested in Kansas City. He testified

that at that time he was on his way to New York City. There is no evidence in the record that in the meantime he communicated with Mr. and Mrs. Zero as to his whereabouts. He testified that he deposited the money January 29, 1923, in the Pacific Southwest Bank in his own name, and that at the time he was arrested he had \$1,600 or \$1,700 in his pocket, and at the date of the trial he had \$300 to pay into court in the case of Ryan v. Zero when he received a court order to do so.

[1] The appellant contends that the evidence was wholly insufficient to show that appellant appropriated to his own use any of the money deposited with him by the Zeros. In that connection the appellant contends that the record does not show facts constituting an actual misappropriation, and that it does not show a constructive misappropriation because there is no evidence of a demand made on the defendant by anybody, unless by Mr. Traber, and that the conversation delineated by Mr. Traber did not constitute a demand. Furthermore the defendant was the authorized custodian of the funds, and Mr. Traber was not, nor was Mr. Traber the attorney, and, consequently, he was not authorized to make the demand. Conceding that there is some evidence in the record which would support the appellant in making these respective contentions, nevertheless, if the jury believed the evidence which we have recited, the jury was entitled to bring in a verdict against the appellant. If, as claimed by the appellant, the defendant was the custodian of the funds, the acts done and performed by the defendant thereafter in taking the money out of the state would support the conclusion of the jury that such act on the part of the defendant was an embezzlement. *People v. Fisher*, 16 Cal. App. 271, 275, 116 P. 688. Moreover, there was some evidence in the record to the effect that Mr. Traber was the attorney, and that the defendant was merely an associate in business with Mr. Traber. Under this theory of the evidence Mr. Traber was entitled to make a demand, and the conversation delineated by him was such that the jury was entitled to treat that conversation as a demand and a neglect or refusal to comply therewith.

[2, 3] The second point made by the appellant is that certain evidence was received erroneously over the objection and exception of the appellant. During the presentation of the case for the prosecution Mrs. Zero, Mr. Zero and the county clerk were each asked if the money had been paid. Each replied that it had not been. The question as addressed to each witness was general, and did not in terms relate to what had been done after the arrest of the defendant. The objection interposed was general. The defense made no application to have the testimony limited to the time transpiring between the date that the defendant received the money and the date

of his arrest. No objection was made on the ground that the question was too broad or that it extended to any facts that had occurred since the date of the arrest. There is nothing to show that the jury understood the testimony as being addressed to a time subsequent to the arrest of the defendant. Even though the jury did so understand it, we think the point was waived. Later, after the prosecution had closed its case, the defendant took the stand. One of the first questions addressed to him by his attorney was:

"Q. In the action of Ryan v. Zero, have you ever deposited that money in court? A. I did not."

[4, 5] In instructing the jury, the trial court read section 512 of the Penal Code. The appellant now claims that in so doing the trial court committed error, as the reading had the effect of instructing them concerning matters of fact, contrary to the constitutional inhibition. This contention is not clear. On the contrary, the instruction was a part of the law of this state, and did not purport to state facts, and no error was committed by reading it to the jury. The appellant asked an instruction, to which the trial court added the language which we have italicized, and then gave it to the jury:

"You are instructed that, if no proof has been introduced of a demand having been made upon the defendant by Mr. Jack Zero, or his wife, or any one acting under their authority, for the return of the \$300, then you will acquit the defendant."

There was no error in altering the instruction. After it was altered, the instruction was more favorable to the appellant than the appellant was entitled to. It implied that proof of a demand is always necessary in every embezzlement case. That is not the law. *People v. Ward*, 134 Cal. 301, 66 P. 372; *Ex parte Vice*, 5 Cal. App. 153, 156, 157, 89 P. 983.

The judgment and order are affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

75 Cal. App. 499

PEOPLE v. BOGGESS. (Cr. 858.)

(District Court of Appeal, Third District, California. Dec. 10, 1925. Hearing Denied by Supreme Court Feb. 8, 1926.)

1. Licenses $\S$ 42(5) — Evidence sufficient for jury on whether corporation did make amount represented within period that accused had "absolute control."

In prosecution for violation of the Corporate Securities Act, $\S$ 14, by representing in application for permit to issue securities that, while accused had absolute charge, mine netted

certain amount, evidence as to whether mine did net such an amount held for jury; "absolute control" conveying the idea of ability to direct and control operation of mine as accused thought best, without let or hindrance or direction by any other person.

2. Criminal law $\S$ 1044—Improper evidence as to amount produced by quicksilver mines in county not prejudicial in prosecution for violation of Corporate Securities Act.

In prosecution, under Corporate Securities Act, $\S$ 14, for making false statements in application for permit to issue securities as to profits of quicksilver mine, admission of evidence of amount of quicksilver produced in county held not prejudicial error, in absence of motion to strike, in view of testimony that mine in question was principal producer in county.

3. Licenses $\S$ 42(4)—Admission of sheriff's deed to quicksilver mine erroneous in prosecution for violation of Corporate Securities Act.

In prosecution, under Corporate Securities Act, $\S$ 14, for making false statement, in application for permit to issue securities, that operations of quicksilver mine netted certain amount, admission of a sheriff's deed to mine for relatively small sum held error.

4. Criminal law $\S$ 1166½(12) — Erroneous statement of court not prejudicial in prosecution under Corporate Securities Act when proper instruction given.

In prosecution under Corporate Securities Act, $\S$ 14, for making false statements, in application for permit to issue securities, that mine netted specified sum at certain market price, erroneous statement of court in overruling objection to evidence of market price that part of statement might be shown to be false held not prejudicial, where question was withdrawn and proper instruction given jury.

5. Criminal law $\S$ 435 — Private memorandum as to amount of quicksilver purchased held improperly admitted in prosecution under Corporate Securities Act.

In prosecution, under Corporate Securities Act, $\S$ 14, for making false statement as to profits of quicksilver mine, private memorandum of one purchasing from mine operated by accused as to amount purchased held inadmissible.

6. Criminal law $\S$ 1169(1)—Licenses $\S$ 40—Cost of furnace not deductible as operating expense in determining falsity of statement under Corporate Securities Act; admission of evidence of cost of furnace in prosecution under Securities Act held prejudicial error.

In determining whether statement, in application for permit to issue securities, as to profits of quicksilver mine was false, cost of furnace cannot be deducted as operating expense, and admission of evidence thereof held prejudicial error, requiring reversal.

7. Criminal law $\S$ 807(1)—Refusal to instruct that application for permit to issue securities must be considered in entirety held erroneous.

In prosecution, under Corporate Securities Act, $\S$ 14, for making false statements, in ap-

plication for permit to issue securities, as to profits of quicksilver mine, refusal of instructions to consider all of the testimony and all the statements of accused in application in determining whether he intended a misrepresentation, as argumentative, *held* improper.

Appeal from Superior Court Sacramento County; Charles O. Busick, Judge.

R. A. Boggess was convicted of violating the Corporate Securities Act, and he appeals. Reversed and remanded for new trial.

See, also, 228 P. 448, 194 Cal. 212.

E. S. Bell, of Oakland, and George E. Foote, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. This is an appeal by the defendant from a judgment of conviction for an alleged violation of section 14 of the Corporate Securities Act (Stats. 1917, p. 680). The information filed against the defendant charges—

"that the said R. A. Boggess, on the ——— day of April, A. D. 1920, in the said county of Sacramento, in the said state of California, and before the filing of this amended information, did then and there willfully and unlawfully and feloniously file and cause to be filed in the office of the commissioner of corporations of the state of California an application of Alpha Quicksilver Company, a corporation, for a permit to issue securities; that in said application was contained and embodied the following statement concerning the property held by such company: 'During the time Boggess had absolute charge of the operations at the mine in 1900—1 and 2, he made it pay net over \$7,000 per month, net over all mine operating expenses, quicksilver selling at an average of \$45.00 per flask'; that said statement, so contained and embodied in said application as aforesaid, is and was false, and that said defendant so made said statement in said application with knowledge of its falsity; that at the time said statement was filed, or caused to be filed as aforesaid, the said R. A. Boggess was an officer, agent, and employee, of said Alpha Quicksilver Company, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California."

A prior trial of this cause was had resulting in a judgment of conviction, which judgment was upon appeal reversed by the Supreme Court of this state. *People v. Boggess*, 194 Cal. 212, 228 P. 448. As the facts presented upon this appeal are in most particulars identical with those involved in the former appeal, we may refer to the recital of the facts contained in the opinion of the Supreme Court, and also quote therefrom.

As to the meaning of the charge contained in the information, there is a wide divergence of the claims made by the prosecution and the interpretation thereof insisted upon by the defendant. The theory of the prosecu-

tion appears to be that, if during the period of time mentioned the net profits of the mine for any one month was shown to be less than \$7,000 net over operating expenses, then and in that case the falsity of the language set forth in the information was established. This theory is succinctly set forth in respondent's brief as follows:

"In regard to the measure of proof sufficient to support the verdict in this case as to the false statements, if we direct our attention to the first year mentioned (1900) a showing that as to any one of the months thereof there was not a net production of \$7,000 in value would be and is sufficient to support the verdict."

[1] On behalf of the appellant, it was insisted in the trial below and upon appeal here that the quoted language set forth in the information, when taken in connection with other statements contained in the application, does not admit of any such construction, and that the period of time embraced in the quoted language must be restricted to the months when the defendant had absolute charge and not to all the months included within the years referred to, and also, that the whole statement, when read together, shows that the defendant did not intend to convey the idea that for each and every month of the period of time in question the mine produced \$7,000 net. The Supreme Court, in its opinion referring to this matter, states the substance thereof as follows:

"* * * That 'in' the year 1898-99, when the mine was acquired by him, he had sole charge of the 'construction and development' work, and 'in 1900' he put it on a net paying basis of \$7,000 net per month. Of course, the words and phrases employed in the statement, in its entirety, must be taken in their ordinary meaning, and so taken the word 'in,' as used in the application with reference to the operation of the mine in the year 1900, may be said to indicate 'inclusion within the limits of the time expressed * * * "In" is * * * common in the sense of "during the course of." Webster's New International Dictionary. Therefore that portion of the application may be read and understood as meaning that he put the mine on a net paying basis of \$7,000 per month some time during the course of the year 1900, rather than during the entire period of that year."

The evidence in the case at bar also sets forth the same typographical errors in the statement submitted by the defendant to the corporation commissioner as are commented upon in the opinion of the Supreme Court, to which we have referred. The evidence upon which the prosecution relied in the former case is practically the same as that relied upon on this trial. We quote again from the opinion of the Supreme Court:

"The case of the prosecution consisted largely, if not entirely, of evidence as to what was the yearly production of the mine, from which its monthly production was arrived at by dividing the total production of the year by the number

of months in the year. Part of the evidence of the prosecution, as to the production of the mine, was embodied in a bulletin of the state mining bureau containing statistics showing the quicksilver production of the state as a whole for the years 1900, 1901 and 1902, together with statistics of the quicksilver production of the individual counties in those years. The production shown by these statistics was a yearly production, and not the production per month. The evidence shows that the statistics in this bulletin were compiled from the reports of the various mine owners for each year as to the quantity and value of the production. The statistics for Lake county, where the mine in question is located, shows a production in 1900 of 3,165 flasks, valued at \$127,345; in 1901 of 4,395 flasks, valued at \$211,324, and in 1902 of 3,611 flasks, valued at \$161,568. These statistics did not purport to show the individual production of any mine situated in Lake county. It was shown in evidence, however, that the statistics in this bulletin were based in part upon a report sent in by the defendant, as to the production of the mine in question in the years 1900 and 1901. This report showed a production of the mine in question for the entire year 1900 to be 1,300 flasks, without stating the value thereof. It was the defendant's claim that, in the early part of the year 1900, while he was using an 8-ton furnace, the production was, on account of the limited capacity of the furnace, much lower than at a later period of the same year, when he was using a 40-ton furnace, and that he put the mine upon a net paying basis of \$7,000 net per month after the installation of the larger furnace in September, 1900. The report for the year 1901, during which time the larger furnace was in operation, shows a production of 2,000 flasks, worth \$100,000."

As to the cost of production, the evidence appears to be the same in both cases, and we hereby adopt the following statement contained in the opinion of the Supreme Court in the former case as applicable to this, to wit:

"The evidence offered by the prosecution, as to the cost of the production of quicksilver at the mine in question, which, of course, was necessary in order to determine the net profit, consisted in a large measure of general estimates to the effect that the average cost of production was about \$30 per flask, throughout the quicksilver mines of the state, but this evidence did not relate to, nor purport to bear directly upon the actual cost of labor, fuel, and other operating expenses of the mine in question. It was an undisputed fact in the case, that the cost of quicksilver production varies greatly at different mines throughout the state, and to such an extent that the cost of production at one mine may be twice as great as at another mine. True, there is other evidence, consisting of general estimates of the cost of production at the mine in question, based upon the probable number of men employed, the probable amount of cordage consumed as fuel, and a general assumption of a sum of money to be added for necessary development work. But it was shown by the testimony of several witnesses, testifying without contradiction upon behalf of the defendant, that the actual number of cords

of wood consumed as fuel in the production of quicksilver at the mine in question from September, 1900, to May, 1901, was only two cords per day, which amount is only one-third of the number of cords estimated by the witnesses for the prosecution to be necessary to the operation of the furnace. There is also evidence, uncontradicted, on behalf of the defendant that many men employed at the mine received but \$2.50 per day, whereas the prosecution's witness estimated the probable cost of labor at the mine at \$3 per day for all of the men employed. There was further evidence to the effect that the mine was comparatively dry, very little timbering was necessary, and that it was favorably located for cheap mining, in that it was not far removed from rail transportation; that wood for fuel grew in abundance, and that there was plenty of water for domestic purposes, steam, etc. Upon behalf of the defendant, there was offered and received in evidence an excerpt from 'Mineral Resources of the United States, Department of Interior, United States Geological Survey,' which stated that, 'under ordinary circumstances, quicksilver could be produced in California at a cost of \$3 per ton or ore mined and smelted.' And the defendant himself testified that the maximum cost of producing quicksilver at the mine in question, under the conditions existing there, was \$3 per ton of ore, and that the cost of production per flask of quicksilver was but from \$10 to \$12 per flask.

"In short, there is direct and positive evidence in the record adduced upon behalf of the defendant tending to show that during several months of the years designated in the application, the mine did actually pay over \$7,000 net per month over operating expenses. On the other hand, there is evidence consisting of general estimates tending to show that, during the said years, the mine did not pay \$7,000 net per month. It is apparent, from a perusal of the evidence adduced upon the entire case, that the guilt or innocence of the defendant hinged upon the solution of a perplexing problem, which necessarily depended in a large measure upon a close consideration of a hypothetical situation developed by the evidence of the prosecution, as against an actual situation developed by the direct evidence of the defense."

In corroboration of the claims of the defendant of the production of the mine from September, 1900, to 1901, the testimony of the witness Bryant is to the effect that he hauled on an average during that period of time from 280 to 300 flasks of quicksilver per month. This testimony is also corroborated by the testimony of the witnesses Buchanan and Dunfield. The witness Dunfield was in charge of the condenser at the mine for a period of 6 months commencing in the fall of 1900. This witness testified that there was a large run of quicksilver during that period of time. The testimony of the witness Roeth, referred to in the opinion of the Supreme Court, showing a production of 273 flasks in the month of November and 304 flasks in the month of December, 1900, and 257 flasks in January, 265 flasks in February, 255 flasks in March, and 188 flasks in May was excluded upon the second trial, for reasons which

we will hereafter consider, and is not taken into account in considering the testimony showing the production of the Abbott mine at any time during the period when the defendant admits he was in absolute charge.

The defendant testified that he intended to refer only to the time when he had absolute charge of the mine, and also testified to a considerable extent as to the period of time during the years mentioned when he did have absolute charge. A considerable portion of appellant's brief is devoted to the subject of absolute charge and what is meant by that term. We do not think it necessary to review this argument, as the term "absolute" has a clear and definite meaning, and would carry with it the idea of being able to direct and control the operation of the mine as the defendant thought best, without let or hindrance or direction by any other person and that he was free to do what he thought best in conducting mining operations. The statement from which the alleged false extract is taken contains references to other records and to other statements made by the defendant more than 20 years prior to the application for permit to sell stock involved in this action, from which it appears that the defendant at that period of time made the statement that the mine in question had shown a profit of more than \$7,000 per month for a considerable period of time, and, if this statement made at that time is correct, and the defendant upon this trial testified that it is true, it would appear to be clearly established that for some several months the mine was actually producing the amount claimed by the defendant. People's Exhibit No. 4, being a report made by the defendant to the California State Mining Bureau of February 23, 1901, reads:

"The Abbott mine, however, produced about 1,300 flasks during the year 1900 and as an additional furnace was installed in that year, we are now producing at the rate of 3,600 flasks a year."

The defendant also testified that in 1900, after the 40-ton furnace was put in operation during the months of November and December, the mine produced 600 flasks. This would leave 700 flasks as the production of the 8-ton furnace from January 1 to November 1 of the year 1900. The defendant further testified that from November 1, 1900, to May 1, 1901, the mine produced on an average of 270 flasks per month. It is argued by counsel for appellant that there is not a scintilla of evidence contradicting this testimony. Our attention has not been called to any, and we have not found any, such evidence.

For the year 1901 the state mining bureau shows a report of the production of the Abbott mine of 2,000 flasks. To offset this testimony, the defendant introduced testimony to the effect that the ownership of the mine

was changed on May 4, 1901, and that the report did not cover the entire year, only the period of time that elapsed after the change of ownership. The testimony of the witness Ansel, introduced by the prosecution, was to the effect that the cleanups worked out about 12 pounds of quicksilver per ton of the ore handled by the 40-ton furnace during a period of about 18 months. The testimony of the witness Forstner, also a witness for the prosecution, was to the effect that the ore ran from 50 to 16 pounds of quicksilver per ton, which would average about 8 flasks of quicksilver per day. This testimony has been erroneously quoted as 5 or 6 flasks per day.

If believed by the jury, there is plenty of testimony in this case, as shown by the records referred to, in the exhibits offered by the prosecution, and the testimony on the part of the defendant, to establish the fact that for a considerable period of time during the years mentioned in the statement alleged to be false that the Abbott mine was actually producing the quantity of quicksilver claimed by the defendant. This made it important to inquire into and determine the cost of producing quicksilver. It appears from the report of the United States Geological Survey introduced as one of the exhibits in this case that, under ordinary conditions during 1901, quicksilver was produced in California at a cost of \$3 per ton of ore mined and smelted. This the defendant claims is corroborative of his own testimony. The witness Gibson, another witness for the prosecution, testified that he produced quicksilver from the Abbott mine, the one operated by the defendant, at a cost of \$10 a flask when he was operating the same with an 8-ton furnace. This is corroborative of the testimony of the defendant. There was also testimony introduced by the prosecution that the cost of producing quicksilver was in the neighborhood of \$30 or \$35 a flask, which, if true, might show that the Abbott mine never produced \$7,000 net during any month of the period when the defendant was in absolute charge. The testimony was also conflicting as to the number of men employed, running all the way from 32 to 60 in number. In this connection it may be well to state that the testimony of a large number of witnesses was based solely upon recollection of occurrences taking place more than 20 years prior to the date of the day on which they were giving testimony. The testimony as to the number of men employed and as to all the items of cost entering into the operation of the mine, of the various witnesses, was based upon statements, and not upon actual experiences in operating either the Abbott mine, or any other quicksilver mine, during the time covered by the charge contained in the information. The quantity of quicksilver produced by the mine as shown by the reports and the testimony of the defendant, and of the employees who handled the quick-

silver, as we have stated, if believed by the jury, would support the defendant's assertions. Based upon the evidence introduced in the case which supports the defendant's theory, the following tables contain a summary of production costs, based upon the number of men estimated to be employed during a 6-months' period of time the defendant claims to have had absolute charge of the operations of the Abbott mine.

Recapitulation A					
Men on Pay Roll.	Amount Pay Roll.	Add 55% All Other Expenses.	Total Expenses.	270 fl. at \$45 Selling Price.	Net Monthly Profit.
32	\$1898.00	\$1044.41	\$2942.41	\$12150.00	\$9207.59
35	2067.50	1137.12	3204.62	12150.00	8945.38
40	2298.00	1263.90	3561.90	12150.00	8588.10
45	2555.50	1405.52	3961.02	12150.00	8188.98
50	2798.00	1538.90	4336.90	12150.00	7813.10
55	3054.50	1679.97	4734.47	12150.00	7415.53
60	3298.00	1830.90	5111.90	12150.00	7038.10

Recapitulation B					
Men on Pay Roll.	Amount Pay Roll.	Add 66% All Other Expenses.	Total Expenses.	270 fl. at \$45 Selling Price.	Net Monthly Profit.
32	\$1898.00	\$1265.38	\$3163.38	\$12150.00	\$8986.67
35	2067.50	1378.34	3445.84	12150.00	8704.16
40	2298.00	1532.00	3830.00	12150.00	8320.00
45	2555.50	1703.66	4259.16	12150.00	7890.84
50	2798.00	1865.32	4663.32	12150.00	7436.68
55	3054.50	2036.32	5090.82	12150.00	7059.18

We are not unmindful of the fact that it is for the jury to determine both the accuracy or nonaccuracy of the figures submitted to it for consideration and of the truth or falsity of the testimony of the various witnesses. We have simply set forth the testimony showing that the guilt or innocence of the defendant rests upon mathematical calculations based upon testimony which, in turn, rests upon estimates as we have heretofore stated, and thus necessitates an examination of the rulings of the court in the admission and exclusion of testimony during the course of the trial and also alleged errors in the refusal to give requested instructions to the jury by the court.

[2] The first assignment of error in the admission of testimony is that of overruling the objection of the defendant to the testimony of the witness Bradley, founded upon a book entitled, "Quicksilver Resources of California, Bulletin 78, Covering the Production of Quicksilver of the County of Lake for the Years 1900, 1901, and 1902." This testimony was to the effect that in the year 1900 there was produced in Lake county 3,165 flasks; in 1901 4,395 flasks; and in 1902, 3,611 flasks. It does not appear that any effort was made to show the production of the Abbott mine further than the Abbott mine was the principal producer of Lake county for those years. We do not find in the admission

of this testimony any prejudicial error that would justify a reversal of this cause. The evidence was not connected with the Abbott mine, and, no effort having been made to connect it with the Abbott mine other than as above stated, the defendant should have moved the court to strike out the testimony. This not having been done, and the testimony as it stood showing a larger production for Lake county than that claimed for the Abbott mine, and also that the Abbott mine was the principal producer, it is a matter of argument to the jury as to whether the testimony was or was not as favorable to the defense as to the prosecution. This being true, we cannot say that its admission, even though erroneous, amounts to prejudicial error.

[3] In assignment of error No. 4 we think the record presents a more serious objection. Over the objection of the defendant, the prosecution was permitted to introduce a number of deeds relating to the title of the Abbott mine. There does not appear to have been any issue whatever raised as to the title to the Abbott mine and where it rested at the time the defendant filed his application with the corporation commissioner, as alleged in the information. The record of the deeds concerning the devolution of the title to the Abbott mine shows that in March, 1915, based upon an execution sale some time previously, the Abbott mine was conveyed by the sheriff of Lake county to one Willson for the sum of \$2,500. In answer to the objection of the defendant, counsel for the prosecution stated:

"Now, by tracing it on down, to show the title to the Alpha Quicksilver Mining Company, I also show by putting in that evidence—show that Mr. Boggess was thoroughly acquainted and conversant with this land in question, and has been for many years, knowing, and has been in charge."

Opposing this, the defendant's counsel queried:

"Wherein does the fact that McKelley, sheriff of Lake county, made a deed to the man Willson, show any intent in years afterwards? How is the defendant to be charged by the fact that the property was sold to Willson in 1909 or 1908, and, subsequently, Boggess bought it from Willson? Where does that go to prove any knowledge on the part of Boggess—when he bought it from Willson, show any knowledge—that he did not produce \$7,000 in 1901 and 1902?"

The objection was overruled; the court stating that it was not admitted to show any judgment. The defense counsel then asked:

"Do I understand, now, the court, that the introduction of these deeds is limited to the purpose of showing the title, and not for any other purpose—It is limited to that?"

"The Court: Well, any purposes they are material for, not limiting the purpose of it. They are admissible to show the title. Now, then, if the jury, from that, draws the inference of knowledge of the conditions there by the de-

fendant, they are entitled to draw such inference as the instrument itself justifies them in drawing, but it is not admitted for the purpose of showing the judgment. It is not material for the purpose of showing the judgment at all."

Further deeds were introduced showing that the defendant subsequently bought the property for the sum of \$6,500. There was no question made at any time that the defendant was not familiar with the property, and the fact that the sheriff's deed showed a consideration of only \$2,500 paid by the purchaser upon execution should not have been admitted for the purpose of allowing the jury to draw an inference that a statement of the production of the mine at a period some 14 or 15 years anterior to its execution, and before operations on the mine had ceased and the premises closed down, was false.

[4] Under assignment of error No. 8, the transcript shows that the witness Forstner was asked as to the average market price of quicksilver during the years 1901 and 1902 and 1903, which question was objected to by the defendant on the ground that it was immaterial, irrelevant, and incompetent, and the court, in overruling the objection, stated:

"In the statement it is charged that during the time Boggess had absolute charge himself in 1900, 1901, and 1902, he made it pay 'net' over the mine operating expenses; quicksilver selling at an average of \$45 per flask, \$7,000 per month. Now, that is the whole statement he is charged with as having been false, and they have a right to show what portion of it is false or if any of it is false."

Under the charge contained in the information, the ruling was erroneous, as the defendant is not charged with having asserted that quicksilver was selling at \$45 a flask, but that the mine netted a certain sum when quicksilver was selling at a certain price, but the record shows that the question was afterwards withdrawn, and, as a proper instruction was afterwards given by the court to the jury, we do not think that the erroneous statement of the court made to counsel when overruling the objection could have been seriously considered by the jury, or, at least, to the extent of influencing prejudicial action on their part. We therefore confine ourselves simply to the statement that the remarks of the court did not correctly interpret the charge.

[5] The next assignment of error which we will consider is that of the exclusion of the testimony of the witness Roeth. The transcript shows that the witness Roeth was a member of a quicksilver company that purchased quicksilver produced by the Abbott mine during the years 1900, 1901, and 1902; that it was the custom or practice of the quicksilver purchasing company to make out monthly settlement sheets, upon which settlements were made and payments made to the companies from which quicksilver had been

purchased; that these settlement sheets were by the secretary of the purchasing company submitted to the witness Roeth, who made a private memorandum of the quantity of quicksilver purchased and the sums paid therefor. It appears that the records of the company engaged in purchasing quicksilver had been lost or destroyed, and upon this showing the defense sought to introduce the private memorandum made by the witness Roeth. No authority has been called to our attention supporting the introduction of such testimony, and we think it objectionable on the ground that private memorandum was of no more effect or validity than would have been a statement by the witness Roeth that the secretary of the company had told him of the monthly production of the Abbott mine and of the sum of money paid therefor.

[6] The next objection which we deem it necessary to consider is that relating to the items of expenditure permitted by the court to go to the jury in order to determine the operating expenses. As heretofore stated, a 40-ton furnace was installed upon the premises and put in operation late in the fall of 1900. When the defendant was on the stand, the defendant was asked the following question:

"Well now, can you give us some idea of what it cost to construct this furnace?"

To which question the defendant objected on the ground that it was irrelevant, incompetent, and immaterial. The court overruled the objection, and, in so doing, stated as follows:

"The cost of putting the tunnel there, and the tunnel is there yet. You offered evidence of that, showing the cost of development. That is there yet. * * * Part of the cost of operating the mine, and it would go to show whether there was a profit or not, what they paid out for the operating of the mine, and what they sold their ores for. That was just as much a part of the operating cost as the picks and shovels. It would be necessary to have the furnace; it was necessary to have the furnace, apparently, to operate the mine. They built it, and you have offered the evidence of the cost of the fuse, and caps, and powder, and wood."

We think it is almost axiomatic that the cost of building a furnace cannot under any conditions be considered as an operating expense. As said by counsel for appellant, the ruling of the court simply left it to the jury to say that, if the appellant expended \$60,000 in 1900 in building a furnace, it should be considered as a part of the operating expenses of the mine. This, of course, would exclude the possibility of the mine having produced the sum of \$7,000 net over and above operating expenses during the period of time the defendant admits he had absolute charge of the premises. A somewhat similar question was presented to the Supreme Court

of Massachusetts in *Eastern Railroad Co., etc., v. Rogers*, 124 Mass. 527, where it was held that interest on money borrowed to build an uncompleted portion of the leased lines of the railroad could not be considered as an operating expense. In the case of *Union Hollywood Water Co. v. City of Los Angeles*, 184 Cal. 535, 195 P. 55, a somewhat similar question was also presented for determination. It was there contended that receipts of bonuses in the sum of \$14,877 paid by owners of tracts of land proposing to subdivide the same for the purpose of having the company extend its pipes to such subdivisions should be considered as a part of the revenue from the operation of the plant by the water company. The court said:

"We cannot agree with this contention. The mains laid in the proposed subdivisions were clearly a part of the plant of the plaintiff, and the money expended in so doing was a part of its capital investment. The same thing is true of the pipes laid from the mains along the streets to the property line of the consumers and of the meters attached thereto. They were a necessary part of the water system, and the expenses thereof were a part of the capital investment and went to make up the total cost of the plant."

The furnace under consideration was a necessary part of the capital investment, and, just as said in the *Hollywood Case*, necessarily became a part of the capital investment, and constituted no part of the operating expenses of the *Abbott mine*. It is not necessary to say that the mine could not be operated without a furnace any more than it would be to say that railroad trains cannot be operated until a railroad track is first built, but it does not follow that the cost of running a train involves a capital investment in the building of a railroad line. It may be also said that the question of dividends or profits to the owners of the plant in question is an entirely different proposition from operating expenses. For, while the receipts may exceed the operating expenses, if the capital invested is large, the dividends available might be very small, even though the operating receipts considerably exceed the operating expenses. The jury, as we have said, were given an item of capital expenditure in the sum of \$60,000 (the evidence showing that sum as the approximate cost of the furnace), which should have been excluded from their consideration, and from the fact, as we have heretofore shown, there was evidence which, if believed by the jury, entitled the defendant to a verdict, the conclusion is unavoidable that prejudicial error resulted from the admission of this testimony.

[7] It is also urged that the court erred in refusing to give to the jury the following instruction requested by the defendant:

"I instruct you that in arriving at a verdict in this case you should take into consideration with all the other testimony all of the statements contained under the heading of 'General Statements' in the letter of January 29, 1920, and all of said statements should be read together in arriving at the meaning and purpose and intent of the defendant in making the alleged false statement charged in this case, and I further instruct you that, after a careful consideration of all of the statements contained in said letter and all of the other testimony offered in the case, unless you find beyond a reasonable doubt and a moral certainty that defendant is guilty of said charge, your verdict must be not guilty. Indorsed: 'Argumentative; refused.'"

We think that the instruction is not argumentative, and, while ordinarily instructions which tend to give undue prominence to any piece of testimony should not be given, yet in this case, where the prosecution relies upon an extract taken from a lengthy statement in a letter written by the defendant, which letter, as we have shown, contains other matters explanatory of the alleged false statement, we think the defendant was entitled to have the jury instructed to consider the whole statement. The fact that there was a sharp divergence in the interpretation given by the prosecution and the defense to the extract taken from the defendant's statement, and the further fact that the language alleged to be false is ambiguous as to whether it does or does not limit the period of time to the months the defendant was in absolute charge, and also the fact as to whether the defendant intended to include each and every month as producing \$7,000 net, or only for a certain period of time, was to be determined by the jury, entitled the defendant to the instruction asked for. In the determination of what was meant by the defendant in the quoted extract, all the statements contained in the letter of which it was a part should be considered. While we think the instruction should have been given, we do not need to rule that its refusal constituted prejudicial error necessitating reversal, because for other reasons stated herein such order must be made.

The appellant assigns numerous remarks by the court during the course of the trial as prejudicial error, but, on account of the conclusions to which we have already arrived, it seems unnecessary to consider such assignments of error.

The question of the statute of limitations presented by the appellant has been definitely adjudicated by the Supreme Court in the case of *Doble v. Superior Court*, 241 P. 852, and need not be considered herein.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: FINCH, P. J.; HART, J.

75 Cal. App. 418

PEOPLE v. McDERMOTT. (Cr. 1303.)

(District Court of Appeal, Second District, Division 2, California. Dec. 22, 1925. Rehearing Denied Jan. 21, 1926. Hearing Denied by Supreme Court Feb. 18, 1926.)

1. Criminal law ⚡823(12)—**Erroneous Instruction as to accomplices not prejudicial, in view of further instructions.**

In robbery prosecution, where uncontradicted testimony showed that the people's witness was an accomplice, error in instruction, that jury was to determine whether witness was an accomplice, *held* not prejudicial to defendant, in view of further instructions defining an accomplice correctly and necessity for corroboration of his testimony.

2. Criminal law ⚡742(2), 780(1)—**When question as to whether witness was an accomplice is not disputed, it is one of law for trial court.**

When question as to whether a witness is an accomplice under the evidence is not disputed, it is one of law for trial court, and it is its duty so to instruct the jury.

3. Criminal law ⚡1144(16)—**Presumed that jurors observed and applied instructions given them.**

It must be presumed that jurors observed and applied instructions given them.

4. Criminal law ⚡511(1)—**Evidence held sufficient to sustain conviction.**

In prosecution for robbery of a bank, evidence *held* to corroborate testimony of an accomplice, and sufficient to sustain conviction.

5. Criminal law ⚡511(1)—**Testimony, independent of that of accomplice, need not be sufficient to convict.**

Testimony, independent of that of the accomplice, need not be sufficient to convict.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

John D. McDermott was convicted of robbery, and he appeals. Affirmed.

Homer C. Mills, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Carleton Bainbridge, of Los Angeles, for the People.

CRAIG, J. The defendant and appellant was convicted upon an information filed by the district attorney of Los Angeles county, charging him with having willfully, unlawfully, and feloniously, by means of force and fear, robbed, stolen, taken and carried away from the person, possession, and immediate presence of Edward A. French and Charles Kellogg the sum of \$3,400. He appeals from the judgment, and from an order denying his motion for new trial, upon two grounds: (1) That the evidence was insufficient to support the verdict and judgment; and (2) that the

trial court erred in instructing the jury that it lay within their province to determine whether or not the principal witness for the people was an accomplice.

[1] The following instruction, the giving of which is assigned as error, will first be considered:

"The court instructs the jury that an accomplice is one who, knowing that a crime is being committed, willfully and with criminal intent intentionally aids, abets, and assists another in the commission of such crime or criminal act, and whether or not one is an accomplice as defined in these instructions is for the jury to determine from all the testimony and circumstances in the case."

[2] We think it clear that upon the facts here presented this instruction should not have been given. The uncontradicted evidence shows that the people's witness, Sová, was the principal actor in the robbery of French and Kellogg, and that if the accused participated in it as testified by Sová, the latter was an accomplice in the crime. In fact, it was admitted both by the people and by the defense, and the testimony of every witness, including Sová himself, established, to the point of demonstration, that he robbed the bank, was caught with the money in his possession, and at once confessed. When the question as to whether or not a witness is an accomplice, under the evidence, is not disputed, it is one of law for the trial court, and it is its duty so to instruct the jury. *People v. Howell* (Cal. App.) 230 P. 991. In *People v. Coffey*, 161 Cal. 433, 436, 119 P. 901, 902 (39 L. R. A. [N. S.] 704), the Supreme Court said:

"Whenever the facts themselves are in dispute, that is to say, whenever the question is whether the witness did or did not do certain things, which, admittedly, if he did do them, make him an accomplice, the jury's finding, upon familiar principles, is not disturbed. But where the facts are not in dispute, where the acts and conduct of the witness are admitted, it becomes a question of law for the court to say whether or not those acts and facts make the witness an accomplice."

[3] And so in the instant case the jury should have been instructed that Sová must be regarded as an accomplice. That question should not have been left to it to determine. However, it must be presumed that the jurors observed and applied the instructions given them. In other instructions the definition of an accomplice was correctly stated, as also was the rule that the defendant may not be convicted on the uncorroborated testimony of an accomplice, and that the corroborating evidence is not sufficient if it merely shows the commission of the crime and the circumstances thereof; and further, that such corroborating evidence must tend to connect the defendant with the commission of the crime. Hence it is inconceivable that the erroneous

instruction given in any way prejudiced any right of the appellant.

[4] We now proceed to consider the other ground urged for reversal, to wit, the claim that the evidence is insufficient to support the verdict and judgment. It is conceded that this point is not well taken if the testimony of Sova was so corroborated as to meet the requirements of the law for a conviction in such cases.

It appears without contradiction that on the afternoon of May 22, 1925, as the president of the First Exchange State Bank, in the city of Los Angeles, was leaving his office for luncheon, he met the defendant at the front door of the bank; that the latter had previously had some negotiations with him for the exchange of real estate, and defendant on the occasion in question stated that he desired an interview; that the president of the bank then said that he would return shortly, whereupon appellant remarked that he would wait for him at the bank. Two tellers of the bank, French and Kellogg, who are named in the information, were the only other persons present at the time. McDermott entered and stepped to a counter, and began to use a telephone which was there maintained for customers' use.

As appellant stood at the telephone, a man, thereafter identified as Robert Sova, walked in the front door, masked the lower half of his face with a handkerchief which he wore about his neck, menacingly pointed a revolver at first one and then another of the three persons present, and commanded, "Stick up your hands!" Sova then ordered appellant to pull down the window shades, which he did, then lined up the tellers and McDermott, with their faces toward the wall, and, rushing behind the counter, hurriedly rifled money drawers, from which he stole a large sum of money, and departed through the rear doorway. French then immediately placed his foot upon the burglar alarm, and seized the telephone to call police officers, but, on second thought, left this duty to McDermott, who completed the call. French then took a revolver and ran out through the front door, in search of Sova, whom he saw trying to state a Chevrolet automobile on East 110th street; he shouted to two men who stood near the machine, "That is the man—get him," whereupon one of the men—who later proved to be a Mr. Johnson, and who knew both French and McDermott—noticing that Sova was covering Johnson's companion with a gun, disarmed Sova, entered the machine, and was driving it toward the bank, when he met McDermott, who was running down the street and shouting, "That is my car," Johnson, thinking that the car had been stolen, called to McDermott, "Don't shoot, Mister," but stated that, although McDermott appeared to be much excited, he was not armed. When the party arrived at the bank the officers were there, and Sova was arrested, the

money was recovered, the Chevrolet delivered to appellant, and Sova was taken to the sheriff's office, where he made a written statement. Appellant remained at the bank for a short period of time, then left, but he returned to the bank in about half an hour. In the statement made by Sova shortly after his arrest he assumed entire responsibility for the robbery, and made no mention of McDermott, but stated that he, Sova, was attempting to escape in the Chevrolet, which he noticed standing on the street.

On May 27th Sova made a second statement, wherein he implicated McDermott for the first time, stating that the latter originated the scheme to rob the bank, talked it over with him on the 21st, drew a sketch of the premises, and furnished the machine; that each of them procured a revolver, one of which Sova stole from the Flintridge Country Club. Appellant was arrested on May 29th, and an information was filed charging him as we have heretofore noted. Sova was also charged with the same offense, but had not been tried at the time of the proceedings brought here for review. Sova reiterated in his testimony the statements which he made on May 27th, but in greater detail. He testified that he first met McDermott through a man named Jim, at Tonopah, Nev., while working at a mine; that he did not know any one by the name of Pete; that Jim had since been in Los Angeles, but had returned to Nevada; that McDermott induced him to join in a plan to make some money, saying, "We will go and rob a bank;" that there would be about \$15,000 available; that when they went to the bank McDermott told Sova that the latter could do the job, as McDermott had a mark on his lip, and that he would be more easily identified. Sova then swore to all of the details of the holdup, of the escape and his arrest, as we have recited them. It was proven by other witnesses that the only "Jim" known to have been seen with Sova in Los Angeles was James Doyle, the owner of the automobile service station visited by Sova, and who was a witness for the prosecution, but he testified that he had never been at a mine in Nevada; that there was in fact a "Pete" working at his station at the time of the trial whom Sova knew, but that he, also, had not been at Tonopah. McDermott, it appeared, had been engaged in the real estate business in the vicinity of the bank for a period of about two years; he had negotiated for a sale or trade of Santa Ana property for the president of the bank, and the latter's property was still open for a trade at the date of the robbery.

[5] Aside from the testimony of the accomplice Sova, the following constitutes the principal evidence tending to corroborate his story of the appellant's participation in the commission of the crime. Sova's hat and coat were found in the Chevrolet sedan belonging to McDermott. This must be regard-

as corroborating that part of Sova's testimony in which he said that he rode to the place where the car was parked by McDermott in the latter's car, and that the witness left his hat and coat in the car while he committed the robbery; it appears from the testimony that Sova did not wear his hat and coat while in the bank committing the crime. The witness Johnson testified that after the robbery he told appellant, in effect, that it might be thought that he was implicated in the robbery, and that he made no denial of such assertion. Again, there was evidence that McDermott speeded his car, disregarding a siren by officers, and passed his home, pursued by them; that they found it necessary to crowd his car to the curb to stop him; and this in spite of the fact that it appears that the appellant knew the officers, and that he saw them coming. One Doyle testified that appellant was at the witness' auto park on the day before the robbery, in company with Sova, and that these two remained there together in McDermott's car for at least an hour. Yet, when McDermott saw Sova at the bank immediately after the robbery without a mask he gave no sign of recognizing him. Doyle also said that McDermott had owed him money, and when asked to pay had replied, "Jim, I am going to get you that money if I have to take a gun and go out and get it." Another circumstance which the jury was entitled to regard was the fact that McDermott parked his car in the rear of the bank; he admitted that there was ample room in front of it. There were several other facts of lesser importance having some tendency to prove a consciousness of guilt on the part of appellant. Although the corroborating evidence is not conclusive of his guilt, we think it was sufficient. The testimony, independent of that of the accomplice, need not be sufficient to convict. *People v. Blunkall*, 31 Cal. App. 778, 161 P. 997; *People v. Sullivan*, 144 Cal. 471, 77 P. 1000.

The judgment and order appealed from are affirmed.

We concur: FINLAYSON, P. J.;
WORKS, J.

75 Cal. App. 540

JONES v. COULTER. (Civ. 4676.)

(District Court of Appeal, Second District, Division 2, California. Dec. 11, 1925.)

1. Evidence $\S$ 413, 448—As general rule, parol evidence not admissible when relating to construction of written contract, but admissible when relating to execution, authenticity, or delivery of instrument.

As a general rule, parol evidence is not admissible when it relates to the construction to be given a written contract, but it is admissible

when it relates to the execution, authenticity, or delivery of the instrument, or whether the delivery was absolute or conditional.

2. Evidence $\S$ 431—Parol evidence admissible to show that recorded instruments were not those which plaintiff signed.

Parol evidence was admissible to show that deeds signed contained neither name of grantor nor that of grantee, nor even description of property, but were executed in blank.

3. Deeds $\S$ 32, 39—A deed executed in blank is void, and passes no title.

Where deeds signed by plaintiff were blank, and contained neither a grantor, a grantee, nor a description of the properties, they were nullities, and passed no title to one whose name was subsequently inserted as grantee without written authority.

4. Frauds, statute of $\S$ 116(5)—Name of grantor or grantee or description of property cannot be inserted by agent for grantor, unless agent's authority be in writing.

Under statute, name of grantor or grantee or description of property cannot be inserted in a blank deed by an agent for the grantor, unless agent's authority be in writing; and, if such authority be not in writing, agent's insertion of such matters does not pass title thereto.

5. Quieting title $\S$ 44(4)—Evidence held sufficient to sustain finding that grantee executed power of attorney to grantor for purpose of restoring grantor to full control and ownership over property.

In suit to quiet title, where defendant claimed under deeds, which plaintiff claimed were mistakenly completed and recorded, evidence held to show that power of attorney, given by defendant to plaintiff, was executed to restore plaintiff to full control and ownership of properties and rectify mistake.

6. Estoppel $\S$ 88(1)—When party estopped to assert title to property stated.

To estop one claiming title to property, party, making admission by declarations or conduct, must be apprised of true state of title, admission must be made with express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; other party must be destitute of all knowledge of true state of title and means of acquiring such knowledge; and he must have relied upon such admission and be injured, if its truth be allowed to be disproved.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Estoppel.]

7. Estoppel $\S$ 88(1)—Grantor's execution of mortgage and mortgage notes in grantee's name under power of attorney, intended to rectify mistake, in completing deeds, held not to estop to deny grantee's title.

Where agent, through mistake, filled in blanks and recorded deeds, and grantee, to rectify mistake, executed power of attorney to grantor, held, that grantor by thereafter signing grantee's name to mortgage notes and mortgage was not estopped to deny grantee's claim of title.

8. **Frauds, statute of** ⚭116(10)—**Ratification of agent's act in inserting description of properties and names of grantor and grantee could only be made in writing subscribed by principal.**

Where plaintiff's agent, without authority, filled in blank deeds executed by plaintiff, inserting names of grantor and grantee and description of properties, such act could be ratified by plaintiff only in writing, in view of Civ. Code, § 2310, and statute of frauds.

9. **Joint tenancy** ⚭8—**Joint tenant entitled to interest in property purchased by cotenant with proceeds of jointly owned property.**

Daughter was entitled to some interest in property purchased by mother, who caused title thereto to be conveyed to herself and daughter as joint tenants, and which was purchased with the proceeds from sale of property owned by mother and daughter jointly.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action by Hattie L. Jones, also known as Hattie L. Lindau Jones, also known as Hattie L. Lindau, against Fannie B. Coulter, also known as Fanny B. Coulter. Judgment for plaintiff, and defendant appeals. Affirmed in part, and reversed in part.

Weber & Crawford and Hedley Richmond, all of Los Angeles, for appellant.

Le Roy M. Edwards, of Los Angeles, and Willard M. Conklin, of Santa Monica, for respondent.

FINLAYSON, P. J. This is an action to quiet title to five separate parcels of land in Los Angeles county. Defendant, the daughter of plaintiff, claims that she and her mother own the land as joint tenants. The answer not only denies plaintiff's allegation of entire ownership, but alleges, as conduct on the part of plaintiff estopping her from asserting sole ownership, that the latter, subsequently to the time when she signed certain blank deeds presently to be mentioned, not only treated the properties as jointly owned by herself and defendant, but that she also, as defendant's attorney in fact, executed several promissory notes secured by mortgages upon the properties, and that in this way she obligated defendant personally, as well as incumbered the latter's joint title to the lands. The trial court found all of the issues in favor of plaintiff and entered judgment for her accordingly. Defendant appeals.

The situation as to one of the pieces of property—lot D in block 87 of the city of Santa Monica (referred to in appellant's brief as parcel No. 1)—differs radically from that of the remaining four parcels (referred to in appellant's brief as parcels Nos. 2, 3, 4, and 5). We shall consider the questions presented by this appeal with respect to the latter parcels of land before taking up those relating to the former.

Parcels 2, 3, 4, and 5.

The facts testified to by plaintiff and her witnesses respecting parcels 2, 3, 4, and 5 are substantially these: On August 7, 1920, and for some time prior thereto, plaintiff was the sole owner of these four parcels of land. On the last-mentioned date plaintiff, being in poor health and about to enter a hospital, was desirous of making some provision for the disposition of the properties in the event of her death. For that purpose she and defendant called upon the vice president of the Ocean Park Bank, George A. Neilson, and sought his advice. Though the evidence does not directly disclose that defendant saw and heard all that was done and said upon this occasion, it is a fair inference from all of the evidence that she did see and hear everything. Plaintiff was advised by Neilson to prepare deeds conveying the property to some third person, who, upon being vested with the title, would immediately convey the same to plaintiff and defendant as joint tenants. It, doubtless, was Neilson's idea that if this suggestion were followed all the title to the properties, in the event that the mother predeceased the daughter, would vest in the latter under the right of survivorship. While he thus was advising plaintiff to convey the properties to some third person, Neilson pointed to the cashier of the bank, Arthur H. Meng, and said that Meng would act as the third party to whom the properties could be deeded, and that, then, Meng could deed them back to plaintiff and defendant as joint tenants. Plaintiff assented to this suggestion and thereupon Neilson procured two printed forms of deeds, with blank spaces left in them for filling in the names of the grantor and grantee and the descriptions of the properties. None of the blanks was filled in, but plaintiff, at Neilson's suggestion, signed her name to each instrument as a blank form of deed. When she signed the two documents, plaintiff, so she testified, said to Neilson:

"These deeds are not to be made a matter of record; they are to be held in the vault until such time as I pass out, if I do."

Neilson had no written authority to fill in the name of the grantor or that of the grantee or the description of any of the properties; indeed, he had no authority in writing of any nature whatsoever. After signing these blank forms of conveyance, plaintiff, accompanied by defendant, left the bank. Thereupon Neilson caused his stenographer to fill in plaintiff's name as the grantor and Meng's name as the grantee, in each of the blank forms of deed which plaintiff had signed, and likewise the description of each of the properties now found described therein. Neilson then procured Meng to execute two deeds purporting to convey the properties to plaintiff and defendant as joint tenants. Through an error on the part of some clerk in the bank

the four documents were recorded in the office of the county recorder. They were recorded August 10, 1920. It seems that before the instruments were placed on record a notary public in the bank attached his notarial certificate to each of the two documents which plaintiff had signed, although the latter had not appeared before him for that purpose, nor had she ever acknowledged to him her signatures to the two blank forms of conveyance. Plaintiff, according to her testimony and that of Neilson, returned to the bank on August 14, 1920, accompanied by her daughter, and then discovered that the instruments, contrary to her instructions, had been recorded. She testified that upon making this discovery she upbraided Neilson and asked him what should be done to meet the unexpected situation. Neilson suggested that defendant execute to her mother either a quitclaim deed or a power of attorney. Neilson is not a lawyer. His suggestion that defendant might execute a power of attorney to her mother seems to have been based upon the idea that if that expedient were adopted then plaintiff, notwithstanding the recording of the deeds, could deal with the properties during her lifetime just as though she were still the sole and absolute owner thereof. Defendant, who was willing to adopt either of the suggestions made by Neilson, executed to her mother a power of attorney. Defendant paid no consideration for any of the titles which the deeds from Meng purported to vest in her as a joint tenant, nor were any of the deeds delivered to her. According to plaintiff's testimony, the recorded documents were turned over to Neilson as soon as the power of attorney was executed. Plaintiff testified that it was never her intention to deliver any deed to defendant or to divest herself of any of the title during her lifetime.

At all times subsequent to August 14, 1920, plaintiff handled the properties the same as before, paying all taxes herself, collecting all the rents and paying all interest accruing upon certain promissory notes which were secured by mortgages previously executed and which were incumbrances upon the properties at the times when the above-mentioned instruments were signed. Thereafter these existing mortgages, as they matured, were renewed, or new ones were given, and the old mortgages were discharged of record. These new mortgages and the notes secured thereby were executed as the joint mortgages and notes of plaintiff and defendant; the former signing her daughter's name as the latter's attorney in fact under the power of attorney which had been given her. Defendant never received any part of the proceeds of these notes. Though defendant, as a joint maker of the notes, is personally obligated thereon, the trial court found that the value of the mortgaged properties is "amply sufficient to protect and take care of the full payment of said notes"; that "plaintiff is solvent and able to

meet any and all indebtedness represented by said mortgage notes"; and that "there is no evidence that defendant will ever be called upon to make good the principal or interest upon any of said notes, or to pay any portion thereof."

Some time in the year 1921 plaintiff and her daughter became estranged, and in the month of July of that year the latter revoked her power of attorney. The trial court found that upon the execution of the power of attorney plaintiff understood and believed that it had the force and effect of revesting her with and restoring to her "complete ownership, title, and possession in and to" the parcels of land; that "the acts and conduct of plaintiff subsequent to August 14, 1920, with respect to the above-described real property, were made in pursuance to such belief"; and that plaintiff, "immediately upon discovering that said power of attorney had been revoked, realized for the first time the true situation with respect to her property and immediately instituted" this action.

Practically the only issue as to which there is any substantial conflict in the evidence is that which relates to the reason for giving the power of attorney. Defendant testified that the deeds were not recorded by mistake; that it was plaintiff's intention, when signing the blank deeds, that her daughter should become a joint owner of the properties; that the power of attorney was given before either knew that the deeds had been recorded; and that it was given for the purpose of enabling the mother to handle the properties for the daughter's benefit, in the event that the latter should be absent from the state. On these issues the court found in favor of plaintiff; the finding being that on August 14, 1920, defendant, "at the suggestion of the said George Neilson, and with the intent and purpose of correcting the error made by said George Neilson in recording the aforesaid deeds, and for the purpose of restoring to and in plaintiff the full and complete ownership, possession, and control of all of the above-described real property, * * * executed and delivered to plaintiff a full general power of attorney, giving to plaintiff full general power and control with respect to, and over all, the above-described real property."

Plaintiff's oral evidence respecting the circumstances under which she signed the blank forms of conveyance was admitted by the trial court over defendant's earnest objection that plaintiff should not thus be permitted to impeach the validity of her own deeds—documents which, at the time of the trial, appeared upon their face to be valid, duly executed, acknowledged, and recorded instruments of conveyance, with the names of grantor and grantee and descriptions of the properties duly inserted therein.

[1, 2] The first point made by appellant is that the court committed grievous error in receiving oral evidence of the circumstances

under which respondent executed the blank forms of deed. In support of this contention appellant asserts that the evidence violates the elementary rule that parol evidence may not be received to contradict or vary a written instrument of conveyance in the absence of a plea that, through mistake, accident, fraud or undue influence, the instrument does not correctly set forth the true agreement of the parties. The objection is devoid of merit. Appellant's claim of title rests entirely and exclusively upon such title, if any, as her grantor, Meng, received under the blank forms of deed signed by respondent. The sole purpose of the parol evidence was to show that the recorded instruments are not those which respondent signed—that the ones which she signed contained neither the name of a grantor nor that of a grantee, nor even the description of any property; whereas, those which now appear of record, and upon which appellant relies to show title in her, do contain the name of a grantor and of a grantee and descriptions of the properties. The parol evidence did not relate to the construction of the instruments, but to their execution and authenticity; that is to say, it was not the purpose of respondent's evidence to show that the recorded deeds to Meng did not correctly embody the understanding of the parties, but to show that those instruments were not the ones which she signed—that those which she signed were mere blank forms of conveyance, and that as such they were and are absolute nullities. "As a general rule," says the court in *Verzan v. McGregor*, 23 Cal. 343, "parol evidence is not admissible when it relates to the construction to be given to a written contract; but such evidence is admissible when it relates to the execution or authenticity of the instrument, or to its delivery, or whether the delivery was absolute or conditional. In such cases, the execution and acts of delivery being mostly a matter in pais, oral declarations of intentions connected with the execution and delivery may properly come in as part of the *res gestæ*." Addressing itself to a situation substantially analogous to that presented by the record before us, the court, in *Vaca Valley, etc., R. R. v. Mansfield*, 84 Cal. 566, 24 P. 147, says:

"It was competent, therefore, for the plaintiff to prove all the facts and circumstances connected with the deed in question, and to show whether it was a valid deed or not."

[3] There can be no doubt as to the utter invalidity of the instruments under which appellant's grantor, Meng, deraigned his purported title. The blank deeds signed by respondent and subsequently filled out under Neilson's direction, with Meng's name inserted as the purported grantee, were mere nullities. According to the great weight of authority, a deed executed in blank is void and passes no title. *Wunderlin v. Cadogan*, 50

Cal. 613, and cases cited *infra*. As was said in *Whitaker v. Miller*, 83 Ill. 381:

"There must be, in every grant, a grantor, a grantee and a thing granted, and a deed wanting in either essential is absolutely void."

In the instant case each of the instruments signed by respondent was wanting in all three of these essentials to a valid deed.

[4] Though the decisions of other jurisdictions are not in entire harmony upon the question, it has been definitely decided in this state that under our statute of frauds the name of the grantor or grantee or a description of the property cannot be inserted by an agent for the grantor, in the absence of the latter, unless the agent's authority be in writing. If the authority of the agent be not in writing, his insertion of the name of grantor or grantee or description of the property does not pass the title. *Upton v. Archer*, 41 Cal. 85, 10 Am. Rep. 266; *Vaca Valley, etc., R. R. v. Mansfield*, *supra*; *Harris v. Barlow*, 180 Cal. 142, 179 P. 682. See, also, *Lund v. Thackery*, 18 S. D. 113, 99 N. W. 856. In *Upton v. Archer*, *supra*, the court says:

"* * * As it could not become the plaintiff's deed until the name of a grantee was inserted, that act could not be performed by an agent, in the absence of the plaintiff, unless his authority was in writing."

[5] The next point urged by appellant is that the evidence is insufficient to sustain the finding that she executed the power of attorney for the purpose of restoring respondent to full control over the properties and to complete ownership thereof, and thus to correct the mistake made by Neilson when he permitted the deeds to be recorded. Respondent and Neilson both testified that such was the purpose and the only purpose, for which the power of attorney was executed. Appellant, it will be recalled, testified that she executed that document solely for the purpose of enabling her mother to handle the properties in the event that she, appellant, should be absent on a trip. If this were all, the problem would be simple indeed, for we, then, would be confronted with nothing more than a mere substantial conflict in the evidence, which clearly would not warrant an appellate court in disturbing the finding. It seems, however, that respondent testified that she saw the recorded deeds in the bank when she returned there on August 14, 1920; that it was upon that occasion that she discovered that her instructions not to record the instruments had been violated; and that it was then that Neilson made the suggestion, acceded to by appellant, that a power of attorney be given the mother to enable the latter to handle the properties as her own and to restore to her the right of complete ownership. But it was shown conclusively that the deeds, after having been recorded, were returned to the bank some days

subsequent to the 14th of August. It also was conclusively shown that it was upon the last-mentioned date that the power of attorney was actually executed and acknowledged by the daughter. Wherefore appellant argues that the reason assigned by respondent and Neilson for the execution of the power of attorney could not have been the true reason, and that, therefore, respondent's testimony to the effect that the power of attorney was given to enable her to treat the properties as though full and complete ownership had been restored to her is inherently improbable.

We are of the opinion that the evidence which shows that the recorded deeds could not possibly have been seen by respondent until some few days after the execution of the power of attorney, while tending to contradict the testimony given by respondent and her witness Neilson, did not so corroborate appellant's testimony respecting her reason for giving the power of attorney as to conclusively contradict that of respondent and Neilson, or impair the latter's testimony to such an extent as to compel the conclusion that a finding based thereon is not supported by credible testimony. There is printed in respondent's brief what purports to be an excerpt from a written opinion filed in the court below, wherein the learned trial judge gave it as his opinion that the testimony of respondent and Neilson to the effect that the deeds had been recorded and returned to the bank as early as August 14th, while evidently a mistake on their part, is not inconsistent with the inference that knowledge that the deeds were being recorded, or had been filed for record, was brought home to the parties on August 14th, and that such knowledge was the inducing cause for the execution of the power of attorney. We think this a fair inference which the trial court was warranted in deducing, and that it affords a complete answer to appellant's claim of inherent improbability in the testimony of respondent and Neilson respecting the reason for the execution of the power of attorney.

[6, 7] Appellant contends that the undisputed evidence in the case supports her plea of estoppel. It is claimed that, by signing appellant's name to the renewal notes and mortgages given at the time when the old mortgages matured, respondent not only recognized the existence of a mortgageable title in her daughter, but imposed upon the latter personal obligations as a joint maker of the notes. Wherefore it is claimed that respondent is estopped to assert the truth respecting the title to the properties. The claim clearly is untenable. The facts necessary to be shown in order to call into exercise the principles of equitable estoppel are stated by Chief Justice Field, in *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 367, as follows:

"* * * First, that the party, making the admission by his declarations or conduct, was

apprised of the true state of his own title; second, that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and, fourth, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved."

The present case lacks several of these essential elements of estoppel. For instance, the evidence fails to show the existence of the second of the above-enumerated essentials. There must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title; the effect of the estoppel being to forfeit his property and to transfer his enjoyment thereof to another. Here respondent, when exercising the power conferred upon her by her daughter to execute mortgages in the names of both of them, did only that which must have been within the contemplation of the parties when the general power of attorney was given, and therefore the acts of respondent in executing the mortgages, so far as those acts affect the matter of title, can present no question of fraud or concealment, or negligence amounting to constructive fraud; and the fact that, by the execution of the notes in the names of both of them as joint obligors, respondent imposed personal obligations upon appellant, could not have induced the latter to believe that the title was vested in herself and respondent as joint tenants. The imposition of such personal obligations was a thing quite apart from any question of title to the properties. It was not, of itself, an act which could have led appellant to believe that the title was other than the facts showed it to be, viz.: A title vested entirely in the mother as the sole owner of the properties. In the next place, the third essential of estoppel mentioned by Chief Justice Field is absent from the case. Appellant, who accompanied her mother on the visits to the bank, and who had every opportunity to see and to hear all that was done and said upon those occasions, had every possible means for knowing the real state of the title. She knew all the facts, from which it follows, as a necessary legal conclusion, that no title passed out of the mother into appellant's grantor, Meng. Appellant, then, was not destitute of convenient and ready means of knowledge of the true state of the title, and she, therefore, could not have been deceived by any act of respondent. "The estoppel is removed by proof that the party claiming its existence, even though mistaken in regard to his rights at law, had notice of the actual state of the facts at the time he acted upon the representation, and this though the representation was made under oath." *Bigelow on Estoppel*, p. 560. "The estoppel does not apply where everything is equally well known to both parties." *Her-*

man on Estoppel, § 957. "Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel." *Crary v. Ivey*, 208 U. S. 521, 28 S. Ct. 360, 52 L. Ed. 595. The same principle is announced in *Eltinge v. Santos*, 171 Cal. 278, 284, 152 P. 915, Ann. Cas. 1917A, 1143; *Leedom v. Ham*, 5 Cal. Unrep. 633, 48 P. 222; *Holcomb v. Boynton*, 151 Ill. 294, 37 N. E. 1031; *Estis v. Jackson*, 111 N. C. 145, 16 S. E. 7, 32 Am. St. Rep. 74; *Sheffield Car Co. v. Constantine, etc.*, 171 Mich. 423, 137 N. W. 305, Ann. Cas. 1914B, 984; and *Gjerstadengen v. Van Duzen*, 7 N. D. 612, 76 N. W. 233, 66 Am. St. Rep. 619.

[8] It next is contended that respondent's conduct amounted to a ratification of her deed to appellant's grantor. There is a well-defined distinction between ratification of a deed and facts constituting an estoppel of the grantor to deny its validity. *Blood v. La Serena L. & W. Co.*, 113 Cal. 221, 226, 41 P. 1017, 45 P. 252. And where, as in California, the mode of ratification is governed by statute, the distinction between the two doctrines often becomes an important consideration. By express statutory provision in this state, ratification of an agent's act can be made:

"Only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof." Civ. Code, § 2310.

As we have seen, it has been definitely decided in this state that under our statute of frauds the authority of an agent to insert in a deed any of the essentials of a valid conveyance, such, for example, as the name of the grantee, is required to be in writing. *Harris v. Barlow*, supra. It follows, therefore, that a ratification of Neilson's act in causing to be inserted descriptions of the properties and the names of respondent as the grantor and of Meng as the grantee could be made only in writing subscribed by appellant. There never was such a writing, and therefore there never was a ratification.

We have now considered all of the points raised by appellant with respect to parcels 2, 3, 4, and 5, and our conclusion is that as to those parcels the judgment should be affirmed.

Parcel No. 1.

[9] The facts respecting lot D in block 87 of the city of Santa Monica (referred to in appellant's brief as parcel No. 1) appear to be substantially these: The title to this lot was acquired some time after respondent had signed the blank deeds which she left at the bank with Neilson. Respondent caused the deed to this parcel of land to be made to herself and daughter, as the grantees. It seems

that prior to the acquisition of this lot respondent and her daughter were the owners, as joint tenants, of a parcel of land referred to by the witnesses as the "Highland property." There seems to be no question as to the daughter's rightful claim to title in this Highland property as a joint owner thereof with her mother. Respondent sold the Highland property. The deed thereto she executed in the names of herself and daughter, as the grantors, signing the daughter's name as the latter's attorney in fact under the power of attorney already mentioned. With the proceeds from the sale of this property respondent bought the Santa Monica property (parcel No. 1), causing the title thereto to be conveyed to herself and daughter as joint tenants. This Santa Monica property is referred to by the witnesses as the "Fourteenth street property," or the "Fourteenth street house." Respondent testified: "The Highland property we held as joint tenants is the Fourteenth street house." By this testimony respondent evidently meant that the "Highland property" had, in effect, been converted by her into the "Santa Monica property." It is manifest that upon these facts appellant is the owner of at least some interest in or title to parcel No. 1, and that the judgment is erroneous, in so far as it declares respondent to be the sole owner thereof, and in so far as it purports to quiet the latter's title thereto as sole owner.

In view of the fact that the judgment should be affirmed as to four, and reversed as to one, of the parcels of land, the costs of appeal should be apportioned between the parties in as equitable a manner as seems practicable.

Those parts of the judgment which quiet respondent's title to, declare her to be the owner in fee simple of, and appellant to have no right, title, or interest in, the lots and parcels of land other than lot D in block 87 of the city of Santa Monica, and all parts of the judgment which relate to or affect the properties other than said lot D, are affirmed. That part of the judgment which quiets respondent's title to, declares her to be the owner in fee simple of, and appellant to have no right, title, or interest in, said lot D in block 87 of the city of Santa Monica, is reversed. The trial court is directed to retry the issues which involve the title to said lot D, and to adjudicate the respective rights of the parties in and to that lot. Appellant shall recover one-fifth of all amounts actually paid out by her in connection with the appeal and the preparation of the record for the appeal, including one-fifth of the cost of printing her briefs, if the cost of printing her briefs did not exceed \$100; and, if it did exceed that sum, then she shall recover \$20 for printing her briefs.

We concur: CRAIG, J.; WORKS, J.

out understanding, made before incapacity was judicially determined, is subject to rescission, appellate court must regard evidence of mental deficiency in light most favorable to such conclusion.

4. Insane persons 60—Party executing trust deed or instrument may lack sufficient capacity to judge of the wisdom of transaction and its effect on his property.

One may understand that he is executing a mortgage and note or trust deed or instrument and still lack sufficient capacity to realize effect it might have on him or his estate and to judge of the wisdom or unwisdom of the transaction and its effect on his property.

5. Trusts 56—Whether trustee planned to gain advantage over creator of trust was question for trial court.

In action to cancel trust instruments for alleged incompetence of creator thereof to execute them, whether trustee intended and planned to gain advantage over creator was, in view of Civ. Code, § 2224, a question for the trial court.

6. Trusts 56—If trustee planned to gain advantage over creator of trust, burden was on him to show transaction fair.

In action to cancel trust instruments for alleged incompetence of creator to execute them, where question whether trustee planned to gain advantage over creator was question for trial court, if trustee did gain an advantage, then burden was on him to show that transaction was fair.

7. Evidence 41—Supreme Court may take judicial notice that attorney was actively practicing in state courts, notwithstanding his name was not on roll.

Supreme Court will take judicial notice that attorney was for many years actively practicing in state courts, though his name does not appear on roll.

8. Attorney and client 11—One assuming to be a practicing attorney held to the duties and burdens imposed in dealing with client.

Where defendant assumed to be a practicing attorney so far as relations with deceased were concerned, he will be held to the duties and burdens which the law imposes on an attorney in dealing with his client, and to the same degree of accountability as though he were legally admitted.

9. Appeal and error 1009(3)—Chancellor's conclusions not disturbed, if supported by substantial evidence.

Where, in action to cancel trust instruments, question whether transactions contained seeds of an iniquitous purpose was question solely for chancellor's conscience, his decree will not be disturbed if supported by substantial evidence, even though an opposing conclusion may be supported in conflicting or contradictory evidence.

10. Jury 14(6)—Jury trial not matter of right where issue of equitable jurisdiction.

Where issue joined in action to cancel trust instruments was clearly of equitable jurisdiction, right to jury trial, under Code Civ. Proc. §§ 592, 738, does not exist as matter of right.

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POMEROY v. COLLINS et al. (WALSH, Intervener). (S. F. 11316.)

(Supreme Court of California. Feb. 1, 1926.
Rehearing Denied March 1, 1926.)

1. Trusts 56—Evidence held to sustain finding that decedent was of unsound mind at and prior to time of execution of instruments creating trusts.

In action to cancel trust instruments, evidence held to sustain findings that creator thereof, due to ills and infirmities of advanced age, was of unsound mind at time and for some time prior to execution of the instruments, to extent that he did not understand nature, purpose, or extent of his acts.

2. Contracts 92—Capacity to make conveyance or contract is tested by mental competence to deal with subject with full understanding of rights.

Capacity to make conveyance or contract, in view of Civ. Code, § 39, providing that conveyance or contract of person of unsound mind, but not entirely without understanding, made before incapacity was judicially determined, is subject to rescission, is tested by his mental competence to deal with the subject before him with full understanding of his rights.

3. Appeal and error 931(1)—Appellate court must regard evidence most favorable to conclusion of avoiding contract of one mentally deficient.

In determining question whether contract of person of unsound mind, not entirely with-

11. Jury $\Rightarrow$ 14(6)—Denial of jury in cases where right thereto not granted at common law not error.

It was not error to deny a jury trial in action for cancellation of instruments, where such right was not granted at common law.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Richard T. Pomeroy, executor of the will of Matthew Kelleher, deceased, against George D. Collins, Sr., individually and as trustee, and others. Judgment for plaintiff, and defendant George D. Collins, Sr., and intervener, Helen H. Walsh, appeal. Affirmed.

Daniel J. Kiley, of Boston, Mass., and George K. Ford, of San Francisco, for appellant Walsh.

McNair & Stoker and George E. Stoker, all of San Francisco, for respondent.

SEAWELL, J. This is an action in equity, brought by the executor of the estate of Matthew Kelleher, deceased, to set aside and compel the cancellation and annulment of four certain trust instruments executed by said Matthew Kelleher, on the ground that said Matthew Kelleher was, at the time he executed the same, mentally incompetent and of unsound mind. It is claimed and alleged that the execution of said trust instruments was induced and procured by fraud and deceit practiced upon said Matthew Kelleher by appellant George D. Collins, Sr., whereby said Kelleher conveyed and transferred to said George D. Collins, Sr., as trustee, certificates representing 910 preferred shares of the capital stock of the Pacific Gas & Electric Company, a corporation, and certain described real property fronting on Folsom street, city and county of San Francisco, of the aggregate value of not less than \$85,000; all of said property being at the time of his death the property of said Matthew Kelleher and constituting property belonging to his estate. The complainant also prayed for an order directing the said George D. Collins, Sr., to reconvey and retransfer said real property and stocks to the executor of the said estate. The trial court annulled said trust instruments and granted relief in accordance with the prayer of the complaint. The appeal taken by George D. Collins, Sr., is from the decree as thus rendered, and is joined in by intervener, Helen H. Walsh. The other defendants, not being beneficially interested in the result of the action, did not join in the appeal.

The trust instruments will be identified in the order and by the same letter stamps that were placed upon them by the trial court.

Exhibit A purports to be a "declaration of trust and assignment of stock," and bears date May 25, 1921. By its terms Matthew Kelleher assigned, transferred, and conveyed to "George D. Collins, Sr., as trustee, and upon the uses and trusts hereinafter specified, 910 preferred shares of the capital stock of the Pacific Gas & Electric Company, a corporation." A description of the stock is therein set out. The instrument bears the indorsement of and recites the delivery of said stock by said Kelleher to said George D. Collins, Sr., as trustee. The next paragraph is as follows:

"The said trustee to have and to hold said 910 shares of stock upon the express trust to pay the dividends thereon to said trustor until such stock is sold and to sell, assign, transfer and convey said stock or any part thereof to the purchaser or purchasers and to dispose of the proceeds of such sale or sales as follows to wit: To Helen H. Walsh, of West Summerville, Massachusetts; Mrs. Margaret O'Neil, of Boston, Massachusetts; Julia H. Pomeroy, Parish of Drischane, County Cork, Ireland; Patrick O'Reardon, Parish of Drischane, County Cork, Ireland—\$1,000 each.

"V.

"All reversionary interests in the proceeds of said sale of said shares of stock, resulting from the death of a beneficiary or other cause and the amount not hereinbefore disposed of, shall vest in said *trustee pro se*, and *not in trust*. (Italics supplied.)

"In witness whereof, I have hereunto set my hand the day and year first above written.

"Matthew Kelleher.

"Witness: Geo. D. Collins, Sr.

"I hereby accept the foregoing conveyances and trust for the purposes therein specified.

"Dated this 27th day of May, 1921.

"Geo. D. Collins, Sr."

Exhibit B is a deed and declaration of trust executed May 26, 1921, whereby the Fulton street real property is granted and conveyed to said George D. Collins, Sr., as trustee, "to have and hold in fee absolute upon the express trust nevertheless to sell and convey said property and to dispose of the proceeds" as follows: To pay all debts and the expenses of his last illness and funeral expenses; to pay to the Reverend Father McDonald, chaplain of the Holy Cross Cemetery, the sum of \$250 for masses for the repose of his soul; to spend \$500 for a monument to be erected at his grave and whatever sum may be necessary for perpetual care of the grave." The names of the same beneficiaries set out in Exhibit A are restated, and each is given an additional \$1,000. The reversionary interest clause and the "pro se and not in trust" clause are repeated. The execution is the same in form as the first instrument. It is dated May 26, 1921.

Exhibit C is a declaration of trust and an assignment of stock and precisely the same

in substance and form as Exhibit A, except the "pro se and not in trust" clause is omitted, and in lieu thereof (after providing for the payment to the same beneficiaries named in the trust instrument bearing date May 25 and May 26, respectively) the following clause appears:

"To dispose of the remaining amount of the proceeds of said sale in accordance with the *instructions heretofore given said trustee by said trustor.*" (Italics supplied.)

It contains a clause providing for the payment of debts and expenses which is not found in Exhibit A. The execution is the same as in the other trust instruments. It bears date May 27, 1921.

Exhibit D is a deed and declaration of trust, and repeats the names of the beneficiaries and the amount of the benevolences set out in the trust instrument marked Exhibit B, by giving to the Reverend Father McDonald an additional \$250 for the saying of masses for the repose of his soul, and by setting aside an additional \$500 for the erection of a monument at the grave, and giving to Helen Walsh, Mrs. Margaret O'Neil, Mrs. Julia H. Pomeroy, and Patrick O'Reardon an additional \$1,000 for the third time, making a total of \$4,000 to each. It is precisely like the trust instrument marked Exhibit B, except the "pro se and not in trust" clause is omitted, and like its companion instrument it directs the expenditure of the remaining amount "in accordance with the instructions heretofore given said trustee by said trustor." The execution is the same as the others, and the day of execution is given as May 27, 1921.

The oral instructions which Mr. Collins claims were given to him by Kelleher on May 23, 1921, and which were afterwards reduced to writing by Collins, were to be a guide for him in the distribution of the estate. According to Collins' testimony, the oral instructions given by Kelleher contained directions which were not to be disclosed to Kelleher's friends or made public. These instructions purport to have been acknowledged by Collins before a notary public on May 26, 1921. Omitting the formal parts, the instructions as prepared read:

"And whereas on said 25th day of May, 1921, the said Matthew Kelleher transferred said shares of stock with the exception of the fourteen shares evidenced by certificate No. 32310 to the undersigned as trustee by endorsement on the certificates and delivery of said certificates so endorsed, and subsequently said fourteen shares were issued to the undersigned as such trustee by said corporation together with eight hundred and ninety-six shares, making a total of nine hundred and ten shares (first preferred) of the capital stock of said corporation, issued to the undersigned as trustee for said Matthew Kelleher;

"And whereas in the said declarations of trust certain property is transferred to the undersigned pro se, to wit, proceeds of sale

therein mentioned, the declared purpose of said Kelleher in that respect being to avert litigation by persons claiming without right to be his heirs or relatives and in that behalf to secure to and confer upon the undersigned the absolute and uncontrolled and independent judgment and discretion free from interference or control by any court in determining from evidence adduced who if any person or persons are the surviving heirs and relatives of said Matthew Kelleher and in selecting from such heirs and relatives the person or persons deemed by the undersigned worthy of having and receiving said property and proceeds, the said Matthew Kelleher stating that to the best of his knowledge and belief, all of his relatives are dead but that if nevertheless any of his relatives survive him, they were to receive said property in equal shares according to said selection by the undersigned, the said Matthew Kelleher further stating that he was never married;

"And whereas said Matthew Kelleher on said 25th day of May, 1921, instructed the undersigned to dispose of and distribute said property to wit, said proceeds to the following persons and to the hereinafter named charitable organization in the proportions and upon the contingencies hereinafter stated, now therefore I do hereby formally acknowledge and declare that the said property and proceeds conveyed to me pro se, by said Matthew Kelleher in each of said declarations of trust, were so conveyed to me upon the following instructions given to me by said Matthew Kelleher on said 25th day of May, 1921, to wit:

"I.

"To make final and conclusive determination from evidence adduced as to who if any are the heirs and surviving relatives of said Matthew Kelleher and thereupon to select from such heirs and relatives those worthy of having and receiving said property and proceeds, and distribute the same to them in equal shares. That should there be but one person so selected as herein stated, to distribute to such person all said property and proceeds.

"II.

"If there be no surviving relatives or heirs of said Matthew Kelleher, or none deemed by the undersigned worthy of having and receiving said property and proceeds, then to distribute said property and proceeds as follows, viz.: One-third thereof to Helen H. Walsh, Julia H. Pomeroy, and Patrick O'Reardon in equal shares, and the remaining two-thirds to be given equally to the Associated Charities of San Francisco for the charitable purposes of the organization, and to the relief of those of the Irish belligerents made destitute in County Cork, Ireland, in consequence of supporting the Sinn Fein warfare now prevailing there.

"III.

"Any residue of the said property and proceeds arising from the death of either said Helen H. Walsh, Julia H. Pomeroy or Patrick O'Reardon prior to distribution to them as hereinbefore stated, shall be paid and transferred by the undersigned to the survivor or survivors, and if none, then said residue shall be paid one-half to said Associated Charities of Sa Francisco for the charitable purposes of

the organization and the remaining one-half shall be paid to those of the Irish belligerents made destitute in County Cork, Ireland, in consequence of supporting the Sinn Fein warfare now prevailing there.

"IV.

"I do hereby accordingly undertake and agree to comply strictly with the foregoing instructions given me by said Matthew Kelleher on said 25th day of May, 1921.

"In witness whereof I have hereunto set my hand this the 26th day of May, 1921.

"[Signed] Geo. D. Collins, Sr."

Matthew Kelleher died June 18, 1921, a little more than three weeks after the execution of the foregoing trust instruments.

The second amended and supplemental complaint contains three counts or causes of action, the gravamen of each count being the practice and imposition of fraud and deceit in several forms by the defendant Collins upon said Matthew Kelleher, thereby inducing and influencing him to execute said instruments.

The first count alleges unsoundness of mind on the part of said Matthew Kelleher, and consequently the execution of said instruments by him was not his voluntary act; also that he lacked the mental capacity to understand the nature, purposes, and effect of said acts; that it was not the intention of said Matthew Kelleher to transfer the whole or any part of his estate to said George D. Collins, Sr., as trustee or otherwise.

The second count alleges the age of Matthew Kelleher at the time of the execution of said instruments to have been about 79 years, and that he was and for a long time prior thereto he had been suffering from disease, loss of memory, and weakness of body and mind to the extent that he was unable to properly care for his property or affairs, and he was at the time of the execution of the said instruments, and for a long time prior thereto had been, in a weakened and impaired condition of mind and body, and was easily influenced by his acquaintances and by those in whom he reposed confidence; that said Collins was an attorney at law and maintained offices in the city and county of San Francisco; that Kelleher reposed absolute faith and confidence in said Collins, and counselled with him with the intention and desire of making a testamentary disposition of his estate by will, but that said Collins advised, counselled, and cautioned said Kelleher, who was in a weakened and enfeebled mental condition, against making a will, and persuaded him that he, Collins, better than the courts of law and better than he, Kelleher, was able to determine who were his surviving heirs and relatives, and the extent, if any, to which said heirs or relatives were deserving of his bounty, and promised said Kelleher that if he signed said instruments and transferred to him the said estate, that upon the death of said Kelleher he would

make such a determination and would distribute his estate according to the merits of the respective claimants as set out in said instructions; that by the adoption of such a plan all litigation commenced by persons claiming, without right, to be his heirs or relatives would be averted.

It is also alleged by said count 2 that Kelleher did not know that he was absolutely divesting himself of his estate by the execution of said instruments A and B, and did not know that he was empowering said Collins to sell and convey the same before as well as after his death and to receive the purchase price thereof without any obligation resting upon said Collins for the support and maintenance of said Kelleher during the remainder of his life or to account to any person for any portion of said estate over and above the sum of about \$10,000, as provided in said trust instruments A and B. It is directly alleged that the fact that Kelleher was absolutely divesting himself of all interest in and to his property was concealed from him and that he was without sufficient understanding to protect himself against the machinations of Collins, whose purpose and intention it was to appropriate all of said estate to himself above the said sum of \$10,000, which amount was, according to the terms of said instruments, made payable to said beneficiaries. It was the theory of plaintiff, as pleaded in said count 2, that if successful in maintaining said trust instruments A and B, it was the purpose and intention of said Collins to suppress trust instruments C and D, but if the first plan should by any chance miscarry, he would, in such event, dispose of the remainder of Kelleher's estate as provided by the instructions referred to in paragraph VI of C and paragraph III of D, which authorized him to dispose of said property "in accordance with the instructions heretofore given said trustee by said trustor," which were orally given and resided in the breast of Collins alone. Further, that the reduction of said instructions to writing was an afterthought, and was compelled by the exigencies of a desperate situation, and was done only to give a fairer aspect to an inequitable transaction. The allegation that it was the intention of Collins to hold under cover the second set of instruments, C and D, until and unless required by some untoward circumstance to produce them, is based upon the fact that he hastened to file at once said trust instruments A and B for record in the office of the county recorder of the city and county of San Francisco, but did not make known the existence of said instruments C and D and said instructions until some days thereafter. Other allegations of fraudulent acts are alleged, but it is not necessary to repeat them. Count 3 alleges mental incapacity on the part of Kelleher, and alleges that George D. Collins, Sr., was practicing law and maintained offices in the city and

county of San Francisco, and that Kelleher in his mentally incapacitated condition took advice from him as an attorney, and was deceived into the execution of said trust instruments. It is further realleged that Kelleher consulted Collins with the intention of making his last will, and informed said Collins that he desired to make a will in favor of a number of his relatives and intimate friends, and requested Collins to prepare such a will for execution, and when he affixed his name to said instruments he believed it was in execution of a will prepared in accordance with his request and desire, and that the instruments which were actually signed by him were represented to be in accordance with the will, wish, and desire of the said Kelleher, but that he was acting under a misrepresentation of facts when he executed said instruments; that he had confidence in said Collins and relied upon him implicitly to carry out his wishes, and that he had no independent advice in the matter whatsoever, but acted solely and alone under the advice and influence of the said George D. Collins, Sr.

The answer specifically denies each allegation of fraud, and alleges that said Matthew Kelleher at and during all the times related therein was of sound and disposing mind and was free from any incapacity of any kind whatsoever, and that said instruments and transfers were prepared by the defendant in strict accordance and compliance with the express wishes, desires, and instructions of said Kelleher, and not otherwise; that at all times he was of sound and disposing mind and acted freely and voluntarily in the exercise of his own will and judgment. It is denied that it was the purpose or the intention of said Kelleher or desire of said Kelleher to make a will, but that it was his effort to avoid probate proceedings and that the trust instruments were the product solely of the mind of said Kelleher and not of the said Collins. Defendant Collins disclaims any and all and every right, title, and interest, other than as trustee, in and to the real and personal property, or any part thereof. His prayer is joined in by Helen H. Walsh, an intervener, that said trust instruments be upheld.

The court found that each of the said instruments was executed by the said Matthew Kelleher without receiving any consideration therefor, and that in the month of May, 1921, he was of the age of about 79 years, and for a long time prior to the execution of said trust instruments was physically infirm, and his mental capacity was greatly impaired; that he was at all times of unsound mind; that because of such unsoundness of mind he was unable to understand and did not understand the nature, purpose, and effect of the said acts, or either thereof, in indorsing and delivering to said defendant the aforesaid certificates of stock, and in executing and de-

livering to said defendant the aforesaid instruments in writing; that at none of said times did the said Matthew Kelleher possess sufficient mental capacity to perform or understand his acts or either thereof; that from the time of the execution of said instruments until his death, to wit, June 18, 1921, the impairment of the physical and mental capacities of the said Matthew Kelleher continuously increased; that the said George D. Collins, Sr., was aware of the mental condition of said Matthew Kelleher, and knew at the time said Kelleher executed said instruments that he did not understand or comprehend the effects of said acts or either of them. It is further found that the said Matthew Kelleher did not, on the 25th or 26th or 27th days of May, 1921, or any other time, intend to transfer, assign, or convey his estate, or any part thereof, to said George D. Collins, Sr., either individually or as a trustee for himself nor for any other person or at all; that the said George D. Collins, Sr., well knew on the said 25th, 26th, and 27th days of May, 1921, that said Matthew Kelleher did not intend to transfer the whole or any part of his estate to said defendant, either individually or as a trustee. It was specifically found by the court that all of the allegations of the first count of the second amended and supplemental complaint were true and sustained by the evidence. No finding was made as to the other two counts, as the finding on the first count made it unnecessary to find on the other two. Both are more or less interwoven with allegations of mental incompetency and the results that may flow therefrom. No point is made because of a failure to find on the other two counts.

It may be said at the outset that a consideration of the contents of the four trust instruments and said instructions, and the manner in which they were prepared and produced, without recourse to any evidence whatever as to the mental competency of the person who executed them, would be a sufficient reason for a court of equity to scrutinize the transactions with great care and concern.

The early story of the life of Matthew Kelleher is told by Bartholomew Danehy, his lifelong associate and intimate friend, to whom he bequeathed \$5,000 in his will dated February 9, 1914. Both were born in County Cork, Ireland, were about the same age, lived but three blocks apart, and were boys together in youth and companions throughout their long spans of life. Kelleher preceded Danehy by four years in arriving at Boston. In 1872 Danehy also left Ireland and came to Boston. For a time he and the companion of his youth lived in the same house, conducted by Mrs. O'Neil, who is mentioned as one of the beneficiaries in the trust instruments. Danehy and Kelleher came to California together in 1875, and both located in

the city and county of San Francisco. Kelleher engaged in the housemoving business, was a man of strong physical powers, and possessed good intellect. He took care of his savings and invested them in sound securities. His habits of life were methodical and fixed, but very simple. He was cautious and very suspicious. He enjoyed his friends, however, and the associations of his boyhood and early life in Ireland seemed to have lingered in his memory up to a short time prior to his death. He never married, and spent at least the later years of his life at a hotel. He associated with friends of his nationality, whose companionship he delighted in. By observing strict rules of frugality he slowly accumulated the property involved in this proceeding. George D. Collins, Sr., described Matthew Kelleher as a "miserly" person, possessing a very suspicious mind, "very illiterate, very uncouth, but very intelligent." As he formerly knew him, he described him as a vigorous, healthy man, apparently very strong. He said he was always "very opinionated" and intelligent in his judgment—"a man of very strong mind at that time. * * * There seemed to be in his mental makeup a rather sinister turn." Later, when he saw him, he described him as "having acquired a very much more positive frame of mind than formerly, and he seemed to be in a quarrel constantly with conditions and people. He had a prejudice against lawyers, and would not pay them if he could avoid it." His suspicious mind did not change with the passing years. It is the testimony of all who knew Kelleher in his better days that he was a strong willed man, independent, self-reliant, and conscious of his ability to make his way in the world. George D. Collins, Sr., testified that he met Kelleher for the first time about 25 years ago. He saw him but occasionally up to about 1909, and from 1909 to 1918 he was out of touch with him entirely. Kelleher visited Ireland in 1910 and returned to San Francisco in 1914. He made a will before leaving this country for Ireland, in 1910, and made another before leaving Ireland for this country in 1914. Collins had no intimate relations with him, nor did he know that Kelleher had spent four years of his life in Ireland since he last saw him or that he had ever executed a will. The only law business that Collins seemed to have transacted for him was in his later years, beginning with an incident when Kelleher became embroiled with a neighbor whom he claimed had dumped some rubbish containing nails and glass upon his vacant lot. Kelleher took the matter up with the person who was alleged to have dumped the rubbish on his lot, and it resulted in Collins swearing to a complaint charging the alleged wrongdoer with an offense under the city ordinance. This difficulty was of a trifling nature but it wrought upon Kelleher very much. He grew to believe that people were

pasturing animals upon his lot at unusual hours, and said animals were eating the wild grasses growing thereon. He was seen by the neighbors at unseemly hours secreting himself in places of vantage that he might discover the trespassers. He became involved in a turmoil concerning these inconsequential matters. These matters were regarded by the neighborhood as trifling and foolish, and they were not inclined to discuss the subject with him. It was within this period that Kelleher's conduct, conversation, and general manner began to attract the attention of the neighbors and of his intimate friends and plainly marked the beginning of his mental decay. Kelleher's most intimate friends did not know that Collins represented him or was his attorney; in fact, they were not acquainted with Collins until the beginning of the transactions in question, when they chanced to see him in Kelleher's room a day or two before the execution of said instruments going through his trunk for the purpose of obtaining certain data. The trunk contained letters and papers of personal importance to Kelleher, and it furnished the basis of much, if not all, of the history related by Collins concerning a knowledge of Kelleher's private life. It appears that Kelleher had, on previous occasions, conferred with attorneys other than appellant on matters of business.

As to the findings of the court that Kelleher was of unsound mind and was not able to understand the effect of the instruments which he executed, there is an abundance of evidence in the record. As early as February 10, 1917, four years prior to his detention for the second time at the Lane Hospital, we find the following entry upon the clinical record: "Eyes: pupils small, reacts sluggishly. * * * Marked arcus senilis." Also the following statement made by him upon his entry to the hospital on that occasion:

"I am crazy. I cannot sleep. From my throat up is all bad. Is a tube running down from my skull which carries the pain around?"

He then complained of "buzzing" in the ears. He was dizzy, and believed that "one of his lungs had gone out of him entirely." It was difficult to get his history because of his mental condition and deafness. He remained there only a short time and departed. Since that time he exhibited upon numerous occasions definite symptoms of both physical and mental decay or what is ordinarily known as senile dementia. Every one who knew him well noted his mental and physical decline. Several persons who regarded and respected him testified that they would avoid trying to converse with him because of his constant mumbling and incoherent speech. He was very garrulous. His conversation with Mr. Collins but a day or two before he executed the instruments in question was alone enough to put him on notice

as to Kelleher's mental condition. Mr. Collins' statement is that in discussing the disposition of Kelleher's estate with him he told him that he wanted a part of it invested in munitions of war to be sent to Ireland to aid the Sinn Fein cause. He also wanted to do something to Lloyd George that would mean his extermination. In a letter written by him late in 1920 he said that if "they could get Lloyd George it would accomplish more than all the night raids they can make." But this is not all. By a great preponderance of the evidence it would not seem possible that Kelleher could have appeared to any one who undertook to carry on a conversation of any length with him to have been a rational person on May 25th, 26th, and 27th, or at any period thereafter.

In February, 1921, Kelleher re-entered the Leland Stanford or Lane Hospital. Doctor George H. Becker, a student interne at the Lane Hospital when Kelleher was admitted in February, 1921, and who was specializing in nervous disorders, had Kelleher under observation. Kelleher had intentionally taken boracic acid internally which had been given him to be used for a chronic ear trouble, believing that if it was efficacious externally it should be helpful if taken internally, and said it had burned a hole through his stomach, and complained that the medicine which the nurse had given him was poison. Physically he presented the findings of an agitated man with the usual deterioration found in such a case. He had muscular weakness, senile tremor, and incoordination of his muscular movements as the result of senility. There was present a marked arteriosclerosis (hardening and thickening of the arteries) and enlargement of the heart. Also diabetes, chronic bronchitis, and emphysematous, a swelling produced by gas or air diffused in the cellular tissue. The witness defined senile dementia to be a breaking down or falling of the intellect as evidenced by lack of ability to judge facts, loss of memory, particularly for recent dates, tendency to unreasonable conclusions. Arteriosclerosis dementia is manifested by loss of memory, a tendency to forgetfulness, repetition, irritability, periods of amnesia. The witness was of the opinion that Matthew Kelleher in February, 1921, was suffering from senile psychosis or dementia. The clinic record showed under date of February 15, 1921, that he was afflicted with diabetes. His case was diagnosed as "psychosis senile." Wandering of the mind, sleeplessness, restlessness, and incoherency are frequent annotations made in the neurological records or charts. Kelleher had hallucinations and illusions of a most pronounced character. He complained of pains in the head, which he attributed to an injury he had received some years prior to his entry into the hospital. He imagined that his "wishbone" was standing up at right

angles and was standing out as much as an inch. He said that he applied some cold cream to the "wishbone," and it seemed to drink it in like a fish. At no time does the neurological record show that Kelleher's mind was entirely normal or free from delusions of some form. While the mental cloudiness may have subsided or cleared up at times and he became better oriented on some occasions than on others, there was no time when he was free from indulging in absurd notions. Another entry in the record states that upon an examination of Kelleher no definite symptoms of mental or nervous diseases were discovered, the conclusion being, however, that he was suffering from diabetes and possibly a senile psychosis.

The testimony of George D. Collins, Sr., was to the effect that Kelleher began to consult him as to making trust dispositions of his property some time in February, 1921, but nothing of a definite nature was done until about the 23d day of May, 1921. The active negotiations were then begun by Kelleher going to Collins' office, and by Collins visiting Kelleher at his home in the Mission Hotel. None of the papers in question were executed before the 26th day of May, 1921. Before this day, however, a number of witnesses detailed a long list of mental lapses on the part of Kelleher, beginning with several months prior to his death. He was prone to fall asleep in his chair, was given to incessant mumbling, was incoherent in his speech, forgetful and listless, and the continuity of thought was broken. He had not engaged in any business for a long time prior to the time in question, and had done by force of habit the simple things which he continued to do until the beginning of the illness which resulted in death. The one desire that was firmly fixed in his mind and which was the last to perish was the desire to accumulate money. His only business was to draw the premiums on his stock, which were paid quarterly, and he appeared very regularly to receive them.

Charles L. Barrett, assistant secretary of the Pacific Gas & Electric Company, who had known Kelleher since 1914 and negotiated with him the purchase of his first stock in said company, gives a vivid picture of Kelleher as he appeared a short time before and at the time he began to dispose of his estate. He met him every time he called to draw his dividends and to reinvest the earnings in the purchase of other stock. He had talked with him a great deal about his personal and business affairs and was well acquainted with him. He visited the office of the Pacific Gas & Electric Company on May 20, 1921, as was his habit every three months, to reinvest his earnings in the purchase of more stock. He was very much emaciated and wandering in his talk. He was weak, and had all he could do to get into the office. His appearance

shocked Mr. Barrett. He muttered, and his talk was more or less incoherent. It was with great difficulty that Mr. Barrett could understand that he wished a check which he had in his possession redrawn and divided into two checks, one to be used for the amount of stock he wished to purchase and the other for the balance, to wit, \$252.47. The latter check was returned to him. He could not understand the transaction. He thought he should still have two checks after he delivered one for the purchase of the stock. Mr. Barrett could not explain the matter so that he understood it. He returned on May 23, and appeared to be very much troubled, and said he wanted the two checks. Barrett was unable to make him understand the situation. Kelleher was usually quick to understand business transactions when he was in health.

On the morning of May 26, when Mr. Barrett arrived at his office, he found Kelleher there sitting in a chair in the worst chill, as the witness described it, that he had ever seen a person have. He was actually shaking the chair. When he was able to speak he asked about the checks. He insisted that he saw the checks on one of the clerk's desks, which was not true. He searched through his clothing, but could not find the check he should have had, and he seemed to have the idea that some one was trying "to do him up." This check was given to him on May 20, and was for \$252.47, and was indorsed by him in a very "shaky" hand, and he took it with him. Later it was cashed by George D. Collins, Sr. His appearance and mumbling to himself on May 20 indicated that he was not his former self. On May 26 Mr. Barrett could understand but a few of Mr. Kelleher's utterances. The "terrific chill," as it was described, lasted spasmodically throughout the entire time that Kelleher was at the office, and when it was at its height he was very weak. The severe shaking spoken of by the witness was doubtless a fit or seizure known as "senile tremor," which appears in the clinic report of his case made in February, 1921. Mr. Barrett put him on a street car and advised him to go home. He did not reach his home, but subsequently fell in a faint or fit and was taken to the emergency hospital. Mr. Barrett was of the opinion that Kelleher was of unsound mind. He noticed that Kelleher began to fail in November, 1920, after he had drunk boracic acid as above related.

Mr. Collins testified that the first trust instrument, Exhibit A, was prepared May 25, and that Kelleher was to call at his office to sign it, but failed to appear, and later telephoned to him to come to his room. He went to Kelleher's room that night and procured Kelleher's signature. No one but Collins was present to witness the signing. Its execution was afterwards acknowledged by Collins as a subscribing witness. Instrument B, conveying the real property, was not signed on

that night, as Kelleher, according to Collins, discovered an error in the description which he wished corrected, and an appointment was made for Kelleher to be at Collins' office to sign the instrument as corrected on the morning of May 26. That was the morning that Kelleher appeared at the Pacific Gas & Electric Company's office. His manner and appearance have already been described by Mr. Barrett. Collins heard of the collapse of Kelleher and hastened to the emergency hospital, taking with him the trust instrument covering the real property and had it signed by Kelleher. Collins testified that Kelleher's mind was perfectly clear when he arrived at the hospital and at the time he executed said instrument, and purported to relate parts of conversations he claims to have carried on with him. He found Kelleher on a reclining chair.

John T. Kane, who was an applicant for letters of guardianship of the estate and person of Kelleher, a matter pending, upon being informed of Kelleher's illness, procured an ambulance and went to the place where Kelleher was stricken to convey him to the emergency hospital. He found him in a helpless condition and unable to walk. He testified:

"He acted kind of childish as if he didn't have any sense. He seemed kind of stunned. I spoke to him and asked how he felt; he shook his head, 'No.'"

From the time Kane first saw him until the time that Collins arrived at the hospital Kelleher did not utter a word. Collins said to him, "You were to be down to my office this morning." Kelleher said nothing, but "laughed like, kind of a funny grin." He was raised to a sitting posture, and Mr. Collins pulled two papers out of his pocket and handed Kelleher a pencil and said, "Sign here." Kelleher signed, Collins holding the tablet. The papers were not read to him. Collins said, "This is the paper you wished to sign at my office." Kelleher said nothing when he signed. The witness could not say whether Kelleher recognized the paper or not. When he signed his name extended beyond the edge of the instrument he was signing. Prior and subsequent acts indicating irrationality were also detailed. Reverend Thomas H. Flaherty was present also when Exhibit A was signed. His version is that Mr. Collins said, "Here are those papers." His recollection was that Kelleher made no reply. Kelleher started to sign on a piece of yellow paper at the top. Collins interrupted by saying, "Don't sign there, sign here," and indicated with his hand. Kelleher made no reply. After he signed the pencil dropped from his hand. Kelleher appeared listless, and "had something of a snarl on his face, sort of a contraction of his face, and every once in a while he would squint and look up with what seemed to be a perfectly clear eye." That

the witness did not believe Kelleher to be in a normal mental condition is made clear by an examination of his testimony. Two other instruments were signed by Kelleher on May 27, no one else being present but himself and Collins. Father Flaherty had Kelleher taken to a private room, where they were together for 45 minutes. What was said by either was not divulged. At any rate, at the conclusion, Father Flaherty suggested to those in charge that Kelleher be taken to St. Mary's and a priest be procured for him there. Reverend Patrick G. Foote was the priest called upon to hear Kelleher's confession at St. Mary's. By Kelleher's words and actions he said he appeared to him to be rational. He heard his confession and gave him absolution. Asked as to what Kelleher said, the father replied:

"That is pretty hard to say. I will have to explain myself. I wish to say the man was a perfect stranger to me. He came into my life for that once, and it would be pretty hard for me to give you my memory of it. If it had been a case I had been visiting for several weeks, I would have been able to tell you more or less what I said on those occasions.
* * *

When asked how long he was in Kelleher's room, he said:

"I came in and heard his confession, and left his room and never met him again."

He was not able to recall any conversation he had with Kelleher prior to the confession. Upon being asked pointedly whether he regarded Kelleher as then being of sound mind, he replied:

"I judged him fit to make his confession. Q. But whether or not he was of sound mind or unsound mind? A. That would be supposed. Q. That he was of sound mind? A. Of sound mind."

The other exhibits, C and D, were executed at St. Mary's Hospital on the 27th day of May, no one being present but Collins and Kelleher. Kelleher was removed from the emergency hospital to St. Mary's on the 26th day of May, and remained at St. Mary's until the time of his death. For the first two days of his detention at St. Mary's Hospital female nurses were assigned to his case, but he grew so noisy and violent that they were replaced by male nurses. The first nurse went on duty at 7 p. m., May 26, 1921. At 11 o'clock that night he became very irrational and continued irrational all the time she was with him. He did not know where he was, and thought his room was on fire, and imagined that people were trying to steal his money. His mind was wandering, and he had to be kept in bed by force. The day nurse went on duty at 7 o'clock the following morning, and she had great difficulty in keeping Kelleher in his room. He was in a de-

lirium all day and talked irrationally. He grew so violent that she and her companion were displaced by male nurses. It became necessary to change his room to a basement room and to confine him in bed with straps. It was impossible to carry on a rational conversation with him at any time. He had hallucinations and delusions, and mumbled continually. At times he would make a great deal of noise by shouting, and he imagined that he saw serpents and tarantulas upon the ceiling. There is evidence in the record given by attending nurses that he tore his bedding apart and cut the sheet into strips. He was also fearful that he was going to be served by a constable with a subpoena or some sort of process. He believed that persons who came about his room were there for the purpose of robbing him and people were trying to enter his room through the transom. His temperature was usually normal. He was in a delirium much of the time, however, and it is the testimony of four or five nurses who attended him from the day he was brought to the hospital until his death that at no time was he a rational man. It was during this period of delirium and irrationality, as described by a number of witnesses, that Kelleher signed three of the instruments in question, and during which period a power of attorney authorizing the transfer of 14 shares of the Pacific Gas & Electric Company's stock to Collins was also brought to the hospital by Collins to be signed by Kelleher. Walter R. Gerard, who nursed Kelleher at St. Mary's, beginning with May 29 to the time of his death, testified that there was not a day within that period that Kelleher did not have hallucinations and delusions. He also recited an attempt he made, at the request of Collins, to have Kelleher copy in his own hand a request prepared and furnished by Collins requesting that the latter act for him as his attorney in the guardianship matter then pending. He further testified that he was requested by Collins to make an affidavit that Kelleher seemed mentally right and to permit no one to see Kelleher, as an attempt might be made to induce him to make a will.

Upon the death of Mr. Kelleher, Dr. G. Y. Rusk, a pathologist of the University of California Hospital, and an assistant professor in the medical school, made an autopsical examination of the abdominal cavity, and found the heart, kidneys, pancreas and lungs in a very advanced stage of deterioration and disease. There was evidence of marked thickening and hardening of the arteries, fibrosis and sclerosis. The heart was generally enlarged, and the surface in some instances had adhered to the sac in which it lies. Extensive fibrous myocarditis of the left ventricle was evident. The general condition of these organs was chronic and of long standing, and affected in a very large degree the flow of the blood to the brain.

The deceased suffered from a "heart block," which was a serious and chronic disturbance of the heart action, in that it showed that the auricle and ventricle did not beat in normal rhythm. This was sufficient to cause loss of memory, forgetfulness, irritability, syncope, and a general mental disturbance. No autopsical examination was made of the brain. It was the opinion of the expert that an examination of the brain would have shown the same condition as to arterial thickening and hardening as was disclosed by the examination of the organs of the body.

[1,2] In addition to what has been above said, there is testimony in the record of marked general deterioration of mind and body in Kelleher beginning several years prior to his death. We think there is no doubt but that there is sufficient evidence in the record to fully sustain the findings of the court that he was of unsound mind at the time and for some time prior to the executions of the instruments in question, to the extent that he did not understand the nature, purpose, or extent of his acts. There is also testimony in the record coming from his most intimate friends that during the time covered by the Collins' negotiations he believed that he was engaged in making a will, and he remarked to one or two of his close friends that he had remembered them in his will. The finding of the court that he did not understand or appreciate the nature, quality, purpose, effect, and extent of his act in executing the papers in question is amply supported by the evidence in the case. It is the contention of appellant that, had decedent made a will, the evidence as adduced in this action would be insufficient to overturn it under the many standard authorities of this state settling the rule as to the degree of mental incompetency necessary to be adduced to justify a court or jury in holding a testator incompetent to make a will, and the same evidence, if applied to such a case, would compel us to hold it insufficient to establish mental incapacity. With this suggestion we must disagree. We feel satisfied that a finding of a court or a jury as to the incapacity of a testator upon evidence such as is presented to us in the instant case would compel an affirmance of the finding. No hard and fast rule may be announced as to whether a different degree of capacity is required to make a deed or contract than is necessary to the execution of a valid will. A contract may be so complex and intricate as to require a keener discernment of intellect and understanding than would be required to execute an ordinary, simple will; and vice versa. As a general proposition of law, it is impossible to say that either requires a greater degree of capacity than the other. Each must be construed with reference to its own particular or peculiar facts. But this case is not to be ruled solely by the decisions of this state which establish the quantum of

capacity required to transmit property by will. Section 39 of the Civil Code provides:

"A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission, as provided in the chapter on rescission of this Code."

Consequently, to avail one's self of this statutory remedy, it has been said by the courts of this state and other jurisdictions that:

"It is not necessary for a person to be incompetent to make any kind of a contract or to transact any business however simple, but the test is: Was the party mentally competent to deal with the subject before him with a full understanding of his rights?" *Carr v. Sacramento Clay Products Co.*, 170 P. 446, 35 Cal. App. 439; *Union Pacific Ry. Co. v. Harris*, 15 S. Ct. 843, 158 U. S. 326, 39 L. Ed. 1003. "Did he understand the nature, purpose, and effect of the contract?"

[3,4] After citing a number of authorities, the decision states the rule that, if there is found in the evidence any rational ground for holding that the person executing a contract was mentally deficient, his contract will be avoided. In determining this question an appellate court must regard the evidence in the light most favorable to such a conclusion. A person may understand that he is executing a mortgage and note or a trust deed, or trust instrument, and still lack sufficient capacity to realize the effect it might have on him or his estate and to judge of the wisdom or un wisdom of the transaction and its effect on his property. *Sutcliffe v. Heatley*, 122 N. E. 317, 232 Mass. 231.

[5-8] Section 2224, Civil Code, provides:

"One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

Whether or not Collins intended and planned to gain an advantage over Kelleher was a question for the trial court. If he did, then the burden was upon him to show that the transaction was fair. While the name of the appellant does not appear upon the roll of attorneys of this state, this court will take judicial knowledge of the fact that he was for many years an active, practicing attorney in all of the courts of this state. That he assumed to be a practicing attorney so far as relations with Kelleher were concerned there can be no reasonable doubt. Therefore he will be held to the duties and burdens which the law imposes upon an attorney in dealing with his client and to the same degree of accountability as though he

were a legally admitted attorney. He brings himself within the rule announced in *Clark v. Millsap* (Cal. Sup.) 242 P. 918.

[9] Surely a transaction such as has been outlined should command the close scrutiny of a chancellor. Whether the transactions contain within themselves the seeds of an iniquitous purpose is a question solely for his conscience, and his decree will not be disturbed if there be any substantial evidence to support his conclusion, even though an opposing conclusion may find some support in conflicting or contradictory evidence. We have examined the entire record, and have given careful consideration to the arguments of counsel, and are convinced that the judgment is supported by the evidence.

[10] Appellant insists that the action is one primarily for the reconveyance of specific real and personal property in the possession of the appellant, and that the action is therefore of a legal cognizance, and that the appellant was entitled to the intervention of a jury under the authority of section 592, Code of Civil Procedure. *Donahue v. Meister*, 25 P. 1096, 88 Cal. 121, 22 Am. St. Rep. 283; *Hughes v. Dunlap*, 27 P. 642, 91 Cal. 385. But where the issue joined by the pleadings is clearly of equitable jurisdiction, the right to a jury trial does not exist as a matter of right. In such cases it is not error to deny the application for a jury trial.

[11] Under the common law the right to a trial by jury was not granted in actions for cancellations of instruments, and the rule is well established in this state that it is not error to deny a jury in any cases where such right was not granted at common law. *Holland v. Kelly*, 169 P. 1000, 177 Cal. 43; *Cassidy v. Sullivan*, 28 P. 234, 64 Cal. 266; *Woods v. Varnum*, 24 P. 843, 85 Cal. 639; *Ballou v. Avery*, 166 P. 1003, 175 Cal. 641; 15 Cal. Jur. 331. It has been held that in actions which are nominally instituted to quiet title under section 738, Code of Civil Procedure, but which are actions of a legal nature, such as the right to the possession of real property, the litigants are entitled to a trial by jury, but in the instant case the gravamen of the complaint is of an equitable nature, and the trial court did not err in denying the application for a trial by jury. We recently held in the case of *Union Mutual Life Insurance Co. v. Broderick* (Cal. Sup.) 238 P. 1034, that, in an action of interpleader between two rival claimants to the proceeds of an insurance policy, neither was entitled to a jury trial, notwithstanding the circumstance that the real controversy was one of law. We hold, therefore, that no error was committed by denying a jury trial in the instant case.

The judgment appealed from is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; LAWLOR, J.

PEOPLE v. FOSTER. (Cr. 2816.)

(Supreme Court of California. Feb. 1, 1926.)

1. Robbery $\S$ 24(3)—Positive testimony of witness held sufficient to identify accused as robber as against inability of other witness to so identify accused.

Positive testimony of a woman as to identity of accused held sufficient to identify accused as the person who robbed her and candy store as against the inability of another woman in the store to identify accused, in view of her admission that she was very frightened and extremely nervous.

2. Constitutional law $\S$ 265—Indictment and information $\S$ 156—Statute, prohibiting amendment of "indictment" in certain respects, but permitting such amendments in an "information," held not unconstitutional as violating due process clause; "grand jury" (Pen. Code, $\S$ 872, 1008).

Pen. Code $\S$ 1008, prohibiting amendment of an indictment to change offense charged, but permitting amendment of an information so long as the crime stated by the amendment is supported by the evidence taken at the preliminary examination, within section 872, held not violative of due process clause of federal and state Constitutions, an "indictment" being found by an official body known as a grand jury and presented in open court, while an "information" is an accusatory paper filed by a district attorney after preliminary examination had before a magistrate; a "grand jury" being a distinctive, inquisitorial body existing for a limited time, and for which no one may act after it has completed its service, its sessions being secretly conducted.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Grand Jury, Indictment; Information.]

3. Criminal law $\S$ 231—Before proceedings may be had in magistrate's court against accused, he must be fully informed of his right to be represented by counsel, and is entitled to compel attendance of witnesses.

Before proceedings may be had in magistrate's court against accused, he must be fully informed of his right to be represented by counsel at every stage of the proceeding, and is entitled to compel attendance of witnesses, and he is also privileged to appear as a witness in his own behalf; all proceedings being required to be had in his presence.

4. Indictment and information $\S$ 161(3)—Permitting state's attorney during trial to amend information charging robbery by substituting name of actual person injured for name of person in whose immediate presence money was alleged to have been taken held not error (Pen. Code, $\S$ 809, 1008).

Permitting state's attorney during trial to amend information charging robbery by substituting name of actual person injured for name of person in whose immediate presence money was alleged to have been taken held not error, in view of Pen. Code, $\S$ 1008; it appearing accused was not surprised, in view of evi-

dence adduced at the preliminary hearing in magistrate's court, despite section 809.

5. Indictment and Information $\S$ 122(2)—Whole system of procedure by information is subject to control and regulation by Legislature (Pen. Code, $\S$ 809).

Whole system of procedure by information is subject to control and regulation by Legislature, including the subject-matter embraced in Pen. Code, $\S$ 809, confining district attorney in framing the information to the same crime as the one designated by the magistrate in the commitment.

6. Criminal law $\S$ 306—Presumption not indulged that accused, on day named in information, committed another robbery.

The presumption will not be indulged that accused, on the day named in an information charging him with robbery, committed another robbery, and took from another person robbed exactly the same sum of money that he took from the person named in the indictment as the person whom he robbed.

7. Criminal law $\S$ 170—Permitting state, during trial, to amend information charging robbery by substituting name of actual person injured for name of person, in whose immediate presence money was alleged to have been taken, held not error as placing accused in double jeopardy for same offense (Pen. Code, $\S$ 956).

Permitting the state, under Pen. Code, $\S$ 956, during trial, to amend information charging robbery by substituting name of actual person injured for name of person, in whose immediate presence money was alleged to have been taken, held not error as placing accused in double jeopardy for same offense, in view of accused's right, in the event of conviction, to prove the identity of the person he robbed both by parol and record evidence in the case.

8. Criminal law $\S$ 141(2).

Error cannot be presumed.

9. Criminal law $\S$ 144(16)—Not presumed that jury would permit evidence, addressed to count, that failed to influence it in consideration of another and separate count (Pen. Code, $\S$ 954).

In prosecution for robbery, based on more than one count, as permitted by Pen. Code, $\S$ 954, it will not be presumed that the jury would permit the evidence, addressed to a count, that failed to influence it in the consideration of another and separate count.

10. Criminal law $\S$ 878(3)—Jury's acquittal of accused of offense charged in one count is not ground for vitiating verdict of guilty found under another count.

Jury's acquittal of accused of offense charged in one count is not ground for vitiating verdict of guilty found under another count, if the verdict under the later count is sufficiently supported by evidence.

11. Criminal law $\S$ 572—Jury, in considering defense of alibi, is not limited to alibi defense alone.

Jury, in considering defense of alibi, is not limited to alibi defense alone, but must consid-

er that question in connection with all the other evidence in the case.

12. Criminal law $\S$ 824(4), 829(7)—Failure to instruct that accused is not required to establish alibi by preponderance of evidence held not prejudicial, in view of instructions, and failure to request proper instruction.

In a robbery prosecution, where defense was alibi, the failure of the trial court to instruct that the burden was not on accused to establish the defense by a preponderance of the evidence, but that jury must acquit, if the evidence was sufficient, on the consideration of the whole case, to produce a reasonable doubt as to his guilt, held not prejudicial, in view of instructions given, and failure of accused to request proper instruction embracing the matter.

In Bank.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Oscar Foster was convicted of robbery, and he appeals. Affirmed.

W. W. Judd, of Los Angeles, and J. A. Balthaser, of Glendale, for appellant.

U. S. Webb, Atty. Gen., Erwin W. Widney, Deputy Atty. Gen., and John L. Flynn, of Los Angeles, for the People.

SEAWELL, J. The defendant was charged by an information filed against him on the 12th day of September, 1924, by the district attorney of the county of Los Angeles, with the commission of two separate and distinct crimes of robbery, separately stated in the information. Both robberies were committed in See's candy store, located at 135 Northwestern avenue, in the city of Los Angeles, on July 19, 1924, and July 24, 1924, respectively. The first robbery was committed at about the hour of 10 o'clock p. m. and the second at about 9:35 o'clock p. m. Upon both occasions the defendant entered the candy store, of which Mr. See was the owner and proprietor, alone and undisguised in any manner, and with drawn revolver compelled the lady employees thereof to stand by while he took and compelled the delivery to him upon his first entry the sum of \$46, and upon the second entry he took the sum of \$23 from the cash register in said candy store.

The jury returned a verdict of guilty as charged in the information upon both counts. The court pronounced judgment as prescribed by law upon the verdict of guilty as found by the jury under the first count of the information, but declined to pronounce judgment against the defendant under the second count, giving as a reason therefor that it was of the opinion that the ends of justice would be fully subserved by the imposition of one sentence, and thereupon made an order dismissing the second count. Appellant upon appeal makes the point that the trial court erred in two major particulars, first, by

permitting the district attorney to amend the second count of the information; and, secondly, by refusing to give a portion of an instruction offered by him in support of his defense of alibi, which contained both objectionable and unobjectionable statements of the law, which will hereafter be considered.

That portion of the first count of the indictment which is descriptive of the offense, reads:

"That the said Oscar Foster, alias Robert Smith, alias Jack Todd, on the 19th day of July, 1924, at and in the county of Los Angeles, state of California, did willfully, unlawfully, and feloniously, and forcibly take from the person, possession, and immediate presence of one Mrs. Agnes Funke, forty-six (\$46.00) dollars * * * the personal property of the said Mrs. Agnes Funke. * * *"

The allegations necessary to the statement of an offense of this character, as to the money having been taken without the consent and against the will of said Mrs. Agnes Funke and accomplished by means of force and fear, are fully set out in said first count.

The second count in formal respects is identical with the first. That portion which is descriptive of the offense is as follows:

"That the said Oscar Foster, on or about the 24th day of July, 1924, * * * did willfully, unlawfully, feloniously, and forcibly take from the person, possession, and immediate presence of one Mr. Fisher, twenty-three (\$23.00) dollars in money. * * * the personal property of said Mr. Fisher, which taking was then and there without the consent of the said Mr. Fisher," etc.

[1] The defendant was positively identified by Mrs. Funke, who was forced by him to open the cash register drawer and take the money therefrom and hand it to him as he stood close by her side, himself occasionally assisting in emptying the money till, as the person who committed the robbery on the night of July 19th. That another lady employee, who admitted that she was very badly frightened and extremely nervous while the defendant was in the candy store, was unable to identify him as the person who entered the store and committed the crime, would by no means justify this court in reversing the case. We have reviewed the record with care and it is not at all surprising that the jury should have accepted the testimony of Mrs. Funke, as against said other employee, and the testimony of the alibi witnesses. The testimony of the former, as it appears in the record, is clear, positive, and convincing, and there appears to be no reason why it should not have been given full credit by the jury. On the other hand, said employee's testimony was badly shaken, if not positively impeached, by a number of witnesses to whom she had made statements inconsistent with her testimony as to whether she was able to say that the defendant was not

the person who entered the store as described by Mrs. Funke. Her ability to distinguish human features was greatly weakened when she declared from the witness chair that she had not before seen the face of the deputy district attorney with whom she had talked the day before she appeared as a witness. The testimony of Mrs. Funke, and the witness above referred to, was considered by the jury and nothing appears in the record that would cause us to discount the convincing effect that the former testimony must have had upon the minds of the triers of the facts. The mother of the defendant, three brothers, and two sisters were called to support the alibi defense of the accused. We have also scrutinized the testimony of those witnesses. It is quite apparent that the testimony of said witnesses was not sufficient to create a reasonable doubt in the minds of the jury that the defendant was at another place than See's candy store at the time the robbery was committed.

The next point has to do with the court permitting the district attorney to amend the information. Miss Freda Knuebel, an employee in charge of Mr. See's store on the night of July 24, 1924, was the second witness called for the people. She had been under examination but a short time whereupon she testified that the defendant came into the store, walked up to her, and pointed a "gun," which he held in his hand, toward her, and said, "Turn over your money." The witness pointed to the cash register and said: "Over there it is." The defendant, who was then within a foot or so of her, walked over to the till, opened it, and took therefrom the amount alleged in the information. At this juncture counsel for the defendant objected to the testimony of the witness on the ground that it did not "tend to establish the allegations of the information" as set out in count 2. As the facts were further developed, it became clear that it was after the money had been taken from the presence of Miss Knuebel and just as the defendant was about to depart from the candy store that Mr. Fisher, an employee of Mr. See, and from whose possession and immediate presence the money was alleged to have been taken, stepped into the store and was confronted by the defendant in the doorway. The defendant had a "gun" in his hand and said, "Get inside and stay there." Mr. Fisher entered the store, and the defendant disappeared into the street. It was these rapidly occurring incidents that caused the confusion in the pleader's mind. The defendant was positively identified by Mr. Fisher, who chanced to be in that particular locality, and was drawn into the store by the strangeness of the situation inside. The testimony directed to the second count, and which tended to show that the money was taken from the person, possession, and immediate presence of Miss Freda Knuebel, was objected to,

as the second count of the information did not allege the robbery to have been committed in the immediate presence of Miss Knuebel, and she was the only person in the store at the time the defendant entered and was engaged in the act of reducing the property to his possession, and no third person other than Fisher entered during the time the defendant was, by force of arms, making good his escape from the immediate place where he had committed the crime and from the immediate presence of the person he had robbed. At the conclusion of the examination of this witness the amendment was allowed against the objection of the defendant in conformity with the evidence taken at the preliminary examination, and the name "Freda Knuebel," the person from whose immediate presence the money was taken, was substituted in place of the name "Mr. Fisher." The testimony of the witness Freda Knuebel came as no surprise to the defendant, as she had testified in the presence of the defendant and his attorney at the preliminary examination substantially as she testified at the trial, and Fisher's testimony at said examination also showed, as defendant was fully aware, that Fisher entered the store immediately after the defendant had gained possession of the money as above described. This was substantially admitted by counsel during the discussion between court and counsel immediately prior to the order of the court substituting the name of Miss Knuebel for Fisher. Upon arraignment, defendant demurred to the information on both general and special grounds, but made no motion to set aside the second count or made no objection thereto in any way.

[2-4] Section 954, Penal Code, authorizes the charging in one information of two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses under separate counts. Section 956, Penal Code, with reference to the particular person injured in this class of crimes, provides:

"When an offense involves the commission of, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material."

Direct authority for the amendment of the information is found in the following section of the Penal Code:

"An indictment or information may be amended by the district attorney without leave of court, at any time before the defendant pleads. Such amendment may be made at any time thereafter, in the discretion of the court where it can be done *without prejudice* to the substantial rights of the defendant. An indictment cannot be amended so as to change the *offense charged*, nor an *information* so as to charge an *offense not shown by the evidence taken at the*

preliminary examination. * * * " Section 1008, Pen. Code. (Italics supplied.)

That portion of said section 1008 permitting the amendments of indictments and informations was added by amendment in 1911. St. 1911, p. 436. Prior thereto no such authority existed.

Inasmuch as the evidence taken at the preliminary examination showed that the money was taken from the immediate presence and possession of Miss Knuebel, the amendment comes within both the letter and spirit of section 1008, Penal Code, and violates no constitutional inhibition. Said section impliedly recognizes a natural distinction between an indictment, which is found by an official body known as a grand jury and presented in open court—preserving to this day at least some remnants of the ancient forms that obtained under the common-law procedure—and an information, which is an accusatory paper filed by a district attorney after preliminary examination had before a magistrate. There exist substantial reasons for placing a different limitation upon the power to amend an indictment than should be placed upon the power to amend an information.

A grand jury is a distinctive, inquisitorial body which exists for a limited time and no one may act for it after it has completed its service. Its sessions are secretly conducted and the person whose acts are under investigation by it may have no official knowledge that he is the subject of investigation, nor does he know who his accusers were or what they have testified to until after the indictment has been returned against him; in short, the accused has not had his day in court, so far as the preliminary proceedings are concerned. The right of the accused to be informed of the evidence taken before the grand jury, even after indictment found, is a modern statutory innovation of the ancient rule. In no case is the accused privileged to be confronted by his accusers. Indeed, he may not appear before the grand jury or produce witnesses in his own behalf as a matter of right. The procedure by information is quite different. The accused, before any proceedings are had against him in the magistrate's court, must be fully informed of his right to be represented by counsel at every stage of the proceeding, and he is entitled to compel the attendance of witnesses and he is also privileged to appear as a witness in his own behalf. All proceedings must be had in his presence. The evidence, which must be sufficient to support the information, is adduced in the presence and hearing of the accused and furnishes the authority for the commitment and the filing of the information. The procedure by indictment and information are so vastly different as to justify the distinction observed by section 1008, Penal Code, which prohibits the amendment of an indictment in

such form as to change the offense charged therein and permits the amendment of an information so long as the crime stated by the amendment is supported by the evidence which was taken at the preliminary examination. By pursuing this course, the due process clauses of the federal and state Constitutions are not violated by such an amendment, for the reason that the defendant was present and was given an opportunity to defend himself throughout the entire proceedings. *Hurtado v. California*, 4 S. Ct. 111, 110 U. S. 516, 28 L. Ed. 232.

Under our system of criminal procedure the committing magistrate is not limited in making his order of commitment to the allegations of the complaint or the crime named therein. It is his duty to commit the accused for trial for the offense disclosed by the evidence, even though it be a different offense than the one laid in the complaint. Section 872, Pen. Code; *People v. Lee Look*, 76 P. 1028, 143 Cal. 216; 14 Cal. Jur. 28, 29. In this case the accused was held to answer to the charge of robbery committed in the county of Los Angeles on a stated day. The kind of property taken is described as money and the amount thereof was \$23. The crime charged in the complaint and found by the magistrate to have been committed by the defendant was robbery, with the time, place, and amount of money taken specifically stated. Treating the crime as completed, and not as continuing at the time of the arrival of Mr. Fisher, the court was of the opinion that the amendment should be made. If no constitutional right of personal liberty is violated by amended section 1008, Penal Code—and we are not aware of such violation, nor have we been cited to any authority in this state which challenges the authority of the Legislature to so regulate criminal procedure—all of the objections made by appellant as to the identity of the crime are swept aside by the amendment.

[5] Conceding that the district attorney by virtue of section 809, Penal Code, is confined to the same crime in framing the information as the one designated by the magistrate in the commitment, such an exaction would not strip the Legislature of the power to authorize the correction of an error by an amendment of the information so as to correctly identify the person who was actually injured by the robbery, if the evidence taken at the preliminary examination justifies the amendment. The whole system of procedure by information is subject to control and regulation by the Legislature.

[6] But let us consider the crime as referable solely to section 956, Penal Code. The person injured is not material if the crime is described in the information with sufficient certainty as to identify the act. The act or crime of robbery as described by the information was committed by the defendant on the 24th day of July, 1924, in the county of

Los Angeles, and the amount of money taken by means of force and fear by the defendant was alleged to be the sum of \$23, the exact amount which was proved at the trial to have been taken by the defendant by means of force and fear. The only way by which any uncertainty could arise as to the identity of the crime charged would be to indulge the probability that the defendant, on the day named in the information, committed another robbery and took from said other person robbed exactly the same sum of money that he took from Miss Knuebel. But this presumption may not be indulged. Criminal acts are never to be presumed or indulged against a person, but must be proved, and the proof of the robbery alleged would not give rise to a presumption that another robbery had been committed by the defendant.

[7] There seems to be no room for doubt as to the object sought to be effected by the adoption of section 956. Said section declares in plain terms that "an erroneous allegation as to the person injured is not material," if the "offense * * * is described with sufficient certainty in other respects to identify the act." This language does not mean that the error which will be held to be immaterial is referable only to a mistake as to the name or a misdescription of the person injured, and therefore not referable to mistake as to the person injured, as expressly provided by the statute, and no case in this state so holds. If that is what the Legislature intended, it would have provided that an erroneous allegation as to the name of the person injured is not material. To so interpret the statute would be to arbitrarily change its language and meaning and render the law impotent to prevent a miscarriage of justice in cases where the commission of the crime is established and the accused identified as the person who committed it, merely because the information alleged the ownership of the property stolen to be in one person and the proofs showed it to be legally in another. In the instant case the examination of the defendant before the magistrate, as well as the testimony at the trial, identified the offense as being the same offense in each proceeding, to wit, robbery committed by the defendant.

We think the amendment as made to section 1008, Penal Code, in 1911, is quite persuasive, if not entirely convincing, as to the intention of the Legislature to permit, in the discretion of the trial court, the amendment of informations where it can be done without substantial prejudice to the rights of the defendant, so as to correctly state the offense shown by the evidence taken at the preliminary examination. Surely, a substitution of the person actually injured in the place of the one who was not injured, so far as the loss of property is concerned, but who was actually present and held in fear during a portion of the time when the injured person

was held under duress by the defendant, could not be said to be prejudicial to the substantial rights of the defendant. If, as contended, amendments only may be made to the indictment or information to correct an error or misdescription as to name, the amendment of section 1008, Penal Code, was absolutely purposeless as this has always been allowable. Prior to the statute authorizing amendments to be made to informations, it was the settled law of this state, as shown by a long line of decisions, that a mistake or misdescription of the name of the person or corporation or firm injured was not a material matter (section 956, Pen. Code), and objections made thereto upon the grounds of variance were uniformly overruled. *People v. Smith*, 44 P. 663, 112 Cal. 333; *People v. Nunley*, 75 P. 676, 142 Cal. 105; *People v. Watson*, 14 P. 97, 72 Cal. 402; *People v. Anderson*, 22 P. 139, 80 Cal. 205; *People v. Olsen*, 220 P. 444, 64 Cal. App. 126; *People v. White*, 190 P. 821, 47 Cal. App. 400; *People v. Hinshaw*, 227 P. 156, 194 Cal. 1; *People v. Grable*, 227 P. 227, 67 Cal. App. 183; 14 Cal. Jur. 91, 92, 93.

In a number of the foregoing cases, and in many others that might be cited, the name of the person or the description of the corporation alleged in the indictment or information to have been injured was so radically different from the person or corporation shown by the evidence to have been injured as to have furnished no definite information to the accused that the person charged to have been injured and the one actually injured was the same person, corporation, or firm. Under the settled state of the law, there was no occasion for further legislation on a question which had been definitely settled both by statute and by decisions of the courts of this state. Decisions in other jurisdictions have been called to our attention as authority for appellant's contention, but, upon an examination of the decisions cited, it will be found that they are based upon the nonexistence of statutory authority or statutes dissimilar to our own or upon the consideration of questions wholly different from the question presented to us for consideration under our statute. In practically all of the cases relied upon by appellant the amendment was made to an indictment as to a substantial matter, or, if to an information, the statutory right to amend, if it existed at all, was less comprehensive than our own. In *Webb v. State* (Okla. Cr. App.) 224 P. 991, the defendant was charged with maintaining a nuisance at a place designated as No. 918, North Broadway, Oklahoma City, by keeping a place where intoxicating liquors were bartered, sold, and given away, and where persons were permitted to congregate for the purpose of buying and drinking liquor. The proof at the trial showed that the defendant was in charge of a hidden whisky plant in the second story rooms at No. 718½, North Broadway, and the

county attorney was permitted to amend the information with respect to the place where the nuisance was maintained under a statute which provided that an information might be amended in matters of substance or in form at any time before the defendant pleads, and may be amended after plea on order of the court, where the same can be done without material prejudice to the rights of the defendant; and, while the court there held that an information could not be amended as to a matter of substance, it nevertheless held that the amendment concerning the place where the nuisance was committed was as to a matter of form and not a matter of substance and upheld the conviction. It will be observed, however, that there was no provision in the Oklahoma statute, as in ours, authorizing the filing of an information based upon the evidence taken before the magistrate at the preliminary examination.

While there is no prior decision of this court involving the precise facts as those presented by the instant case, the cases of *People v. Anderson*, 22 P. 139, 80 Cal. 205; *People v. Grable*, *supra*, and other decisions cited tend to establish the only interpretation which we think can be placed upon sections 956 and 1008, Penal Code, and which we have here discussed. There is certainly no authority in this state holding or pointing to a contrary conclusion. If what we have said as to the right of the district attorney to amend the information in the discretion of the court be sound, then the further question as to the identity of the defendant with the crime is rendered immaterial, as the amended information sufficiently described the offense as having been committed in the presence of the person from whose custody and possession the money was actually taken. Nevertheless, as the defendant has made the contention that the identity of the crime places him in a position where he could not defend himself against a second charge based upon the same offense, we will consider his objections as made under section 956 alone and without reference to 1008. The information in the case of *People v. Faust*, 45 P. 261, 113 Cal. 172, decided many years before the amendment of section 1008, was much more vulnerable to attack on the ground that the information did not sufficiently identify the offense than the information first filed in the present case. The defendant in that case was charged under the provisions of section 397, Penal Code, which made it a felony to furnish or supply intoxicating liquors to any Indian. Faust was charged by the information filed against him with the crime of selling liquors to two Indians, neither of whom was described by name or in any other way than "two Indians." The same objection was made in that case as is made here as to the sufficiency of the identity. This court there held that, if the defendant should again be prosecuted for the offense of which

he stood convicted, he might plead the conviction and establish the identity of the offense by parole evidence. So here, if any question should hereafter arise as to the identity of the person robbed, the defendant could show beyond the peradventure of a doubt, both by parole evidence and by the record in the case, including the information, the evidence, and the minutes of the court, that the person whom the defendant was charged and convicted of robbing on the said 24th day of July, 1924, of the sum of \$23, was Miss Knuebel and not Fisher, and all danger of being placed twice in jeopardy would be averted. Other authorities to the same effect touching the question of the plea and defense of jeopardy are commonplace in our reports.

[8, 9] Appellant, assuming the invalidity of the second count of the information for the reasons assigned, argues that a reversal of the judgment of conviction should be had under the first count, for the reason that the evidence offered in support of said assumed void count must have had a prejudicial effect upon the minds of the jurors and influenced them to the defendant's injury in their consideration of said valid count. But error cannot be presumed and it cannot be said that a jury would permit the evidence addressed to a count that failed, to influence it in the consideration of another and separate count. If appellant's reasoning be sound, section 954, Penal Code, which is the authority for the procedure adopted in the instant case, would be rendered fatal to the people in every case. The same argument as to the prejudicial effect of the offer of testimony to establish any one of the counts upon the minds of the jurors with respect to the other separate counts could be made with equal force whether the defendant be convicted on all the counts, or whether he be convicted on one or more and found not guilty on one or more. The people cannot be properly charged with bad faith by charging the defendant with two different offenses, as the evidence amply justifies its action.

[10] With bad faith removed as an element or consideration, the fact that a jury should acquit a defendant of an offense charged in one count could not be urged as a reason for vitiating a verdict of guilty found under another count, if it be sufficiently supported by legal evidence. We think there is no substantial merit in the contention of appellant as to legal prejudice suffered by reason of the proof offered to sustain the second count. This form of pleading is authorized by statute. In *re Kinney* (Cal. App.) 235 P. 460.

[11, 12] But one other question remains for decision which arises out of the court's refusal to give the whole of the alibi instruction offered by the defendant. The first paragraph of the following instruction was given, but the portion inclosed within parenthe-

sis was refused as not being a correct statement of the law:

"The defendant in this case has introduced evidence to prove the fact that he was not at the place where the crimes were alleged to have been committed, at the time charged, and if, in your deliberations, you determine that defendant was not at the place where the offenses are said to have been committed, at the time alleged, but was at another place, then under this state of facts you must find the defendant not guilty, for it is impossible for the same person to be in two different places at the same time. (The defendant is not required to prove this fact beyond all reasonable doubt, or even by a preponderance of the evidence, to entitle him to an acquittal, but it is sufficient if, after hearing all the evidence *introduced upon this subject by the defendant*, you have a reasonable doubt of his presence at the time and place where the commission of the crime is charged, and if it does, you must give the defendant the benefit of this doubt, and find him not guilty.)" (Italics supplied.)

The portion refused was properly rejected. The law is well settled that, while an alibi is not a separate or affirmative defense, the jury is not restricted or limited in its consideration of the case to the alibi defense alone, but is to consider that question in connection with all the other evidence in the case. It is true that the alibi evidence may be so persuasive as to raise a reasonable doubt as to the guilt of the defendant as against all the other evidence produced against him, but it is the duty of the jury, nevertheless, to consider all the evidence offered in the case, and it should be so instructed. *McClain v. State*, 62 So. 241, 182 Ala. 67; 29 A. L. R. 1141; *Flanagan v. People*, 73 N. E. 347, 214 Ill. 170. The court having properly refused to give the erroneous portion of said alibi instruction, the question arises whether it committed prejudicial error by failing of its own motion to instruct the jury that the burden was not upon the defendant to establish an alibi by a preponderance of the evidence, but that it was sufficient to entitle the defendant to an acquittal if the evidence of alibi, considered in connection with all the evidence in the case, raised in the minds of the jury a reasonable doubt as to defendant's guilt. The court did, by giving the sound portion of the instruction, specifically call the attention of the jury to the defense of alibi, and told them that it was impossible for the defendant to be "in two different places at the same time." It also instructed the jury fully as to its duty if any member thereof should entertain a reasonable doubt as to the guilt of the defendant upon the whole case presented, and, further, that every material fact in the case must be proved beyond a reasonable doubt; that, considering the evidence as a whole, if it was susceptible of two reasonable interpretations, "one looking towards guilt, and the other towards the innocence of the

defendant, it was their duty to give such facts and evidence the interpretation which makes for the innocence of the defendant"; further, that if the facts and circumstances of the case could be reasonably construed as establishing the innocence of the defendant, or as raising a reasonable doubt of his guilt, it was the jury's duty to so construe the evidence. In the light of the instructions given it seems almost incredible that the defendant could have been prejudiced by a failure of the court to instruct upon a subject, which doubtless it would have instructed upon, had it been furnished with a correct statement of the law with respect thereto. While it should be the practice of courts to instruct the jury that the burden is not upon the defendant to establish the defense of alibi by a preponderance of the evidence, and that it must acquit, if the alibi evidence is sufficient, upon a consideration of the whole case to produce a reasonable doubt as to his guilt, we cannot say that prejudicial error was suffered by the defendant in the light of the proceedings in the instant case.

The judgment and order appealed from are affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; LAWLOR, J.

198 Cal. 148

In re REED'S ESTATE.

REED et al. v. REED.

(L. A. 8750.)

(Supreme Court of California. Feb. 10, 1926.)

1. Insane persons $\S$ 2—Evidence held sufficient to support finding that person was incompetent to manage property.

In proceedings to declare person incompetent to care for property, evidence held to support finding that he was incompetent.

2. Insane persons $\S$ 27.

Conclusion of trial court as to incompetency of person to manage estate, based on conflicting testimony, is binding on appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

In the matter of the estate of Edward L. Reed, an incompetent person. Proceedings by Emily L. Reed and another to have Edward L. Reed declared incompetent to manage his estate. From an order appointing the Security Trust & Savings Bank guardian of his estate, Edward L. Reed appeals. Affirmed.

Hughes & Miller and Harold Aubry Miller, all of Los Angeles, for appellant.

Bertin A. Weyl and T. C. Gould, both of Los Angeles, for respondents.

WASTE, C. J. After proceedings for that purpose duly had, Edward L. Reed was declared to be incompetent, and incapable and unable unassisted, to manage and take care of his property. From the order appointing the Security Trust & Savings Bank, a corporation, guardian of his estate, Reed has appealed. His sole contention is that the evidence does not warrant the court in finding him to be an incompetent person.

[1] It appears from the record that, before the hearing on the petition for the appointment of a guardian, Reed was adjudged by the superior court of Los Angeles county to be mentally sick and was placed in charge of the psychopathic parole officer of the county. At the time of the proceedings in the court below he was confined in a private sanitarium. A number of witnesses, including three medical practitioners, testified in support of the petition. In addition to appellant, two lay witnesses and two medical witnesses were called in his behalf. In brief, the evidence is to the effect that, for about two years before the hearing in the court below, the appellant, a man now nearly 70 years of age, acted very strangely. At times he became violent, and appeared to be getting worse. His married life of some 20 years was pleasant, and he was devoted to his wife and to their son; but his attitude toward them changed. At times he became angry, chased his wife "all around the table, showing his teeth, and his eyes bulging, like he was just going to claw (her) with his teeth, and he cursed (her) unmercifully." On these occasions "his face was flushed, very red, and the veins protruded. * * * During the last two years he had had those spells very often." When the family was away he went to live at another place, and refused to return home. Finally he began lavishing his money on women who were not members of his family, and who had no call on his benevolence.

In a case involving a question of the sufficiency of the evidence to warrant a finding of incompetency by the trial court, this court said:

"It is unnecessary to enlarge upon the rule, so long settled and so well known as to be axiomatic, that the findings of a trial court upon disputed issues of fact are not to be overturned on appeal, unless they totally lack the support of substantial evidence. That rule is as applicable to a case of this character as to any other. It requires us to uphold the assailed finding if there is in the record evidence, which, with the aid of all inferences reasonably to be drawn from it, tends logically to establish the conclusion embodied in the finding." Matter of Coburn, 131 P. 352, 357, 165 Cal. 202, 212.

Aside from the testimony of the witnesses, which we have so briefly stated, there was the evidence of the medical witnesses who

testified that the appellant showed mental deterioration, had hardening of the arteries in the brain, and was suffering from senile dementia. In their opinion the appellant was insane and incompetent, and liable to be imposed upon by artful and designing persons. The testimony of these witnesses was based upon their personal observation and examination, had in connection with the lunacy commission before which the appellant was examined, and the history of appellant's case. The testimony of the witnesses for the appellant, at variance with that of the witnesses who testified in support of the petition for the appointment of the guardian, merely raised a conflict in the evidence. The effect of the testimony of the medical witnesses who examined and who testified in behalf of the appellant was so destroyed upon cross-examination as to practically amount to an admission that under some circumstances the appellant might be imposed upon by artful and designing persons in relation to his property matters.

[2] We are not unmindful, of course, of the rule invoked by appellant, that an adult person has the right to control his own person and affairs, and that that right should not be taken from him except upon a clear showing of the statutory grounds warranting a restriction of his liberty of action for his own protection. But, as was said in the case cited by the appellant, where there is any substantial conflict of testimony, the solution of that conflict must in this class of cases, as in any other, rest with the trial court. The conclusion reached by that court, after weighing opposing testimony and considering the different inferences which may be drawn from all the testimony, is not open to review on appeal. Estate of Schulmeyer, 153 P. 233, 171 Cal. 340, 342.

The order appealed from is affirmed.

We concur: RICHARDS, J.; LAWLOR, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LENNON, J.

198 Cal. 145

In re CHAPMAN'S ESTATE. (L. A. 8455.)
(Supreme Court of California. Feb. 10, 1926.)

1. Appeal and error ⇐766—Where appellant made no motion for affirmance, but printed substantially entire record, and appellant was by order relieved from requirement of statute as to matter to be included in briefs, merits of appeal would be considered (Code Civ. Proc. § 953c).

Though appellant, not including in brief matter she desires to call to attention of court, as required by Code Civ. Proc. § 953c, incurs risk of affirmance upon motion, where respondent made no motion, but printed as supplement to his brief substantially entire record of testimony, and appellant was by order of Supreme

Court relieved from requirement of such statute, held, that merits of appeal would be considered.

2. Insane persons ⇐1—One whose mental faculties were impaired so as to render her incapable of taking care of her property was "incompetent person" (Code Civ. Proc. § 1767).

One whose mental faculties were impaired so as to render her incapable of taking care of her property was "incompetent person," within Code Civ. Proc. § 1767.

3. Insane persons ⇐29.

Court on appeal would not disturb finding that mental faculties of one adjudged incompetent were still impaired, where evidence was conflicting.

4. Appeal and error ⇐204(1).

Objection to testimony would not be considered on appeal, where testimony was admitted at trial without opposition.

5. Insane persons ⇐29—On petition to be restored to competency, statement of judge at prior hearing held immaterial.

On petition by one adjudged incompetent to be restored to competency, statements of judge at hearing, which resulted in appointment of guardian, held properly excluded as immaterial.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

In the matter of the estate of Kate C. Chapman, incompetent. Petition by Kate C. Chapman to be restored to competency. From an order refusing the relief prayed for, petitioner appeals. Affirmed.

E. D. Martindale, of Los Angeles, for appellant.

Chapman & Chapman, L. M. Chapman, and Ward Chapman, all of Los Angeles, for respondent.

WASTE, C. J. On February 25, 1921, Kate C. Chapman was adjudged by the superior court of the county of Los Angeles to be an incompetent person, and a guardian of her estate was duly appointed. She has now petitioned the same court to be restored to capacity, upon the theory that, since the appointment of her guardian, her mental condition has changed for the better to such an extent that she has become capable of properly managing and preserving her estate. After hearing the evidence, the lower court was of the opinion, and found, that Kate C. Chapman is still incompetent and unable, unassisted, to properly manage her property. The petition was accordingly denied. It is from that order that this appeal is taken. The only point raised by the appellant is as to the sufficiency of the evidence to justify the finding of the lower court.

[1] A preliminary objection to the consideration of the appeal is urged by the respondent, who contends that the order below should be affirmed because of the failure of the appellant to comply with the mandatory provision of section 953c of the Code of Civil Procedure that in filing briefs in an appeal the parties must print in their brief, or in a supplement appended thereto, such portion of the record as they desire to call to the attention of the court. As we pointed out in *Estate of Berry* (Cal. Sup.) 233 P. 330, since the 1923 amendment to the section, an appellant who fails to comply therewith incurs the risk that the order or judgment appealed from may be affirmed upon motion. In the present case, respondent made no such motion. On the contrary, he printed, as a supplement to his own brief, substantially the entire record of the testimony. For this reason, and the further reason that appellant appears to have been relieved by an order of this court from the requirement of the section, we have given due consideration to the merits of her appeal. See *Jeffords et al. v. Young* (Cal. Sup.) 239 P. 1054.

[2, 3] The trial court found that appellant is afflicted with a paranoiac state of mind; that such condition is incurable; that the petitioner is unable, unassisted, to properly manage and take care of herself or her property; and that by reason thereof she would be likely to be deceived or imposed upon by artful or designing persons. Appellant contends that the evidence is insufficient to support these findings. Even if it be assumed that findings were required, there is testimony in the record to give them ample support. A number of witnesses testified for the petitioner, and others testified in opposition to her prayer for restoration to competency. The testimony of these witnesses raises a direct conflict as to the competency of the appellant. It is the contention of the respondent that the testimony of the incompetent herself, when taken and read as a whole, is sufficient to support the findings made by the trial court, and that, even though there were no other evidence in the record, the order of the lower court should be affirmed. It would serve no useful purpose to set out in detail the testimony of the petitioner or the other witnesses. The lower court had the advantage not only of seeing and hearing all of the witnesses, but of observing the appellant herself, and was in far better position than we could be in determining her mental condition. With the witnesses before it testifying to the facts disclosed by the record, the court could very properly conclude that appellant's mental faculties were still impaired to such an extent as to render her incapable of taking care of her property, and that she was still likely to be deceived or imposed upon by artful or designing persons. When it

was satisfied that such were the facts, it was its duty to hold that the appellant was still within the definition of an incompetent person found in section 1767 of the Code of Civil Procedure. Its finding on the conflicting evidence will not be disturbed. *Estate of Schulmeyer*, 153 P. 233, 171 Cal. 340.

[4] Complaint is made by the appellant that the lower court permitted Dr. Steddom, who was appointed by the court to examine appellant and report, to testify that the appellant was not competent to manage her property; no reason being assigned for the conclusion. The witness testified at length as to the condition of appellant, and all his testimony was admitted without opposition. It cannot be objected to at this time.

[5] Another contention of the appellant is that the lower court erred in sustaining an objection to a question propounded by appellant to a witness as to what statements the judge of the superior court made in announcing his judgment from the bench, at the conclusion of the hearing in 1921 which resulted in the appointment of the guardian. The objection that the remarks made at the former hearing were immaterial was properly sustained.

We find no error in the record, and the order of the trial court is affirmed.

We concur: RICHARDS, J.; LAWLOR, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LENNON, J.

76 Cal. App. 52

DANLEY v. MERCED IRR. DIST. et al.
(Civ. 2931.)

(District Court of Appeal, Third District, California, Dec. 29, 1925. Hearing Denied by Supreme Court Feb. 25, 1926.)

1. Costs $\S$ 32(1)—Landowner, who sued irrigation district to prevent unauthorized contract, and who prevailed on appeal, held entitled to costs of appeal (Code Civ. Proc. $\S$ 1027).

Landowner, who sued irrigation district to prevent unauthorized contract, and who was caused heavy expenses on appeal, by defendants' resistance, held entitled to recover costs of appeal under Code Civ. Proc. $\S$ 1027, on decision in his favor; district being benefited by result of suit.

2. Costs $\S$ 3.

The right to recover costs is statutory, and warrant for their recovery must be found in some statute.

3. Costs $\S$ 169—Where costs actually paid, prevailing party is entitled to recover, whether paid personally or by advancement by other party under agreement to repay them, and such agreement not determinable in motion to tax.

Where costs were actually paid, prevailing party was entitled to recover therefor, whether

he paid costs personally, or procured payment to be made by another party under an agreement for repayment and question whether prevailing party had obligated himself to repay sums advanced cannot be litigated on a motion to tax costs.

4. Costs $\hookrightarrow$ 169—Agreement whereby interested party paid costs under agreement for repayment, if plaintiff recovered same, did not preclude plaintiff from recovering costs of appeal.

Where interested party advanced costs on plaintiff's appeal, under agreement that plaintiff should repay costs if recovered, plaintiff on prevailing, was not precluded from recovering costs of appeal merely because his obligation to repay under such agreement was conditional upon his recovery of the costs.

5. Contracts $\hookrightarrow$ 154.

It is not presumed parties deliberately entered into agreement calling for impossible condition or event as test of performance.

Appeal from Superior Court, Merced County; J. J. Trabucco, Judge.

Action by L. E. Danley against the Merced Irrigation District and others. From an order striking out items of costs claimed, plaintiff appeals. Reversed with directions.

See, also, 222 P. 362, 64 Cal. App. 594.

James F. Peck and Robert L. McWilliams, both of San Francisco, for appellant.

E. F. Treadwell, of San Francisco, A. L. Cowell, of Stockton, and F. W. Henderson, of Merced, for respondents.

FINCH, P. J. The plaintiff, as a landowner in the defendant district, brought the above-entitled action to restrain the district and its board of directors from entering into an unlawful contract obligating the district to pay certain persons a total sum of more than \$1,000,000. The trial court sustained defendants' demurrer to the complaint, without leave to amend, and entered judgment in favor of defendants. The plaintiff appealed, and the judgment was reversed, with direction to overrule the demurrer, and the appellant was given judgment for his costs of appeal. *Danley v. Merced Irr. Dist.*, 66 Cal. App. 97, 226 P. 847, 854. Within due time after the filing of the remittitur in the trial court, the plaintiff filed therein his memorandum of costs and disbursements on appeal. The defendants duly served and filed their notice of motion to reduce certain items claimed by plaintiff as costs, on the ground that the amounts thereof were excessive, and to strike out all of the items of the cost bill "on the ground that none of the same were paid or incurred by the said plaintiff and appellant, but that, on the contrary the same were entirely incurred and paid by parties other than the plaintiff and appellant." The motion was heard and determined upon affidavits and the court made an

order "striking out all items." The plaintiff has appealed from the order. The only evidence bearing upon the question in issue is contained in the affidavit of James F. Peck, attorney for plaintiff, and is as follows:

"That it is true that said L. E. Danley did not pay directly in the first instance any of the costs in the above-entitled action, nor in the companion case of *Kelsey v. Merced Irrigation District*, but the said Danley arranged for the payment by the Crocker-Huffman Land & Water Company of said costs, and said costs were paid by the Crocker-Huffman Land and Water Company, and in this behalf affiant alleges that said Crocker-Huffman Land & Water Company, being a landowner in said Merced irrigation district (and said Danley being likewise an owner of land in said Merced irrigation district, as alleged in the bill of intervention herein), agreed with the said L. E. Danley that the said L. E. Danley should institute said action and prosecute said intervention in the name of the said Danley, and that the said Crocker-Huffman Land & Water Company would advance to said Danley, and for his use, all the costs that said Danley should expend in said action, and that, if the said Danley should recover the said costs, the said Danley should pay to the Crocker-Huffman Land & Water Company such sums as it had expended or incurred therein, and said Danley, who is likewise a property owner in said district, and interested in prosecuting the said action, in the same manner, but to a lesser amount than the Crocker-Huffman Land & Water Company, did commence and maintain the said suit and said appeals, under said arrangement, as to payment of costs of suit and appeals.

"Affiant further alleges that, prior to the printing of the transcripts in the above-entitled action, and in the companion case of *Kelsey v. Merced Irrigation District*, affiant endeavored, through R. L. McWilliams, an attorney associated with him in said case, to secure from counsel, E. F. Treadwell, for the respondents therein, a stipulation for the printing of one transcript on appeal to be used in the two appeals, in order to reduce the expense thereof, but that said attorney for said respondents refused to agree thereto, or to join in said stipulation, and said attorney for respondents insisted that two transcripts be printed and filed, one thereof in each appeal."

[1, 2] The plaintiff sued to protect the district from the unauthorized act contemplated by its board of directors, and the district, through the board, resisted his efforts, and thereby caused him to incur the heavy expense of an appeal, and, further, by refusing to make the stipulation mentioned in the affidavit, put him to the unnecessary expense of printing two transcripts, where apparently one would have answered every purpose of both appeals. The questions presented by both appeals were identical. *Kelsey v. Merced Irr. Dist.*, 66 Cal. App. 113, 226 P. 853, 854. The defendant district, as well as the plaintiff, is largely benefited by the result of the suit. On every principle of natural justice, therefore, the plaintiff is entitled to recover

his costs of appeal. The right to recover costs, however, is statutory, and "warrant for their recovery must be found in some statute." *Turner v. East Side Canal & Irr. Co.*, 177 Cal. 570, 573, 171 P. 299, 300. Section 1027 of the Code of Civil Procedure provides:

"The prevailing party on appeal shall be entitled to his costs excepting when judgment is modified, and in that event the matter of costs is within the discretion of the appellate court. The party entitled to costs, or to whom costs are awarded, may recover all amounts actually paid out by him in connection with said appeal, and the preparation of the record for the appeal, including the costs of printing briefs."

[3] In this case the costs were actually paid, and it appears to be immaterial whether the plaintiff paid the same personally or procured the payment thereof to be made by another person under an agreement that he would repay such other person the amount thereof. Respondents contend that the plaintiff—

"did not either actually pay out any amount or incur any expense in connection with his appeal. It will be impossible for him to incur any expense unless he recover costs in this action, for he cannot incur expense by paying amounts which he is under no obligation to pay, but he has not even done that. Costs cannot be recovered for the purpose of incurring the expense for which the costs are allowed. He cannot, under the facts in this case, incur expense until he recovers costs, and he cannot, under the law, recover costs until he incurs expense."

[4] Plaintiff incurred such expenses when he procured the services for which the costs are claimed. The question here presented is not whether he incurred such expenses or paid the same, but whether he obligated himself to repay the sums which the Crocker-Huffman Company advanced and paid for him. That seems to be a question between him and that company, and any controversy between them cannot appropriately be litigated on a motion to tax costs in an action to which the company is not a party. But, if it be conceded that respondents are in a position to raise the question, no sound reason appears for holding that the plaintiff is precluded by the agreement from recovering costs.

[5] The substance of respondents' contention is that the agreement between the plaintiff and the Crocker-Huffman Company is wholly ineffectual, and by its very terms defeats the evident intention of the parties. The Crocker-Huffman Company was not an officious intermeddler in the suit. Both parties to the agreement were landowners in the defendant district, and, in common with all other landowners therein, they were both interested in preventing the execution of the unlawful contract alleged in the complaint.

A suit by one landowner would as effectively accomplish that purpose as a suit by all. It is not uncommon or improper for many persons who have a common interest in the subject-matter of a controversy to advance the costs of a suit by one of them to protect the rights of all. This is especially true in actions by taxpayers to enjoin the unlawful use of public funds. No case has been cited holding that the plaintiff in such an action cannot recover his costs of suit on the mere ground that his obligation to repay those contributing to the expense of the action is conditional upon his recovering costs. When the plaintiff and the Crocker-Huffman Company entered into the agreement stated in the affidavit, they had the right to assume that, if the plaintiff prevailed in the contemplated action, he would be given judgment for his costs, and that payment of the amount thereof by the district could be enforced. It must be presumed that they acted upon that assumption in making the agreement.

"It is not to be presumed that parties deliberately enter into an agreement which calls for an impossible condition or event as a test of performance." *Saunders v. Clark*, 29 Cal. 300, 306.

The agreement is neither unusual nor improper. Courts are authorized, in proper cases, to allow persons acting in trust capacities, such as guardians, administrators, and trustees of express trusts, the necessary expenses of administering their trusts, including reasonable attorney fees. Attorneys frequently agree with such trustees to accept as compensation for professional services whatever the court may allow the trustee for that purpose. In such a case it would hardly be contended, merely because the trustee may be under no legal obligation to pay anything to his attorney unless and until the court makes an allowance therefor, that the court could not allow the trustee any sum whatever with which to pay the attorney for his services. The trustee and his attorney would have the right to contract upon the assumption that the court would allow a reasonable sum for attorney fees, just as the parties to the agreement in question here had the right to assume that the plaintiff would be allowed his reasonable costs of suit. There seems to be no distinction in principle between the assumed case and the one here under consideration. Respondent relies upon the case of *Mudd v. Mudd*, 98 Cal. 320, 33 P. 114, an action by a husband against his wife for divorce, in which it was held error to require the plaintiff to pay his wife counsel fees in the action, upon the ground that her attorneys had agreed to give their services gratuitously. The two cases are not parallel. If the attorneys for the defendant in the *Mudd* Case had agreed with her, as is usual in such cases, to accept as compensation for their services such amount as the court might

allow her for attorney fees, she would undoubtedly have been entitled to a reasonable allowance therefor.

The order is reversed, and the trial court is directed to hear and determine the motion to tax costs in accordance with the views herein expressed.

We concur: HART, J.; PLUMMER, J.

76 Cal. App. 799

H. G. KELSEY et al., Plaintiffs and Respondents, v. MERCED IRRIGATION DISTRICT et al., Defendants and Respondents, L. E. Danley, Intervener and Appellant. (Civ. 2932.)

(District Court of Appeal, Third District, California. Dec. 29, 1925. Hearing Denied by Supreme Court Feb. 25, 1926.)

Appeal by plaintiff from an order of the Superior court of Merced county, J. J. Trabucco, judge, striking out items of costs in an action to restrain the defendant Irrigation District and its Board of Directors from entering into a certain contract. Reversed.

See, also, 226 P. 853, 854, 66 Cal. App. 113.

James F. Peck and Robert L. McWilliams, both of San Francisco, for appellant.

E. F. Treadwell, of San Francisco, A. L. Cowell, of Stockton, and F. W. Henderson, of Merced, for respondents.

PER CURIAM. This is an appeal by the intervener from an order striking out all the items of his memorandum of costs. The facts are in all respects the same in principle as those in *Danley v. Merced Irrigation District et al.*, 243 P. 676, this day decided by this court.

For the reasons stated in the opinion in that case, the order is reversed, and the trial court is directed to hear and determine the questions raised by respondents' motion to tax costs in accordance with the views expressed in that opinion.

76 Cal. App. 1

CALIFORNIA CANNING PEACH GROWERS v. DOWNEY et al. (Civ. 2913.)

(District Court of Appeal, Third District, California. Dec. 26, 1925.)

1. Agriculture ⚡6—Evidence held to show co-operative member's crop had not been sold to packing company, whose permission to sell elsewhere was asserted, but merely assigned on co-operative basis.

In action by co-operative association against member for breach of contract, evidence held to show no sale had been made by association to packing company from which member claimed to have obtained permission to sell elsewhere, but that association had merely assigned peach-

es grown by defendant to packing company upon a co-operative basis.

2. Agriculture ⚡6—Member's claim of repurchase of crop from packing company to which co-operative association had sold it held unsupported by evidence.

In an action by co-operative association against member for breach of contract, defendant's claim that it had repurchased crop from packing house to whom association had sold it, held unsupported by evidence.

3. Agriculture ⚡6—Packing house to whom co-operative association had assigned crop held to have no authority to release member from delivery.

Packing house, to which co-operative fruit-growing association allotted member's crop held, under terms of agreement between association and members, to have no authority to release member from obligation to deliver.

4. Agriculture ⚡6—Though grower released by packer to whom crop had been assigned by co-operative association member held required to account for fruit sold to other than association.

Even though packing company, to whom co-operative association had assigned member's crop, had authority to release member from obligation to deliver, held that, under terms of membership contract, member would be required to account to association for fruit sold others, and would be only entitled to receive average price received by other member growers.

5. Agriculture ⚡6—Officers of co-operative association held not authorized to release fruit grown by member so as to exonerate member from accounting for proceeds.

Officers of a co-operative fruit-growing association held not authorized to release fruit grown by member so as to exonerate him from accounting to association for proceeds of sales, in view of terms of agreement with other members of association.

6. Agriculture ⚡6—Members of co-operative association must be held to have knowledge of all elements entering into marketing agreements.

Every member of a co-operative fruit-growing association must be held to have knowledge of all the elements which enter into co-operative marketing agreements, and must be charged with knowledge that no member can be advantaged to the detriment of any other member by being released from his obligation as to delivery of fruit.

7. Agriculture ⚡6—Co-operative association held not estopped to recover damages against member by reason of letter informing member it had sold crop to packing company releasing crop.

Co-operative association held not estopped to claim damages from member's breach by reason of its letter informing him of sale of his crop to packing company, from which he thereafter procured a release, since he was charged with knowledge that under contract packing company could not release his crop.

8. Novation ☞ 1.

Act of one party alone cannot accomplish a novation.

9. Novation ☞ 1—Alleged contract for release of crop of member of co-operative association held not a novation (Civ. Code, § 1531, 1532).

Where co-operative association notified member that it had sold member's crop to a certain packing house, and member thereupon secured an alleged release from the packing house of his crop, such release did not constitute a novation of defendant's contract with the association under Civ. Code, §§ 1531, 1532.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the California Canning Peach Growers, a corporation, against Sheridan Downey and others. Judgment for defendants, and plaintiff appeals. Reversed.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant.

Downey, Downey & Seymour, of Sacramento, for respondents.

PLUMMER, J. Action by plaintiff to recover liquidated damages from the defendant Sheridan Downey, on account of alleged violation of the terms and conditions of a certain fruit-marketing agreement, entered into between the plaintiff and the defendant Downey on or about the 17th day of April, 1923. The defendant had judgment, and the plaintiff appeals. Leaving all the allegations of the plaintiff's complaint uncontroverted, the defendant sets up in his amended answer:

"That the plaintiff notified the defendant that his peaches for the year 1923 had been sold to Smith-Frank Packing Company, a corporation, and that thereafter and on or about the 25th day of July, 1923, the defendant secured from said Smith-Frank Packing Company permission to ship his peaches to and sell said peaches in the eastern market."

The testimony set forth in the transcript, alleged to be insufficient to support the findings in favor of the defendant, is as follows:

On or about the 16th day of July, 1923, the plaintiff, by its secretary, forwarded to the defendant Downey a letter in the words and and figures as follows:

"July 16, 1923.

"Sheridan Downey, Sacramento, California—Dear Sir: We beg to advise you that we have sold to Smith-Frank Packing Company your crop of canning peaches based on your estimated tonnage as follows: 26 tons of new variety midsummers; 82 tons of Phillips. Peaches to be delivered at Manlove.

"Yours very truly,

"California Canning Peach Growers,

"F. S. Schmitt, Asst. Secty."

About a week subsequent to the receipt of this letter, the defendant had a conversation

with a Mr. Humphrey, representing the Earl Fruit Company, and learned that there was a possibility of obtaining a little better price for the fruit by shipping his crop through the Earl Fruit Company on a commission basis to eastern markets. Thereafter, and on or about the 25th day of July, 1923, the defendant Downey called up Smith-Frank Packing Company and had the following conversation:

"On the morning I called up the Smith-Frank Packing Company, and I asked for D. L. Smith, with whom I had dealt previously in matters; he was not there. Then I asked for Mr. Temple Smith, who was the executive officer of the Smith-Frank Packing Company. I asked Mr. Temple Smith if it would injure him in any way for me to ship my peaches to the eastern market, and, if it would not, I would appreciate it very much, their releasing my peaches. Mr. Smith was very courteous to me, and said: 'Mr. Downey, we have absolutely no objection to releasing you, if you can make more money—if you can do it by shipping your fruit, but,' he said, 'I do not believe I have any authority to release you from your contract with the Canning Peach Growers.' I said, 'Well, Mr. Smith, the Peach Growers have sold my peaches to you.' He said, 'If that is so, I have no information to that effect;' and I said, 'Well, Mr. Smith, I know it must be so because I have their letter on my desk; I am looking at it now.' Mr. Smith says, 'Well, that is rather mysterious, it had not been brought to my attention, but my brother has been handling these matters of the fruit; I do not know much about it;' and I said, 'Well, under those circumstances, then, have you any objection to my selling my fruit in the East?' Mr. Temple Smith said, 'No; as far as I am concerned I am glad to release you,' and said, 'I do not know—I do not think that the association would in any way object,' and I said, 'You, of course, realize they pay more for peaches than canned goods in the eastern markets.' He said, 'Yes; I think that is true; while we have all we can handle, we will be glad to accommodate you.'"

Mr. Downey, on cross-examination, testified in part as follows:

"Now, in this conversation with Mr. Temple Smith, was anything said as to what would be done by the Smith-Frank Packing Company to get a release from their obligation to buy the peaches which were bought, under your assumption, from the California Canning Peach Growers? A. Nothing that I can recollect now. Q. In other words, so far as the conversation over the telephone was concerned, about their getting a release from their obligation to the association? A. Nothing was said by Mr. Temple Smith, but I said then to Mr. Temple Smith that, as long as they were refusing orders from the organization, I am entirely willing to pay the association the commission that they charged for handling those peaches. Q. Of course, that is not a question of commission; all I want to know is the further conversation. A. That was all that was said. Q. Was anything said between you that you would get their release from any obligation to the association? A. No, sir. Q. Was there anything further said in case the association insisted on them

buying the peaches—A. No. Q. Nothing of that kind? A. No sir.”

Temple Smith's version of this conversation, as shown by the transcript, is as follows:

“A. Mr. Downey called up on the phone; he asked me if we would object to him shipping Tuscan peaches to the eastern market. I said, ‘Mr. Downey, we have no jurisdiction over those peaches.’ He said, ‘Why you know I expressed a preference to deliver to you, don't you?’ I says, ‘Yes;’ and I said, ‘We have never, * * * your expressed preferences has not been confirmed by a sale of those peaches.’ Then I said, ‘Inasmuch as we have not confirmed them, that is tentative.’ ‘Well,’ he said, ‘I have been notified by the association my peaches have been assigned to you.’ I said, ‘That is news to me; we have not received any such notification.’ He says, ‘Have you any objection to my shipping peaches?’ I said, ‘Mr. Downey, how can I object; we never purchased the peaches; we have not purchased one peach at all.’ * * * I forget now whether that was all the conversation or not, but I said, ‘In the nature of.’ I told him that he had better see the association about it, that we could not possibly object because we had nothing to do with them. Then he said finally, ‘Well, you have no objection to my shipping the peaches.’ I said, ‘No; I have no right to, because I cannot.’ That was all the conversation.”

On the same day, the defendant forwarded to the Smith-Frank Packing Company a letter as follows:

“Sacramento, July 25, 1923.

“Smith-Frank Packing Company, Sacramento, California—Gentlemen: Confirming my oral conversation over the telephone with your Mr. Temple Smith, Tuesday, in the event the California Canning Association sells to you my peaches from the Manlove ranch, I am to have the right to ship what portion of the crop I desire for other purposes than canning, upon the understanding that I shall notify you promptly as to what portion of the crop shall be reserved for your cannery. I wish to thank you for your courtesy in this matter, and express my appreciation of your liberal attitude.

“Yours very truly, Sheridan Downey.”

After dictating and forwarding this letter, the defendant again called up Mr. Humphrey and entered into an agreement with him for the shipment of defendant's peaches by the Earl Fruit Company to the eastern markets.

On the 26th day of July, 1923, the Smith-Frank Packing Company wrote and forwarded the following letter to the defendant:

“July 26, 1923.

“Mr. Sheridan Downey, Capital National Bank Building, Sacramento, Calif.—Dear Sir: Replying to your letter of the 25th, beg to advise that the writer does not know just what understanding our Mr. Temple Smith had with you, but we hasten now to advise you that you must not take any statement from us in regard to shipping your peaches, as final, because we are not the ones to get the authority from.

Cal. Rep. 240-243 P.—53

The peaches, as you know, have been pooled through the California Canning Peach Growers' Association, and they are the ones that have the final disposition of your peaches; therefore we beg to advise that these are the people whom you should address in the matter. The writer believes that it was only the intention of our Mr. Temple Smith to tell you that if you got the permission of the association, we would not object to your shipping the peaches. The writer is unable to take this up with our Mr. Temple Smith at the present time, because he is out of town.

“Very truly yours,

“Smith-Frank Packing Company,
“D. L. Smith.”

On the 27th day of July, 1923, the canning company forwarded to its members, including the defendant, the following circular letter relative to the handling of peaches for the year 1923:

[Letterhead of the California Canning Peach Growers.]

“244 California Street, San Francisco, California. July 27, 1923.

“To All Members: In order to place the entire tonnage of cling peaches being handled through the association, it became necessary that we place a quantity with canners on a co-operative basis. The tonnage being canned co-operatively will approximate 12,000 tons. So that members will know the way in which we are handling the matter, we have placed all the cling peaches that are being handled through the association of the No. 1 grade in one pool, all No. 2 cling peaches in one pool, Lovells in one pool, and other Freestones in one pool.

“The members delivering to canners who are packing for the association on a co-operative basis will participate proportionately in any moneys received from canners to whom we sold for cash, and the growers whose crops have been sold to canners on a cash basis will participate proportionately in any returns we may receive from the tonnage placed on a co-operative basis. In other words, all the net proceeds we receive from cash sales sources, and the co-operative sources are pooled together. As an illustration, if our deliveries for the week, including cash sales and tonnage delivered to co-operative canners, will total 1,000 tons of No. 1 Tuscan cling peaches, for which we will receive in total \$10,000, then every member who delivered that week would receive \$10 a ton.

“As regards payments, it has been deemed advisable that payments to members be made on the basis of \$15 per ton on No. 1 cling peaches, \$7.50 per ton on No. 2 cling peaches, \$12.50 per ton on No. 1 Lovells, and \$10 per ton on No. 1 grade of other Freestones; further payments to go forward at such time as the money becomes available, and our directors may deem advisable.

“Complete settlement to the members cannot be made until such time as all peaches placed with canners on a co-operative basis have been sold, and final settlement has been made by them to the association.

“Yours very truly,

“California Canning Peach Growers,

“A. D. Poggetto, Manager.”

On the 30th day of July, 1923, the defendant Downey wrote to the plaintiff as follows:

"Sacramento, July 30, 1923.

"California Canning Peach Growers, 244 California Street, San Francisco, California—Gentlemen: This will advise you that I have made arrangements to ship the peaches upon the Manlove ranch to the eastern market. Under your letter of July 16th, I was informed by you that the Manlove peaches had been sold to the Smith-Frank Packing Company. Thereafter I secured the consent of the Smith-Frank Packing Company to the release of my peaches from their contract, and, relying upon your letter and their release, my commitment has been made to an eastern shipment. I presume in any event I would have a right to make such shipment, and that you would not object to it, but certainly under the facts before enumerated I have the right to make the sale to which I have now committed myself.

"Very truly yours, Sheridan Downey."

To this letter the canning company replied by letter of the same date, to wit:

"244 California Street, San Francisco, California, July 31, 1923.

"Mr. Sheridan Downey, 314 Capital National Bank Bldg., Sacramento, California—Dear Mr. Downey. Your letter of July 30th to us is at hand this day. We are not willing to release your peaches from your contract to us. Smith-Frank Packing Company is operating for us on a co-operative basis, and, in order to make our operations through that company successful, it is necessary that they shall have all the peaches which we have assigned to them. We regret, of course, that without consulting us you have made some sort of a committal for eastern shipment, but we cannot allow that fact to jeopardize our interests in having the Smith-Frank Packing Company make a successful run this season. If growers desire to obtain a release for green fruit shipments, they should make application to the association before the association has completed its arrangements for the disposition of the fruit. Regretting our inability to comply with your request, we are,

"Yours very truly,

"California Canning Peach Growers,

"C. D. Poggetto, Manager."

[1, 2] It may be further stated that the defendant Downey testified that he acted under the belief that his peaches had been sold to the Smith-Frank Packing Company. The testimony which we have set forth shows, however, that no sale had been made, and that an assignment only had been made to the Smith-Frank Packing Company to cover the peaches grown by the defendant upon a co-operative basis. The theory upon which the respondent rests his case appears to be: (1) That the conversation had with Mr. Temple Smith of the Smith-Frank Packing Company amounted to a release of the respondent's peaches, and released him from the terms of his contract in so far as the handling of the peaches was concerned by the plaintiff corporation; and (2) that the letter dated July 16, 1923, constitutes an estoppel against

the plaintiff to set up the fact that the peaches had only been allotted and not sold to the Smith-Frank Packing Company. Upon the part of the appellant it is insisted that the letter does not amount to an estoppel, that the conversation had with the Smith-Frank Packing Company, taking the defendant's version alone, does not amount to a release, or, if it did, the Smith-Frank Packing Company had no authority to make any release and could not give to the defendant any release which would absolve the defendant from his contractual relations with the plaintiff. While in some portions of the briefs the argument is presented on the theory that the defendant's peaches were resold to him by Smith-Frank Packing Company, the answer sets up only the claim of a release, and the testimony which, when analyzed, shows that there was no element of sale entering into the negotiations between Smith-Frank Packing Company and the defendant Downey, irrespective of whether the defendant's version is accepted or that given by the witness Temple Smith.

Preceding the execution of the marketing agreement, the transcript shows that the defendant Downey had made application for admission to membership in the plaintiff California Canning Peach Growers, a corporation, and had been received as a member therein. The marketing agreement necessary to be considered in this case contains, among others, the following paragraphs:

"(5) The buyer shall pool the peaches of the grower with peaches of like kind, grade, and classification purchased by the buyer under contracts similar to this, and the price to be paid to grower therefor shall be based on the average price per pound at which all peaches of like kind, grade, and classification shall have been sold by the buyer. If, however, the grower request the buyer to sell the peaches purchased of the grower to any given purchaser, the buyer, if such sale can be made, will comply, if the prices and terms of sale are at least equal to the minimum fixed by the buyer at such time, and if such sale will not in any way injuriously affect the business of the buyer. Such sale shall not, however, affect or change the basis or manner of accounting to grower."

"(8) Each year the buyer will sell the peaches purchased by it in that year at the best obtainable market price, and pay the proceeds to the growers named in this and similar contracts, first deducting any advances made the grower, and each grower's pro rata share of the cost of receiving, handling, storing, advertising, and marketing, and other association expenses, including depreciation and an association charge not to exceed 5 per cent. of the gross sales. From this 5 per cent. organization and other general association expenses shall be deducted, and with the balance a commercial reserve shall be created. The annual surplus from such association charge must be prorated among the growers in that year on the basis of the crop purchased from each."

"(12) Grower, upon written consent of the buyer, may retain and sell all or part of his peaches green or dry, for use green or dry, but

only to or through persons, firms, or corporations which then have written contracts with the buyer, providing that the said purchasers shall handle said peaches for green use or dry use only. Grower agrees to give buyer immediate written notice of such sale, and will render an accounting to buyer for the peaches so sold by him; provided that no such sales shall be made after June 1st of any year, or such later date as the buyer may designate."

"(19) Buyer may make regulations from time to time for release of peaches for sale by grower for strictly home canning or home use."

Paragraph 13 of the marketing agreement, after setting forth that it would be impracticable and extremely difficult to fix actual damages, sets forth that 50 per cent. of the marketing price of peaches at the time of any member's breach of the agreement entered into by him shall be considered, and is by that paragraph fixed as liquidated damages and also such sum as the trial court may allow for attorney's fees in any action brought against a member for violation of his contract.

The several provisions of the marketing agreement, as hereinbefore set forth, show clearly that the whole intent and purpose of the co-operative plan are that all of its members shall stand upon an equal basis, bearing an equal proportion of the expenses of maintaining the corporation, marketing the crops, and then share upon the same basis in the proceeds available for distribution, based upon the several grades of fruit raised by the different growers. All the peaches of like kind are to be pooled, and all growers having peaches of a like kind receive exactly the same price for their product, irrespective of the fact that different quantities of the same grade of fruit may be sold for different prices. In other words, the essential foundation of the co-operative association is equality of burden and equality of profits, irrespective of whether one particular grower's crop may or may not be sold upon the most favorable market. Thus we find in paragraph 5 that the grower is to receive for his peaches the average price per pound at which all peaches of a like kind, grade, or classification may have been sold. To accomplish these purposes it is necessary that the buyer named in the agreement, which is the plaintiff in this case, have practically absolute control of the disposition and marketing of the fruit raised by different members. Were this not true, the different members would be placed in direct competition with each other. Subdivision 8 sets forth the expenses and such items as shall be charged against the crop of each member grower.

Paragraph 12 of the agreement, which is discussed at considerable length in the briefs of counsel, specifies the only procedure or method by which a grower may be permitted to retain and sell his own crop. Even in such case sales can only be made through persons, firms, or corporations which have

written contracts with the buyer (i. e., with the plaintiff in this case), and it is further agreed that such sales shall be only for green use or drying purposes (i. e., such peaches shall not be sold so as to come in competition with the peaches raised by other member growers suitable for canning purposes). Paragraph 19 of the agreement allows the canning company, the plaintiff in this case, to release peaches for sale for strictly home canning or home use. There is no claim in this case that the California Canning Peach Growers, the plaintiff and buyer named in the agreement, has executed any release or authorized the respondent to make any disposition of his fruit other than to deliver his crop of peaches to the Smith-Frank Packing Company at Manlove. The place of delivery is an important factor in the handling of fruit to the intent that excessive quantities of fruit may not be directed to be delivered at any place and an insufficient quantity at other points.

[3] The most favorable construction that can be given to the conversation had with the Smith-Frank Packing Company by the respondent is, at best, only conditional; that is, if the Smith-Frank Packing Company had bought the peaches and had the authority to make a release which would bind the plaintiff in this case, they were willing to release. It is evident, however, from a reading of the terms of the contract and from what we have said, that no authority to execute any such release was vested in the Smith-Frank Packing Company. The respondent, as a member of the peach-canning company, and as a party executing the agreement to which we have referred, certainly had knowledge of the provisions of the agreement, and that the Smith-Frank Packing Company had no power or authority to change any of its provisions. The very paragraph, to wit, No. 12, which refers to the sale of certain kinds of peaches by the grower, by its language, limits sales by the grower to such as are made prior to the 1st day of June of any year. The evident purpose of this again is to prevent competition by a grower in selling his peaches in the same market where the canning company is endeavoring to make sale of its fruit. For the more effectual purpose of carrying out the objects of the co-operative company, the title to all the fruit is vested in the canning company, and consent to any other method of distribution than that set forth must be had from the canning company. Even in such cases the paragraph of the agreement to which we have referred requires a full accounting of the proceeds of sales made by growers of released crops or released portion of their fruit, so that the members of the association may be placed upon an equal footing and not disadvantaged by reason of such released sales. In other words, if the canning company should make sale of fruit at \$30 per ton, and a released member grower

should, by advantageous circumstances, secure \$40 per ton, such grower would have to account to the canning company for the sale of his peaches at the advanced price, and would be entitled to receive as his proportion, after the accounting, the average price received by the other members of the association for the sale of a like quality and quantity of their fruit. This appears to be the very thing which the respondent avoided or sought to avoid in the disposition of his peaches through the Earl Fruit Company.

[4] The respondent's offer to pay 5 per cent. does not meet the requirements of his contract. Under the agreement, had an official release been executed by the plaintiff, or even through the medium of the Smith-Frank Packing Company, an accounting would have been had from the respondent to the plaintiff, and the respondent then only entitled to the average price for his peaches, as received by other member growers for a like quality of fruit. If the agreement could be construed otherwise, it would nullify the whole scheme of co-operation, because competitors, wishing to break down co-operative enterprises, would adopt the very tactics in obtaining fruit which the agreement prohibits, and so break up co-operative associations and leave the field thereafter free for their own exploitation. As said by the court in *Anaheim C. F. Ass'n v. Yeoman*, 51 Cal. App. 759, 197 P. 959:

"The existence and life of the association itself depended upon its being furnished fruit to dispose of in the public market. A reduction in the amount of fruit so handled would not only tend to increase the overhead cost to the non-transgressing members, but, we may assume, to some extent affect the prestige and standing of the association as a marketing concern."

The *Anaheim Case* considers fully the legality of such co-operative associations' purposes, etc., and, as a hearing of that case in the Supreme Court was denied, it may be taken as settling the different phases of the law there considered relative to co-operative organizations.

[5, 6] There is no claim that the Earl Fruit Company was a firm, corporation, or otherwise, having an agreement with the plaintiff for the handling of fruit, or any person or corporation through or by which any member grower was authorized to contract for the handling of his crops. From what we have said, and the paragraphs of the agreement which we have set forth, it is also apparent that the officers of the canning company could not release the peaches grown by the respondent so as to exonerate the respondent from accounting to the canning company for the proceeds of his peaches without violating the terms of the agreement with other grower members of the association. All the other members of the association have an interest in the proceeds received from the sale of the

respondent's peaches; they are entitled to share therein and to have the prices for their own peaches enhanced to the extent of any sum which the respondent may have secured by reason of a sale made outside of the dealings of the association. This pecuniary interest the officers of the association cannot waive or release, as that is one of the fundamental rights belonging to every member of the association. Every member of the association must, of course, be held to have knowledge of all of these elements which enter into co-operative marketing agreements. They are not simply agreements entered into with an agent, although a few people may be selected to act in the capacity of officers to manage the business of the association. The agreements are essentially to and with all the other members of the co-operative association, and the interests of every member rest upon the same foundation, and no member can be advantaged to the detriment of any other member. Of all this each member must also be held to have full knowledge, as the contract sets forth all of these facts in equalizing burdens and advantages.

[7] The respondent's theory is that the plaintiff is estopped by reason of its letter dated July 16, 1923, written by the secretary of the association. The respondent also relies upon the alleged release of his peaches by the Smith-Frank Packing Company, but it is apparent from what we have said that the respondent had no right to rely upon anything that the Smith-Frank Packing Company said as to its willingness to release the respondent, because it had no authority whatever to execute a release of the agreement and rights held by the California Canning Peach Growers, and of this fact the respondent, as a member of the marketing agreement, must have had full knowledge. If the respondent acted upon that conversation as constituting a release, he must have done so with the full knowledge that his contract provided otherwise, and that a release could only be obtained from the canning company, as conditioned in the agreement requiring full accounting. There was no lack of knowledge of these matters on the part of the respondent, and the conversation had with Smith-Frank Packing Company indicated clearly that the Smith-Frank Packing Company did not consider itself in a position to grant any release, but simply a willingness to do so, and that it would, in effect, make no difference to them.

Again, the letter of July 16th, written by the secretary of the corporation, does not evidence anything indicating an expectancy or promise that the respondent deliver his peaches, other than as therein indicated, and does not authorize any other conduct on the part of the respondent. In *Murphy v. Clayton*, 113 Cal. 153, 45 P. 267, the court, in considering some of the requirements necessary to constitute estoppel, says:

"In *Lux v. Haggin*, 69 Cal. 266 [10 P. 674, 676], the court said: 'To constitute the estoppel, the party claiming the benefit of it must be destitute of knowledge of his own legal rights, and of the means of acquiring such knowledge. *Biddle Boggs v. Merced, etc., Co.*, 14 Cal. 279; *Stockman v. Riverside, etc., Co.*, 64 Cal. 57 [28 P. 116]; *Morrill v. St. Anthony Falls*, 26 Minn. 222 [2 N. W. 842, 37 Am. Rep. 399]. To constitute such an estoppel it must also be shown that the person sought to be estopped has made an admission or done an act, with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, inconsistent with the evidence he proposes to give, or the title he proposes to set up; that the other party has acted upon or been influenced by such act or declaration; that the party so influenced will be prejudiced by allowing the truth of the admission to be disproved. *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406; *Plumb v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 392, 72 Am. Dec. 526.'"

Also, upon this phase of estoppel, the principles applicable are set forth in 21 C. J. 1126:

"It is an essential element of equitable estoppel that the person invoking it has been influenced by and has relied on the representation or conduct of the person sought to be estopped; and this rule applies with equal force and effect, as well where the conduct of the party sought to be estopped consists of silence, as where it consists of positive acts. There can be no equitable estoppel where the complainant's act appears to be rather the result of his own will or judgment than the product of what defendant did or represented. The act must be the immediate or proximate result of the conduct or representation, which must be such as the party claiming the estoppel had a right to rely on. The representation or conduct must of itself have been sufficient to warrant the action of the party claiming the estoppel. If, notwithstanding such representation or conduct, he was still obliged to inquire for the existence of other facts and to rely upon them also to sustain the course of action adopted, he cannot claim that the conduct of the other party was the cause of his action and no estoppel will arise. As a corollary to the proposition that the party setting up an estoppel must have acted in reliance upon the conduct or representations of the party sought to be estopped, it is as a general rule essential that the former should not only have been destitute of knowledge of the real facts as to the matter in controversy, but should have also been without convenient or ready means of acquiring such knowledge. One relying on an estoppel must have exercised such reasonable diligence as the circumstances of the case require."

[8, 9] As a further defense, the respondent alleges a novation. Here, again, we find no

tenable ground as a defense. Sections 1531 and 1532, Civil Code, provide the rules for determining the question of novation in this state. The first section referred to lays down three methods:

"1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation; 2, by the substitution of a new debtor in place of the old one, with intent to release the latter; or, 3, by the substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former."

Here, again, essential elements are wanting. None of the rights of the plaintiff is purported to be transferred and the Smith-Frank Packing Company expressly stated that it doubted its authority to exercise any such rights. Section 1532, *supra*, says:

"Novation is made by contract, and is subject to all the rules concerning contracts in general."

This is amplified in the case of *Young v. Benton*, 21 Cal. App. 382, 131 P. 1051, where the court said:

"Novation, strictly speaking, implies four essential requisites: 1. A previous valid obligation; 2. The agreement of all the parties to the new contract; 3. The extinguishment of the old contract; and 4. The validity of the new one."

There is nothing here which shows the agreement of all the parties to the new contract; nothing by which the parties to the old contract have contracted for its extinguishment. The act of one party alone cannot accomplish the result. As we have shown, the conversation between the respondent and Temple Smith of the Smith-Frank Packing Company did not establish any new contract; it was no sale of peaches from the packing company to the respondent, and was only the expression of a willingness on the part of the packing company to release the peaches to the respondent, provided they had any authority so to do. There is only one of the four requirements which we find in this case; i. e., a previous valid obligation, which provided for the handling of the crop in the manner set forth in the marketing agreement. To the same effect, though not set forth so fully, is the opinion of the court in *Cal. Packing Corp. v. Emirzian*, 45 Cal. App. 236, 187 P. 77.

It follows from what has been said that the judgment of the trial court must be reversed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

75 Cal. App. 737

**PRODUCERS' FRUIT CO. OF CALIFORNIA
v. GODDARD.** (Civ. 2971.)

(District Court of Appeal, Third District, California. Dec. 23, 1925. Rehearing Denied Jan. 22, 1926. Hearing Denied by Supreme Court Feb. 18, 1926.)

1. Corporations $\S$ 432(12)—Facts and circumstances held to warrant finding of power of plaintiff's general superintendent or manager to make contracts for handling fruit grown in county (Civ. Code, $\S$ 2317).

Facts and circumstances held sufficient to establish in mind of defendant, and to warrant jury's finding, that fruit company's general superintendent, or manager, in handling and purchasing fruit had power as such, in view of Civ. Code, $\S$ 2317, to make contracts for handling fruit grown in defendant's county.

2. Principal and agent $\S$ 173(3) — Evidence held to show implied ratification of oral agreement to purchase peaches at market prices by accepting fruit under terms thereof.

Evidence held to show plaintiff's implied ratification of oral agreement of its agent to handle defendant's peaches at market prices instead of under former contract at specified prices by accepting and disposing of fruit under the oral contract.

3. Novation $\S$ 4—Oral agreement to handle peaches at market price held "novation" of former agreement to handle them at specified prices (Civ. Code, $\S$ 1531).

Where, under oral agreement, defendant was obligated to deliver to plaintiff both canning and shipping peaches at market prices at time of sales, jury were justified in finding that it was made with intention that it be substituted for and extinguish previously written contract to handle peaches at specified prices, and evidenced intention that it should constitute a "novation" within Civ. Code, $\S$ 1531.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Novation.]

4. Frauds, statute of $\S$ 125(3) — Unwritten agreement, if otherwise legally unobjectionable, is as effective as is agreement committed to writing until enforcement voided on ground it was not in writing (Civ. Code, $\S$ 1624, subd. 1).

An agreement not in writing, but which Civ. Code, $\S$ 1624, subd. 1, requires shall be in writing to be enforceable, is, if otherwise legally unobjectionable, as effective as to all purposes for which it was made as is a written agreement, until its enforcement is voided because it was not in writing.

5. Frauds, statute of $\S$ 125(3) — Contract within statute, if otherwise valid, is not, because it was not written, invalid in sense that it is void (Civ. Code, $\S$ 1624, subd. 1).

An agreement or contract, within Civ. Code, $\S$ 1624, subd. 1, if otherwise valid, is not, merely because it is not in writing, invalid in sense that it is void.

6. Frauds, statute of $\S$ 144—Defense based on statute of frauds may be waived.

Because the statute of frauds relates to the remedy only, defense based thereon may be waived.

7. Novation $\S$ 10—Where parties intended a novation, and were governed by the new agreement, the old agreement is extinguished (Civ. Code, $\S$ 1531).

As question whether novation, under Civ. Code, $\S$ 1531, is always one of intention, where new agreement was intended to take place of an existing one, and where parties proceeded to be and were for two years governed by the substituted agreement, then it follows that the old agreement has been entirely abrogated or extinguished.

8. Contracts $\S$ 238(2) — Where oral agreement substituted for written agreement, statute providing that written contract may be altered only by contract in writing held inapplicable (Civ. Code, $\S$ 1698).

Since the abandonment or extinguishment of a written contract may be shown by parol, in cases where an oral agreement is substituted for an existing written agreement, Civ. Code, $\S$ 1698, providing that a contract in writing may only be altered by a contract in writing or an executed oral agreement, is not applicable.

9. Pleading $\S$ 8(7)—Courts not bound by construction pleader may give to a written instrument.

Courts are not bound by the construction the pleader may give to a written instrument, or an oral contract declared on or set up as a defense, nor pleader's conception of legal nature or effect thereof.

10. Appeal and error $\S$ 1070(1)—Failure of jury to follow instructions on plaintiff's theory of care not miscarriage of justice, where verdict accords with proper theory.

Where plaintiff's instructions were framed on theory that oral agreement effected a mere alteration of original agreement, but where verdict accords with proper theory that oral agreement was substitution of original agreement, no miscarriage of justice resulted in failure or refusal of jury to follow instructions.

11. Appeal and error $\S$ 762 — Plaintiff not placed at disadvantage because of theory on which case was decided on appeal.

Plaintiff cannot complain that in supporting appeal it was placed at disadvantage because of theory on which case was decided, since defendant presented question whether oral agreement amounted to novation, and plaintiff in reply brief noticed that fact, but refused to discuss it.

On Petition for Rehearing.

12. Sales $\S$ 89—Evidence held sufficient to justify finding that nothing was said, at time substituted oral contract was made, about committing its terms to writing.

Evidence held sufficient to justify finding of jury that, at time terms of oral contract to deliver peaches at market price, which was substituted for written contract to deliver canning peaches at specified prices, were agreed on,

nothing was said about committing terms thereof to writing.

13. Appeal and error 994(2)—Inconsistencies in witnesses' testimony concerning credibility or weight of testimony was for jury.

Apparent inconsistencies in testimony of defendant and his wife as witnesses which concerned particularly the question of their credibility or weight of their testimony was for jury to settle.

14. Sales 89—Fact that parties acted on oral agreement held competent proof of intention to abandon and cancel previously written agreement.

Even though it were true that oral agreement to deliver peaches at market price was that it should be committed to writing before it became binding, since parties themselves acted on terms of oral agreement, it was competent proof of abandonment and cancellation of written agreement.

15. Sales 78—Prices received by plaintiff for peaches, minus commissions and loading charges, constituted reasonable value thereof.

Where defendant was entitled to maintain action on quantum meruit for reasonable value of peaches delivered to plaintiff under oral agreement that plaintiff handle it at market prices, prices received by plaintiff, minus commissions and loading charges, constituted such reasonable value.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by the Producers' Fruit Company of California against M. C. Goddard. From a judgment for defendant, and from an order denying plaintiff's motion that judgment be entered in its favor notwithstanding the verdict, plaintiff appeals. Affirmed.

Devlin & Devlin and A. I. Diepenbrock, all of Sacramento, and Lowell, Lowell & Lowell, of Auburn, for appellant.

Dozier, Kimball & Dozier, of San Francisco, for respondent.

HART, J. The plaintiff is a corporation, organized and existing under and by virtue of the laws of the state of California. The defendant is a resident of Placer county, this state, and is, and has been for many years, a fruitgrower in said county.

On or about the 1st day of March, 1917, the defendant entered into an agreement in writing with the Producers' Fruit Company, a corporation, whereby the former agreed to sell, and the latter agreed to buy, the crop of Levi and Phillips cling peaches grown by the defendant on his fruit ranch in said county during the years 1917 to 1926, inclusive, covering a period of 10 years, the same "to be delivered by the seller," as the complaint alleges, "at his own expense to the shipping house of the buyer, at Loomis, California, at the following prices: No. 1 Phillips cling, \$27.50 per ton net; No. 1 Levi

cling, \$25.00 per ton net; No. 2 Phillips cling, \$13.75 per ton net; No. 2 Levi cling, \$12.50 per ton net."

The above contract, with all the rights of the said Producers' Fruit Company thereunder, was, prior to the year 1922, assigned and transferred to the plaintiff herein.

The complaint alleges that the defendant failed and refused to deliver to the plaintiff, as said contract required, the crop of peaches of the varieties named therein for the year 1922, although, it is further alleged, there were produced in said year upon defendant's fruit ranch 22½ tons of No. 1 Phillips cling peaches, 2½ tons of No. 2 Phillips cling peaches, 112½ tons of No. 1 Levi cling peaches, and 12½ tons of No. 2 Levi cling peaches; that the market value of said 1922 crop of Phillips and Levi cling peaches was \$60 per ton for No. 1's and \$30 per ton for No. 2's. The complaint alleges that, because of the failure and refusal of defendant to deliver the above specified crops of peaches for the year 1922, the plaintiff was and is damaged in the sum of \$4,928.13, for which amount judgment is prayed.

Answering the complaint, the defendant admits the making of the contract therein referred to and expressly made a part thereof, but denies all other material allegations of said pleading, and then sets up a special defense, as follows:

"That prior to the commencement of the above-entitled action, and on or about the 17th day of October, 1919, the said agreement was altered as hereinafter stated by the mutual consent and agreement of this defendant and the plaintiff herein; that on or about the 17th day of October, 1919, it was mutually understood and agreed by and between plaintiff and defendant that the said defendant did then and there sell and agreed to deliver to plaintiff during the then coming seasons of the years 1920 to 1926, inclusive, all of the fruit grown on said ranch, and that said plaintiff did then and there purchase from and agree to pay to the said defendant therefor the prevailing market price for said fruit at the times of such deliveries, less loading charges for canning fruit of \$2.50 per ton, and less a commission of 7 per cent. on all other fruit; and this defendant made and entered into said last-mentioned agreement with said plaintiff because of the desire of said plaintiff to purchase from this defendant all of his shipping fruit, in addition to the canning fruit covered by said contract of March 1, 1917; that this defendant, during the years 1920 and 1921, did perform all of the terms and conditions of said contract as so altered and on his part to be performed, and delivered to said plaintiff all of the fruit grown on said ranch during the seasons of 1920 and 1921, but the said plaintiff has failed, neglected, and refused, and still fails, neglects, and refuses, to pay to this defendant, in accordance with said contract as so altered, the said agreed market prices for said fruit prevailing during the seasons of 1920 and 1921, and this defendant is excused from further performance of

said contract as so altered by the said breach on the part of said plaintiff of said contract as so altered.

"Said defendant denies that plaintiff was entitled to purchase the 1922 crop of peaches raised on said ranch or receive delivery of the same or any part thereof under and pursuant to or under or pursuant to said agreement of March 1, 1917, or any other agreement between defendant and Producers' Fruit Company, a corporation, or any agreement between plaintiff and defendant, or otherwise or at all, and this defendant denies that he was so informed during any part of the year 1922, but in this regard defendant alleges that said plaintiff failed, neglected and refused to pay the agreed prices for the fruit delivered from said ranch to plaintiff during the seasons of 1920 and 1921 in accordance with the agreement as altered on or about the 17th day of October, 1919, as aforesaid."

Further answering the complaint, and "by way of counterclaim," the answer alleges:

"That within the four years last past, and under and by virtue of that certain written agreement, a copy of which is annexed to plaintiff's complaint herein and marked Exhibit A, as such written agreement was altered by the agreement between plaintiff and defendant, made on or about the 17th day of October, 1919, which has been executed by defendant and breached by plaintiff as hereinbefore alleged, the said plaintiff became and was indebted to this defendant in the sum of \$12,681.50, for goods, wares, and merchandise, to wit, fruit sold and delivered by this defendant to said plaintiff at the special instance and request of said plaintiff, and for which said plaintiff agreed to pay to defendant the prevailing market prices for said fruit during the seasons of 1920 and 1921 as hereinbefore alleged."

The answer admits that the sum of \$8,898.87 has been paid on account of said sum of \$12,681.50, but alleges that there is still due, owing, and unpaid to defendant, on said sum, the sum of \$3,782.63, for which sum the defendant prays that he be awarded judgment.

The cause was tried by a jury, and a verdict returned that "plaintiff is not entitled to recover anything as against the defendant; and that defendant is entitled to recover of and from plaintiff, upon the defendant's counterclaim, the sum of \$2,358.93."

Plaintiff made a motion for a judgment in its favor, notwithstanding the verdict. The motion was denied, and judgment was entered in favor of defendant in accord with the verdict.

The plaintiff appeals from the judgment and also from the order denying the plaintiff's motion that judgment be entered in its favor, notwithstanding the verdict of the jury. It is conceived to be the more orderly to set out the facts before stating the legal points upon which plaintiff relies for a reversal of the judgment. The terms of the written contract entered into between the plaintiff's assignor and the defendant are sufficiently set forth hereinabove.

It appears that, during the years 1919, 1920, and 1921, one J. H. Randolph was the plaintiff's superintendent of its Placer county shipping agencies; that, as such, he had charge of the Auburn, Newcastle, Penryn, and Loomis districts for the plaintiff, and the local agents at the places named worked for plaintiff under his supervision; that his duties were "to solicit fruit and ship fruit"—that is, he was engaged in "handling fruit and buying fruit" for plaintiff. "We sometimes bought fruit and sometimes handled it on commission," Randolph testified. Prior to the time he became connected with the plaintiff, Randolph, for several years, acted in a similar capacity for plaintiff's assignor, Producers' Fruit Company, and continued so to act until the latter went out of business and transferred all its interests to plaintiff. Just when this transfer took place the record is not clear, but it does appear that the contract of March 1, 1917, was made between defendant and the predecessor of the plaintiff.

The undisputed evidence shows that defendant grew upon his fruit ranch table, or, as it is referred to in the testimony and briefs, "shipping fruit," as well as canning fruit—that is, fruit that is to be shipped in a condition suitable for canning or packing. The written contract of March 1, 1917, covered canning fruit only; hence the defendant was, so far as said written contract was concerned, perfectly free to sell his table or shipping fruit to or through whomsoever he pleased. In other words, the written contract referred to did not include or cover the table or shipping fruit produced by the defendant during any of the years embraced within the 10-year period during which said contract was to run or subsist.

It appears that, while under no contractual obligation to do so, the defendant delivered the shipping as well as the canning peaches produced or grown on his ranch in the years 1917 and 1918 to the plaintiff's assignor and the plaintiff. In the year 1919, and after plaintiff succeeded to the interests of the Producers' Fruit Company, the defendant, in obedience to the terms of the contract of March 1, 1917, delivered his crop of canning peaches to the plaintiff's assignor, but delivered his shipping peaches to the Earl Fruit Company.

In the month of August, 1919 (near the end of the fruit season), Mr. Randolph (above referred to), as representative of plaintiff, called upon the defendant at the latter's home, and, in effect, proposed to the defendant that the contract of March 1, 1917, be canceled or abandoned, and that in lieu thereof an agreement be made between him and plaintiff whereby defendant would agree to sell and deliver to the plaintiff, during every year of the balance of the unexpired term of 10 years provided in said written contract—that is, from and including the

year 1920 to and including the year 1926—all his shipping as well as all his canning fruit, the defendant to receive for all said fruit the prevailing market prices at the times of the sale of the fruit, less a commission of 7 per cent. on the table fruit and a loading charge of \$2.50 per ton on the canning fruit. This proposition was accepted by defendant; the agreement being that the contract thus made should be substituted for the written contract of March 1, 1917, and that the latter contract should then and there be considered as canceled. Goddard said that on the occasion of the making of the oral agreement nothing was said by either him or Randolph about committing the said agreement to writing. The defendant, however, testified that some time in the year 1920, although he was then delivering all his fruit to plaintiff in pursuance of the oral agreement, he spoke to Randolph about a written memorandum of the terms of said oral agreement, and that Randolph said that he would have a written memorandum ready and presented for execution "as quick as he could," but defendant "to keep right on" and "continue shipping his clings, shipping fruit and all," or, in other words, to continue delivering all his fruit to plaintiff under the terms of the oral agreement. The defendant did continue to deliver all the fruit grown on his ranch—that is, all the canning and table fruit—and so delivered all such fruit for the years 1920 and 1921 under and in pursuance of the terms of the oral agreement. The plaintiff received or accepted the fruit so delivered, sold or marketed the same, and rendered to defendant a statement of the result of the sale of the fruit delivered by the latter to it in the year 1920 and a like statement for the fruit so delivered in the year 1921. The 1920 statement showed that plaintiff received the following prices per ton for the fruit delivered to it by defendant in the year just named: For No. 1 Phillips, \$110; for No. 2 Phillips, \$55; for No. 1 Levi, \$100; and for No. 2 Levi, \$50. The total amount for which said fruit was sold was \$9,128.68. Deducted from that sum were the loading charges, and the sum of \$7,210.06 paid to defendant by plaintiff on account of said sales. Said statement also contained a charge against defendant of \$2,358.93, noted as follows: "Your proportion of expense in re United Cannery action." This would leave the defendant, at the time of the rendition of said statement, indebted to plaintiff in the sum of \$560.99, for which sum, in a letter to defendant accompanying said statement, the plaintiff requested the former to execute and return to it his promissory note. The 1921 statement showed that the sales aggregated the sum of \$1,832.15, and a net sum in favor of defendant, after deducting commission and certain charges, of \$1,688.21. The record is not clear as to the nature or purpose of the action referred

to in the statement of 1920 sales as "the United Cannery action." There is, though, no point made here with regard to that action, or whether the charge made against the defendant on account of that suit was or was not a legitimate charge. The defendant, however, repudiated that item in said statement, claiming that he was in no way connected with or responsible for, or, either directly or indirectly, a party to or in interest in said action, and insisted upon plaintiff paying to him the full amount shown by said statement to be due him, regardless of the charge based upon said action. The plaintiff refused to make a settlement of the statement on the basis suggested and insisted upon by defendant, and the latter, claiming that thus the plaintiff had breached their oral agreement, conceived that he was under no further obligation to deliver any fruit to the plaintiff.

The above statement, as may be supposed, is extracted principally from the testimony of defendant and his wife, the latter having testified that she was present in October, 1919, when, as her husband testified, the oral agreement was made; that the terms of the said agreement were such as they are given above from defendant's testimony; and that she heard Randolph tell the defendant, when the latter asked the former when he would have a written memorandum of the oral agreement ready for the signatures of himself and plaintiff, to proceed with the delivery of all his fruit to plaintiff and that the written memorandum would be prepared and presented as soon as he could have it done.

Randolph gave a different version, in certain particulars, of what took place between him and the defendant and his wife at the time the oral agreement was made. He also claimed, and so testified, that, while it was true that he was a general agent or manager of the plaintiff in Placer county during the years preceding and at the time the alleged oral agreement was made, it was not within the scope of his authority as such general agent or manager to make any agreement with any fruitgrower with whom plaintiff had a contract for the sale of his fruit to change or modify or rescind such contract, or to make any contract for plaintiff with any other grower; that he could change, modify, rescind, or abandon a subsisting contract for plaintiff only when specially vested with such authority by plaintiff in writing; and that he had no such written authority at the time of the making of the alleged oral agreement with defendant to negotiate either a new contract with defendant or to make an agreement modifying the written contract of March 1, 1917. All the authority he possessed as agent or manager in Placer county of plaintiff, he said, had been reduced to writing. His written authority, however, had been destroyed by fire, he stated, and, therefore, could not be produced at the trial,

but a form of the written contract whereby he was employed as agent or manager was the same in all respects as the form of a like contract whereby another agent or manager for plaintiff was appointed, and that form was introduced in evidence, and the limit of his authority as such agent was, with the aid of his testimony, thereby shown. By said document Randolph "promised and agreed," among other things, "not to make or enter into any contract or agreement of any kind or nature whatsoever for the purpose of binding or obliging the said Producers' Fruit Company of California, without first receiving written authority therefor in manner as above specified." The "manner as above specified" is in the preceding paragraph of the document, and is to the effect, paraphrased, that, having no such authority, he will not attempt to make any agreement for and on behalf of plaintiff, "except said authority be specified, given, and granted by the terms hereof or by instrument in writing, signed by" certain named individuals.

Randolph admitted that, in the year 1919, after the shipping season for that year was over, he called on the defendant and his wife at their home for the purpose of securing a contract for the plaintiff for the handling of all the fruit grown by the latter on their ranch. "A man in the fruit business," testified Randolph in that connection, "wants to get all the business he can. Mr. and Mrs. Goddard had been shipping with the Producers' Fruit Company, and when they quit doing business with that company for one year (meaning the year 1919, when they delivered or sold their table or shipping fruit to the Earl Fruit Company, I naturally wanted to get it back." Randolph also admitted that he proposed to defendant that the 1917 written contract would be canceled if the latter would make an agreement to deliver all his fruit to plaintiff on the terms stated by defendant and his wife, as above set forth. He testified, though, that he said to defendant, and defendant agreed thereto, that there must be a written marketing contract covering their oral understanding or agreement, and that he would attend to having one prepared and presented to defendant for his signature. In the month of June, 1920, Randolph testified, he called on the defendant, and informed him that the plaintiff was willing to agree to a substitution of a marketing contract, covering all the fruit grown by defendant containing the terms agreed on in the oral agreement, for the 1917 written contract, and that later he would bring or send to him (defendant) a written agreement containing the terms of the oral agreement—that is, that defendant was to receive for all his fruit the prevailing market prices, minus 7 per cent. commission on the shipping fruit, and \$2.50 per ton loading charge on canning fruit; that defendant replied, "All right"; that in August, 1920, he (Randolph) called on

defendant, and informed him that "the company" (plaintiff) would make the marketing contract, "but they felt they should have the new contract take the place of the cling contract (referring to the contract of March 1, 1917), for a period of 10 years and the charge \$5 a ton as the loading charge." Defendant, Randolph said, refused to sign any contract which would bind him to a contract with plaintiff for all his fruit for a period of 10 years from the date of the execution of the proposed new contract, and further declared that he would not agree to a loading charge of \$5 per ton. He also told Randolph that his (defendant's) wife, who was not present at that conversation, would not sign an agreement containing the terms mentioned. Randolph said that when the conversation was being held he had the written agreement in his pocket, but that, defendant having declared that he would not sign it, because of the 10-year term and the increased loading charge therein provided for, he did not take the writing from his pocket or show it to defendant. The defendant, so Randolph admitted, made it clear to him (Randolph) on the occasion referred to that he would execute a written agreement in accord with the oral agreement, viz.: for a term of 6 years, covering the unexpired period or term of 10 years for which the written contract of March, 1917, provided, and providing that plaintiff should receive and sell all his fruit every year for the 6 years, on a commission of 7 per cent. on the packing fruit and \$2.50 per ton loading charge. Further testifying, Randolph said: That, subsequent to the conversation just related, he received word from the Sacramento office of the plaintiff advising him not to execute the proposed new agreement until after the "cannery action" was settled, as the lawyers of the plaintiff were apprehensive that the making of such new contract or one to be substituted for the contract of March, 1917, might in some manner affect the suit; that the "canning suit" was settled in April, 1921; and that at the close of the fruit season of that year, and subsequent to the date of the same, he attempted to induce defendant to sign a marketing contract covering all his fruit for a period of 6 years, but insisted on keeping in the contract a provision for a \$5 per ton loading charge. Said proposed written agreement was dated the 10th day of August, 1921, and signed by plaintiff. Both defendant and his wife refused to sign the agreement as so proposed. The defendant had then delivered all his fruit for the years 1920 and 1921 to the plaintiff under and in pursuance of the terms of the oral agreement of 1919, as above indicated.

Randolph repeatedly stated that the new agreement was intended to be a substitute for the written contract of March 1, 1917. Indeed, such was the trend of all the conversations between him and defendant relative

to the oral agreement. Randolph was asked by the attorney for defendant whether the latter, on the conclusion of the conversation relative to the oral agreement, in June, 1920, said that "he would commence shipping his fruit to the Producers Company," to which he (Randolph) replied: "Yes, the visit before he said that—he did commence delivering it."

In rebuttal, defendant denied that Randolph at the former's ranch, in the month of August, 1920, or at any time or any place, told him (defendant) that the plaintiff wanted a 10-year marketing contract on his fruit and an agreement that "I would pay a loading charge of \$5 per ton." Defendant further contradicted Randolph's testimony that he (defendant) told him (Randolph) at any time or place that Mrs. Goddard, wife of defendant, "would not sign any such contract," referring to the proposed written memorandum of the oral agreement, containing, however, contrary to said agreement, as the Goddards claimed, a provision that said agreement should cover or embrace a term or period of 10 years from the date of the execution thereof, and that defendant would pay plaintiff \$5 per ton as a loading charge.

The above comprehends a statement in substance of the salient facts of the controversy.

The plaintiff contends: (1) That Randolph, the general agent of plaintiff, was without authority to negotiate the alleged oral agreement; (2) that, even if, at the time said agreement was made, he possessed such authority, the agreement was, nevertheless, invalid, under the terms of subdivision 1 of section 1624 of the Civil Code, which provides, *inter alia*, that an agreement that by its terms is not to be performed within a year from the making thereof is invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged; that furthermore, the said agreement being oral and executory and its purpose to alter a contract in writing, it was invalid under section 1698 of said Code, which provides: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise;" (3) "that the evidence without conflict shows that the oral agreement was expressly understood and contemplated to be placed in writing and signed by each of the parties," and that until the same was put in writing no contract existed, "and neither party was bound by the same, irrespective of whether one or both of the parties had performed the same pursuant to the terms thereof, and in reliance that it would be placed in writing and signed by each of them"; (4) that the jury disregarded the instructions of the court.

It is to be assumed that the verdict implies the finding by the jury of the following facts: (1) That Randolph at least possessed

ostensible authority to negotiate the oral agreement above referred to and described; (2) that the defendant and Randolph, in October, 1919, entered into the said oral agreement, and that defendant, in pursuance of the terms of said agreement, delivered to plaintiff all the canning and shipping fruit grown on his ranch in the years 1920 and 1921; (3) that plaintiff received, accepted, and disposed of all said fruit upon the terms agreed upon in said oral agreement; (4) that nothing was ever said about committing the terms of the oral negotiations to writing until after defendant had proceeded with the delivery of all his fruit to plaintiff and the acceptance of the same by plaintiff; (5) that no written memorandum of the oral agreement was ever submitted by Randolph or any other person acting for plaintiff to be signed by the latter; (6) that defendant, at some time subsequent to the making of the oral agreement, and before he had delivered all of the fruit grown on his ranch in the two years named—1920 and 1921—to plaintiff, asked Randolph if he had a written memorandum prepared, to which Randolph replied in the negative, but told the defendant to proceed with the delivery of his fruit as stipulated in said agreement, and that everything would be all right, or words to that effect, and that, as above stated, defendant did so.

The facts above set forth were, as stated, comprehended within the implied findings of the jury. In the evidence as to some of those facts there is no conflict. As to some there is a conflict. Upon the question whether, at the time of the oral negotiations, it was understood between Randolph and defendant that, before those negotiations should take the form of an agreement, the terms thereof should be reduced to writing, there is a conflict. The defendant testified, as we have seen, that the terms of the new contract were agreed to by both him and Randolph at the time the new agreement was first proposed; that nothing was then said about committing them to writing; and that he proceeded, at the seasonal time for fruit shipping, to carry out the agreement; that, conceiving it to be the better plan to have the terms put in writing, he spoke to Randolph about a written memorandum after he had delivered, and plaintiff had accepted, his shipping and canning fruit under the oral agreement. Randolph, as seen, testified that the understanding was, when the oral negotiations for a different contract from that then existing were had, that the terms to which they then agreed should be committed to writing. Hence it is clear that the evidence is such that it cannot be said, as a matter of law, that the jury were not warranted in finding the vital facts—those above enumerated—favorably to defendant.

[1] 1. It is clear that the evidence discloses circumstances from which the defendant

had the right to infer, and the jury to find, that Randolph was vested with authority by plaintiff to negotiate and consummate the oral agreement. Randolph, for some time prior to the transfer of the interests and business of the plaintiff's assignor to plaintiff, represented the former in Placer county in precisely the same capacity in which he was acting for the plaintiff at the time of the making of the oral agreement, namely, general superintendent or manager of the plaintiff's business in handling and purchasing fruit, and the evidence shows that he entered into the employment of the plaintiff in the capacity mentioned, operating as such in Placer county, immediately upon the plaintiff succeeding to the fruit business of its assignor, the Fruit Producers' Corporation. Randolph admitted that, acting for plaintiff's assignor, he personally conducted the negotiations leading to the making of the written agreement of March 1, 1917. In his capacity of superintendent or manager for plaintiff and its predecessor he had exercised control or supervision of all the local fruit agencies of those corporations for several years prior to the time at which the oral agreement was made, and in that capacity, as well may be inferred from the evidence, made contracts with other fruitgrowers in the vicinity of the defendant's home. In addition to the foregoing considerations it was not shown that the defendant ever knew that Randolph was in any way limited in his authority by the plaintiff or its predecessor in the matter of making fruit contracts with fruit growers in Placer county. We think that these facts and circumstances were sufficient to establish in the mind of the defendant and in warranting the jury in so finding that the plaintiff held Randolph out as its agent in Placer county, with plenary power as such, to make for it contracts for the handling of fruit grown in said county. In other words, we think it is clear that the evidence warrants the conclusion that Randolph possessed ostensible authority to act for the plaintiff in said county in the particulars referred to, and, even if we were required to say that the circumstances were not such as to show that the plaintiff intentionally caused third persons in said county to believe him to be possessed of such power as such agent, that such third persons were allowed to so believe by the want of ordinary care on the part of the plaintiff. Section 2317, Civ. Code. The case here comes squarely within the rule stated in *Robinson v. American Fish, etc., Co.*, 17 Cal. App. 212, 219, 119 P. 388, 390, as follows:

"The law will not, of course, permit a principal to escape the liability which it attaches to him by reason of such circumstances as are present here, upon the plea that the agent has violated or transcended some limitation that he has secretly or without the knowledge of those with whom his agent, as such, is to deal placed upon the latter's authority as such agent.

* * * As is said by all the law-writers and all the cases, the rule is that 'quiescence is tantamount to acquiescence,' and forbids the principal denying an authority which his own conduct has invited those with whom he was dealing to assume. See *Clark on Contracts*, p. 717, and cases cited in the footnote. So, it may be true—indeed, assumed—that appellant did limit the authority of Junta in the respects specified by the latter, and yet the former, under the circumstances as disclosed here, and according to the implied findings of the jury, is still bound by his acts and estopped by its own conduct from denying his authority to go as far as he did. 'Where the special character of the agency is not known, and the principal has clothed the agent with apparent powers, strangers, in dealing with the agent, may assume that such apparent powers are possessed. The principal cannot, by private communications with his agent, limit the authority which he allows the agent to assume.' *Clark on Contracts*, p. 734, and cases cited."

See *Leavens v. Pinkham & McKevitt*, 164 Cal. 242, 244 et seq., 128 P. 399, in which the facts are strikingly similar to those herein, and also *Jan Wai v. Smith-Riddle Co.*, 55 Cal. App. 59, 202 P. 952; 1 Cal. Juris. § 44, p. 745.

[2] But the question of the authority of Randolph to make and bind the plaintiff by the oral agreement is without material significance, since the evidence unquestionably shows that there was at least an implied ratification of the oral agreement by the plaintiff, in that it accepted and disposed of all the fruit grown on defendant's ranch and delivered by the latter to the former in the years 1920 and 1921, in accord with the terms of said agreement. Indeed, to the extent of that portion of the period during which the agreement was to exist covered by the years 1920 and 1921, the agreement was fully performed and executed. The written statements rendered by plaintiff to defendant showing the sales according to the prevailing market prices of the years 1920 and 1921, the verity of which was in no way challenged or impeached, together with the fact that plaintiff accepted and handled all the fruit produced by defendant on his ranch for those years, stand as conclusive evidence of the fact that plaintiff, in accepting and handling said fruit, was acting, and did act, in pursuance of the terms of said contract, and thus ratified it.

[3] That the oral agreement constituted an entirely new contract and the jury were justified in finding that it was made with the intention that it should be substituted for and so extinguish the contract of March 1, 1917, are propositions which seem to afford no ground for legitimate discussion. The agreement is itself evidence evincive of an intention by both parties that it should constitute a novation, or, as our law defines such a transaction, the substitution of a new obligation for an existing one. Civ. Code, § 1531. It is widely divergent or different in

terms from the contract of March 1, 1917. By the latter, as has been pointed out, and as is obvious, the defendant was bound to the delivery of his canning fruit only at definitely specified prices. As before stated, he was under no obligation under said contract to deliver or sell any of his shipping or table fruit to the plaintiff or its assignor. These he could dispose of as he saw fit or as pleased him. Under the new agreement he committed himself to deliver to plaintiff both his canning and shipping fruit, not at specified prices, but at the prevailing market prices at the times the sales of the fruit were made.

[4-7] 2. We are wholly out of accord with the contention that the new agreement could not have the effect of extinguishing the contract of March 1, 1917, for the reason that, not being in writing, it is invalid under the statute of frauds. Civ. Code, § 1624, subd. 1, *supra*. It is thoroughly settled that an agreement or contract within the provisions of the statute of frauds, if otherwise valid, is not, merely because it is not in writing, invalid in the sense that it is void. In *re Balfour v. Garrette*, 14 Cal. App. 261, 111 P. 615; *Durbin v. Hillman*, 50 Cal. App. 377, 195 P. 274; *Kinney v. Jos. Herspring & Co.*, 53 Cal. App. 628, 636, 200 P. 737; *Warder v. Hutchison* (Cal. App.) 231 P. 563; *O'Brien v. O'Brien* (Cal. Sup.) 241 P. 861. It follows that an agreement not in writing, but which the statute requires shall be in writing to be enforceable, if legally unobjectionable in all other respects, is as effective as to all the purposes for which it has been made as is such an agreement whose terms have been committed to writing until its enforcement is voided upon the ground that it is not in writing. This proposition is sustained by the consideration that, because the statute of frauds relates to the remedy only, a defense based thereon may be waived. 1 Cal. Jur. § 110, p. 941, and cases therein named. Hence, upon the making of the oral agreement, the written contract of March 1, 1917, *ipso facto et eo instanti*, passed out of existence, and became *functus officio*. And this proposition would still remain unimpeachable even where the statute of frauds had been successfully interposed against the enforcement of the terms of the new agreement itself. The question whether a novation has taken place is always one of intention (Civ. Code, § 1531; *Parkside Realty Co. v. McDonald*, 166 Cal. 426, 430, 137 P. 21; 29 Cyc. 1134), and where it satisfactorily appears that a new agreement was intended by the parties to take the place of an existing one, as clearly it was so made to appear here, since the parties proceeded to be and were for two years governed by the substituted agreement, then, as stated, it necessarily follows that the old agreement has been entirely abrogated or extinguished. And, as

is said in *Beckwith v. Sheldon*, 165 Cal. 319, 323-324, 131 P. 1049, 1050:

"This extinguishment does not mean that the earlier contract was held in abeyance or in suspense. It does not mean that it could be revived upon a mere failure to perform the new obligation. It means that it was canceled and obliterated as completely as though it had never had existence. It means that, saving in the exceptional cases which are indicated by section 1533 of the Code, and of which this is not one, all rights are to be measured and determined under the new substituted obligation as completely as though it had never been preceded by an earlier contract. It matters not, as has been said, that the new agreement is itself executory. Indeed, generally speaking, all the cases arise when the substituted agreement is executory, for, if executed, there could seldom or never be cause of complaint or ground of action. The courts have felt themselves compelled to look no further than to determine whether a novation has taken place, or, in other words, whether the new contract was entered into without fraud and with an agreement of minds that it was to be substituted for the existing obligation. When that point has been reached they have found no difficulty in declaring that the rights of parties to the agreement are to be governed by the new contract alone, and that a failure to perform does not, under any theory of rescission or revivor, operate to breathe new life into the dead and extinguished obligation. *Spier v. Hyde*, 78 App. Div. 151 (79 N. Y. S. 702); *Morehouse v. Second Nat. Bank*, 98 N. Y. 503; *Kromer v. Heim*, 75 N. Y. 576 (81 Am. Rep. 491); *Dean v. Skiff*, 128 Mass. 174; *Huggins v. Safford*, 67 Mo. App. 469; *Howard v. Scott*, 98 Mo. App. 509 (72 S. W. 709); *Oakley v. Ballard*, 1 Hempst. 475, 18 Fed. Cas. 515."

[8] The theory upon which we feel justified by the record in deciding this case makes inapplicable, regardless of the consideration that the oral agreement was in part executed, those cases in which it is held, in accord with section 1698 of the Civil Code, that a contract in writing may only be altered by a contract in writing or an executed oral agreement. As has already been shown, the oral agreement here goes further than merely to modify or alter the existing agreement—its effect was to work a novation and the consequent rescission or abrogation of the written contract of March 1, 1917. Manifestly, no one will take the position that the abandonment or extinguishment of a written contract by the mutual agreement of the parties may not be shown by parol. The rule that such extinguishment may be so shown proceeds from the very nature of such a transaction itself, and has often been applied by the courts. See *Pearsall v. Henry*, 153 Cal. 314, 95 P. 154, 159; *Credit Clearance Bureau v. Hochbann Cont. Co.*, 25 Cal. App. 546, 144 P. 315; *Proud v. Strain*, 11 Cal. App. 74, 103 P. 949. In those cases it is held that, where an oral agreement is substituted for an existing written agreement,

section 1698 of the Civil Code has no application.

3. To the contention that the oral agreement was without binding force for the reason that it was agreed, in the making thereof, that it should not bind the parties until its terms were reduced to writing, a sufficient answer is that, upon the question whether such an understanding was had when said agreement was made, the evidence is in sharp conflict, from which situation it follows, in view of the direct and explicit instructions given by the trial court to the jury upon that question, that the verdict must be interpreted to imply a finding that it was not understood or agreed by and between Randolph and defendant, at the time said agreement was made, or at any other time, that the terms thereof should be committed to writing and signed or subscribed by the parties before it should become operative or binding upon them. The fact that both parties, after the oral agreement was made, acted upon or in conformity with the terms of the oral agreement for two consecutive years immediately succeeding the date of the making of said agreement is itself singularly persuasive as in substantiation of defendant's testimony and that of his wife that no such an agreement was made or understanding had. It is a consideration worthy of note that, if it were true that the agreement was to be put in writing, the written statement delivered to defendant by plaintiff and signed by the latter of the sales of the fruit in 1920 in accord with the terms of said agreement, in effect, constituted at least an acknowledgment in writing of the making of said agreement.

[9] But it is vigorously asserted by counsel for plaintiff that the case went to issue entirely upon the theory that the oral agreement involved an attempted modification of the written agreement of March 1, 1917, and that the trial was had and submitted to the jury solely upon that theory; that, accordingly, the case should here be decided on that theory. Practically, the case was tried upon both theories; that is to say, upon both the theory that the oral agreement involved a modification of the existing agreement and upon the theory that it wrought a novation. The defendant in his answer pleaded or set forth the terms of the oral agreement, and it is in the case to speak for itself. It is true that defendant, in pleading said agreement, characterized it as a modification of the written contract so often referred to herein; but the courts are not bound by the construction the pleader may give to a written instrument or an oral contract declared upon or set up as a defense, or the pleader's conception of the legal nature or effect thereof. As pleaded, the oral agreement upon its face is clearly a new agreement between the same parties relative to the same subject. And there was evidence that, as pleaded, it was

made and intended to take the place of the one then in existence. Randolph and the defendant and the latter's wife repeatedly declared, when giving their testimony, that it was expressly agreed and clearly understood that the oral agreement was to operate as a substitute for the old agreement, or, as Randolph himself several times expressed it, "as in exchange for the written agreement." While these statements by those witnesses do not constitute the criterion determinative of the legal nature of the oral agreement (a function of the court), still they show and emphasize what the parties themselves understood and, in fact, intended was to be the purpose of said agreement when they were negotiating the consummation thereof. But a further and quite a significant consideration in the present connection is that, while it is true that the trial court submitted to the jury a number of instructions fitting the theory that the oral agreement involved a modification of the written contract of March, 1917, it also gave to the jury the following: "If, from the preponderance of the evidence in this case, you find that plaintiff and defendant entered into an agreement as a substitute for the written contract sued upon, which agreement was to be placed in writing and signed, but which has not been either reduced to writing or signed by plaintiff and defendant," then the plaintiff is entitled to a verdict, etc. While, perhaps, it may not be strictly correct to say that the question whether the oral agreement was intended as a substitute for the original agreement was thus directly submitted, yet the phraseology of the instruction is such that, when considered with the evidence in the case as to the circumstances characterizing the making of said agreement, it may justly be concluded that the theory that said agreement was intended to operate as a novation or to be substituted for the contract of March 1, 1917, was fairly within the case, as it was tried and submitted to the jury. Indeed, the facts of the transaction culminating in the making of the oral agreement would necessarily be the same whatever might be the legal nature of said agreement. As Mr. Justice Waste said in *McClure v. Alberti et al.*, 190 Cal. 348, 351, 212 P. 204, 205, which involved an action upon a contract similar in its general aspects to the one here, and in which it was objected that the trial court committed prejudicial error by allowing the respondent to amend her pleadings, after the evidence was all in, so as to make them conform to the proof that the contract declared upon wrought a novation rather than the alteration of an existing agreement, as was the theory of plaintiff's case as originally framed and filed, so in principle, it is true here:

"Assuming that an additional issue was tendered by the amendment, we cannot see how the testimony in the case could have been dif-

ferent from that already introduced. All the facts were before the court, and its findings [verdict here] conclusively establish the liability of the appellants, irrespective of whether the issue was one of an alteration of the written contract or its entire abandonment, and the substitution of the oral agreement."

[10] 4. The given instructions which appellant contends the jury disregarded in considering the evidence and arriving at a verdict were framed upon the theory that the oral agreement constituted and effected a mere alteration of the original contract. They were given to the jury at the request of the plaintiff, but, as the verdict accords with what we conceive to be the correct theory of the nature of the oral agreement, and is evidentially well supported upon that theory, it cannot, of course, consistently be said that a miscarriage of justice has resulted from the failure or refusal by the jury to follow said instructions.

[11] Lastly, it is to be observed that the appellant cannot justly complain that in supporting this appeal it has been placed at a disadvantage because of the theory upon which the case is here decided, since the respondent in his brief, while not elaborating the proposition, nevertheless presented the question whether the oral agreement amounted to a novation, and counsel for the appellant, in their reply brief, noticed that fact, but refused to discuss the question, claiming that that proposition was not an issue in the case. Certainly, the plaintiff cannot justly claim that the question was not opened up by respondent for discussion on this appeal.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

On Petition for Rehearing.

PER CURIAM. [12] Counsel for plaintiff, in their petition for a rehearing, state the former opinion was incorrect in the statement therein that there was a conflict in the evidence upon the question whether it was agreed and understood that the terms of the "new agreement," as it may the more conveniently be designated, were to be reduced to writing before it should become binding upon the parties. On page 32 of the transcript is the defendant's testimony that in October, 1919, Randolph, at defendant's house, made a proposition to defendant that plaintiff would cancel the old agreement if defendant would agree to deliver all his peaches for the remainder of the term specified in the old agreement to plaintiff upon the terms stated in the former opinion herein, and that defendant then and there agreed thereto. On page 36 of the transcript it will be seen that defendant testified that on the occasion above referred to nothing whatever was said by either Randolph or himself about committing the new agreement to writ-

ing. On cross-examination, defendant repeatedly stated that, while the new agreement was understood to be a "marketing contract," he also said page 69 that in the conversation in October, 1919, leading to the making of the new agreement, nothing was said about a "written contract." On the same page it will be seen that he also said "there was nothing spoken of a marketing contract"; that all that was said by Randolph was that "he would give us a market price for it" (the fruit). The deposition of defendant as to the transactions involved here was taken prior to the trial. Counsel for defendant based a part of their cross-examination of defendant on said deposition, thereby showing that defendant therein stated that the understanding was that the new agreement was to be put in writing as a marketing contract. In brief, the defendant's testimony upon that subject seems to be inconsistent. A careful analysis of it would well warrant the conclusion that he was unable to make himself clear regarding that matter. His testimony in places would indicate that what he understood to be a "marketing contract" was an agreement whereby he was to receive the market prices for his fruit, and that it was in that sense that he stated in his testimony that he was to have a marketing contract for his fruit. Again, he would seem to undersand the technical characteristics of a marketing contract, and stated that no such contract was mentioned when the new agreement was first suggested by Randolph. And repeatedly he said that nothing was ever said about a writing until 1920, about or after the time he delivered all his fruit to plaintiff according to the terms of the "new agreement"; and again he stated that he supposed that the terms would be put in writing, and for that reason asked Randolph when he would have the writing embodying the terms of the new agreement prepared. Goddard did say, on cross-examination, that his statement in his deposition that there was an understanding at the time the new agreement was made that said agreement was to be put in writing was correct. In fact, he "backed and filled," so to speak, throughout his testimony, brought out both on his direct and cross examination, upon the question whether anything was said at the time the agreement was made about reducing said agreement to writing. The testimony of defendant's wife, who was present at the time the new agreement was made, was something of the same general character as that of her husband regarding this matter. She first stated that nothing was said about a written memorandum of the terms of the new agreement when the same was made. She stated that Randolph and her husband agreed on the terms of the new agreement, as they are explained in the former opinion, and that, in pursuance thereof, her husband

in 1920 and 1921 delivered all his fruit to plaintiff under said agreement. On cross-examination she contradicted her testimony to the effect that nothing was said about putting the new agreement in writing at the time said agreement was made. But, with all these inconsistencies considered, we still adhere to the view that the repeated statement of defendant during the course of his examination that there was no understanding, at the time it was made, that the new agreement should be reduced to writing, and that of his wife to the same effect, taken together with the undisputed fact that defendant delivered to and the plaintiff received and disposed of all of the former's fruit in the years 1920 and 1921 in accord with the terms of the oral agreement, and also Randolph's positive testimony that the oral agreement was to be put in writing, and that such was the understanding at the time it was made, created a conflict in the evidence upon that question.

[13, 14] The jury could, in our opinion, have well concluded, upon a consideration of the testimony of both Goddard and his wife as to the matter in hand, that, having freely admitted that there was some talk subsequent to the making of the oral agreement about putting the same in writing, became confused as to dates, and that what they at all times intended to say was that no writing was spoken of until some time after the oral agreement was made and the parties had proceeded to carry out the terms of said agreement. At all events, the apparent inconsistencies in their testimony concerned particularly the question of their credibility or the weight of their testimony, which it was for the jury to settle, as, upon the whole case, it was for the jury to determine whether there was or was not any understanding had between Randolph and Goddard that, before the terms of the oral agreement were to become binding upon the parties, the same should be put in the form of a writing. But, be all that as it may, we are in no doubt that, even if the oral agreement was void for the reason that it was not put in writing as agreed, if such was the agreement, the fact that both Randolph and Goddard agreed, at the time the oral agreement was first discussed, that it should be substituted for the old written contract, and the further fact that in the years 1920 and 1921 the defendant delivered all his fruit to the plaintiff, and the latter received, handled, and disposed of the same precisely according to the terms of the oral agreement, as shown by its statements rendered to de-

fendant for those years, constitute conclusive evidence of an intention on the part of both parties to abandon and so cancel the written agreement of March 1, 1917 (*Parkside Realty Co. v. MacDonald*, 137 P. 21, 166 Cal. 426, 430; 29 Cyc. 1134; Civ. Code, § 1531), and that such was the effect thereof. There is no inconsistency between the conclusion thus announced and the fact, if it is a fact, that the so-called new agreement was or is void or nonenforceable because not committed to writing. The fact that a written contract has been abandoned or canceled may be shown by parol, and, while it is true that the terms of the oral agreement, in so far as they are executory, may not be enforced, if it be true that the agreement was that they should be committed to writing before they were to become binding, still the fact that the parties themselves acted upon and in accord with the terms of the oral agreement, it having been expressly understood that said agreement was to supersede or be substituted for the old or existing agreement, is competent proof of the intention to abandon and cancel and consequently of the fact of the abandonment and cancelation of the latter agreement.

The cases cited by counsel in their petition as upholding their position that the old agreement, upon which this action is grounded, still exists or was never abandoned or canceled have no application to the situation here. They are: *Spinney v. Downing*, 41 P. 797, 108 Cal. 666; *Aftergut v. Mulvihill*, 145 P. 728, 25 Cal. App. 784; *Mercantile Trust Co. v. Sunset, etc., Co.*, 168 P. 1037, 176 Cal. 461; *Durst v. Jolly*, 169 P. 449, 35 Cal. App. 184; *Dillingham v. Dahlgren*, 198 P. 832, 52 Cal. App. 322. In each of the cases named the action was on the invalid contract, or, in other words, involved an attempt to enforce a contract which was void because it offended the statute of frauds or was not committed to writing, as the parties agreed that it should be before its terms should be binding upon them.

[15] It will not be disputed (assuming that the oral agreement was invalid) that the defendant was entitled to maintain an action upon a quantum meruit for the reasonable value of the fruit which he delivered to plaintiff under the oral agreement, and that the prices received by plaintiff for said fruit in 1920 and 1921, minus the commissions and loading charges, as disclosed by the statements of the sales rendered to defendant by plaintiff, constituted the reasonable value of said fruit.

The petition for a rehearing is denied.

75 Cal. App. 680

NIELSEN v. RICHARDS, County Auditor.
(Civ. 3000.)

(District Court of Appeal, Third District, California. Dec. 21, 1925. Hearing Denied by Supreme Court Feb. 18, 1926.)

Schools and school districts § 135(3)—Contract by county superintendent of schools, employing wife as supervising teacher, is unenforceable; "traveling expenses" (Pol. Code, § 920; Pen. Code, § 71; Civ. Code, §§ 155-159, 171, 176, 1607, 1608, 1667).

Contract by county superintendent of schools, employing his wife as supervising teacher of schools, including provision for "traveling expenses," which include room rent and meals as well as transportation, held unenforceable, under Pol. Code, § 920, and Pen. Code, § 71, prohibiting officers from having any interest in contracts executed in their official capacity, in view of duty of support of wife by husband under Civ. Code, §§ 155, 156, 171, and in view of sections 1607, 1608, 1667, making entire contract, part of which is against public policy, void, and notwithstanding sections 157, 158, 159, 176.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Application by Josie E. M. Nielsen for a writ of mandate against Lucy V. Richards, as Auditor of the County of Butte, to require payment of salary as supervising teacher of rural schools. Judgment denying writ, and petitioner appeals. Affirmed.

See, also, 232 P. 480.

Ware & Ware, of Chico, for appellant.

Wm. E. Rothe, Dist. Atty., of Chico, and C. W. Johnson, Deputy Dist. Atty., of Oroville, for respondent.

PLUMMER, J. Action by petitioner to secure a writ of mandate directing the respondent, as the auditor of the county of Butte, to audit, approve, and allow a certain warrant issued and delivered to petitioner by C. H. Nielsen, the county superintendent of the county of Butte, for and on account of a certain contract purporting to employ the petitioner as a supervising teacher of rural schools in the county of Butte. Respondent had judgment, and the petitioner appeals.

The record shows that during all the times referred to in this proceeding C. H. Nielsen was the superintendent of schools of the county of Butte; that the petitioner was a qualified teacher of the county of Butte, holding a valid certificate authorizing her to teach in said county; that during all the times referred to the petitioner Josie E. M. Nielsen, and C. H. Nielsen, the county superintendent of said county, were husband and wife. On or about the 1st day of September, 1923, the said C. H. Nielsen and the petitioner herein entered into a contract purporting to employ the petitioner as a super-

vising teacher of rural schools in said county, which contract was in the words and figures following, to wit:

"I, C. H. Nielsen, superintendent of schools, Butte county, state of California, hereby appoint Mrs. Josie E. M. Nielsen as supervising teacher in the schools of Butte county for the term ending June 1, 1924, at an annual salary of three thousand three hundred (\$3,300) dollars (\$2,700 of which is designated as salary and \$600 as traveling expenses), one-ninth of which salary shall be payable on the first of each calendar month following the first of September until nine payments shall have been made. The above payments shall be made in requisitions drawn upon the county auditor by me upon the supervision fund of Butte county.

"[Signed] C. H. Nielsen,
"Superintendent of Schools.

"Dated Sept. 1, 1923.

"I hereby accept the conditions stated above, and agree to serve as supervising teacher in the Butte county schools for the term specified above.

"[Signed] Josie E. M. Nielsen."

At the conclusion of the trial of the action the court made certain findings as to the official character of the said C. H. Nielsen, of the relationship existing between the petitioner and the said C. H. Nielsen, the fact that there was money in the county treasury of the county of Butte available for paying the claims of a supervising teacher, the issuance of a warrant by the superintendent of schools, and the refusal of the respondent to audit the claim of the petitioner, and, also, the execution of the writing which we have hereinabove set forth. The trial court then made the following finding, to wit:

"That prior to and before the execution and acceptance of said purported employment of said petitioner, the said petitioner and the said C. H. Nielsen, had conversations wherein, and as a result of which, the said C. H. Nielsen agreed that all money which his wife should earn teaching school under said purported employment should become her own money, and that he would have and claim no interest whatever in any money earned by his said wife under said purported employment as supervising teacher in the county of Butte."

Based upon the findings to which we have referred, the court drew its conclusions of law that the purported employment was illegal and void, and entered judgment for the respondent.

Based upon section 157, Civil Code, which reads, "Neither husband nor wife has any interest in the property of the other, * * *" and section 158, Civil Code, which reads, "Either husband or wife may enter into any engagement or transaction with the other or with any other person, respecting property, which either might if unmarried, * * *" and also upon section 159, Civil Code, which reads, "A husband and wife

cannot, by any contract with each other, alter their legal relations, except as to property, * * * it is argued by the appellant that under the findings of the trial court set forth, the agreement of the parties that whatever salary the petitioner might earn as a supervising teacher of the county of Butte was to be her separate property, the contract is free and clear of any legal inhibitions whatever.

The respondent rests her case upon section 920 of the Political Code, which specifies that members of the Legislature, state, county, and township officers must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members, * * * and section 71 of the Penal Code, making executing contracts in which an officer is interested a penal offense. One phase of this controversy was before this court in the case of *Nielsen v. Richards*, 232 P. 480. No question was presented in that case as to the relationship of the parties, or the interest of the school superintendent in the contract entered into by him with petitioner, employing her as a supervising teacher of rural schools in the county of Butte. The questions decided related to whether the provisions of the law providing for supervising teachers were valid and applied to the county of Butte, and, also, as to the power of the county school superintendent to employ such teachers and fix their compensation. These questions were resolved in favor of the petitioner. The validity of the petitioner's appointment was not itself passed upon, as there was nothing in the record showing the relationship of husband and wife existing between the petitioner and the superintendent of schools of the county of Butte at the time of the employment and the execution of the contract set forth in the opinion of the court in the case just referred to.

Examination of the contract of employment brings to our attention serious questions affecting its validity. We will first consider the provision for "traveling expenses" and what is written into the contract by those words. The contract expressly states that in the fixing of the salary at the sum of \$3,300, an item of \$600 is inserted therein to cover traveling expenses, or, as said in the opinion deciding the first phase of this case presented to us, "The evident intention of the parties to the contract, inartificially expressed in the parenthetical clause, is that the petitioner shall be paid an annual salary of \$3,300, she to pay her own traveling expenses, estimated to be \$600 a year." The words "traveling expenses" have a definite legal meaning in reference to officers and employees traveling from place to place in the state of California, and include not merely means of locomotion or transportation but room rent and meals. This question was definitely settled by the Supreme Court in the

case of *Corbett v. State Board of Control*, 188 Cal. 289, 204 P. 823. In deciding that case the Supreme Court said:

"If the meaning of the phrase 'traveling expenses' prevents its application to anything except expenses paid for some kind of locomotion or conveyance, doubtless this interpretation might be sustained. But it is a familiar rule of statutory interpretation that words and phrases are construed according to the approved usage of the language, and that words of common use are to be taken in their ordinary and general sense. *Gross v. Fowler*, 21 Cal. 396; *Pol. Code*, § 16. Ever since the year 1878 [Amendments to the Codes, 1877-78, p. 22] the law has provided that the members of the Supreme Court shall be allowed their 'actual traveling expenses' in going to and from their respective places of residence to attend the sessions of the court. It has been the universal practice for that period to allow the members and officers of that court, not only their railroad fare, but also their hotel bills during the time of their attendance on the sessions. The phrase quoted has always been understood to include these expenses. Section 3702 of the Political Code was enacted in its present form in 1887, and the same practice has prevailed ever since that time with relation to the traveling expenses of the members of the board of equalization. The Legislature has undoubtedly acquiesced in this interpretation, since the law has remained unchanged. It would seem that it is too late to claim the technical and literal construction now contended for. Furthermore, it is not in accordance with the common use of the phrase 'traveling expenses.' It is common knowledge that in commercial affairs agents are traveling * * * constantly under an arrangement with their principals that their traveling expenses are to be paid. Often they are required to remain in one place for considerable periods of time in the transaction of the business, but it is commonly understood that their hotel bills are a part of the traveling expenses, unless some provision of the contract shows a different meaning."

Section 155, Civil Code, reads: "Husband and wife contract towards each other obligations of mutual respect, fidelity and support." Section 156, Civil Code, declares:

"The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto."

Irrespective of the Code provisions, the common law casts the duty of support, which includes meals and a place for the wife to sleep, or a room to occupy, upon the husband, or as said in 13 Cal. Jur. 804:

"While the husband and wife undertake toward each other obligations of mutual support, primarily the husband is the breadwinner and assumes the responsibility for the support of the family. Independently of the statute, he is bound to support her according to his means and station, even though she is insane or has ample means of her own."

This principle of law is set forth in the opinion of the Supreme Court in the case of *Shebley v. Peters*, 53 Cal. App. 288, 200 P.

364. In speaking of the claims of the wife and children upon the husband, the Supreme Court there said:

"They were entitled to demand of him a support in accordance with his station in life. Such support it is the right of every wife and minor child to receive from the husband and father, even if they are not dependent upon him at all, but have ample means of their own."

This primary liability fixed by the common law and its application to particular cases must be read in connection with sections 155 and 171 of the Civil Code. Section 155, as hereinbefore set forth, makes the obligations resting upon the husband and wife mutual in relation to respect, fidelity, and support. Read by itself, this section would leave no primary liability upon the husband, but would place them upon an equal footing. The next section, however, of the Civil Code names the husband as the head of the family, and section 171, *supra*, particularly points out and fixes the liability of the wife. It is there said:

"The separate property of the wife is liable for her own debts contracted before or after her marriage, but it is not liable for her husband's debts; provided, that the separate property of the wife is liable for the payment of debts contracted by the husband or wife for the necessities of life furnished to them or either of them while they are living together; provided, that the provisions of the foregoing proviso shall not apply to the separate property of the wife held by her at the time of her marriage or acquired by her by devise, succession, or gift, other than by gift from the husband, after marriage."

This section, as applied to the case at bar, would render all of the salary earned under the contract liable for the necessities of life furnished the petitioner and her husband, C. H. Nielsen. The latter portion of the section makes it impossible for the husband by any agreement to make a gift thereof to her of any property in which he would otherwise have an interest so as to escape such liability. This section has a present and immediate application. It does not relate to any expectancies or contingencies, as is provided for in section 176, Civil Code, or the statute relating to succession when husband or wife dies intestate. As said in *Leake v. Lucas*, 65 Neb. 359, 91 N. W. 374, 62 L. R. A. 190:

"There can be no doubt but that the defendant would be liable as surety for her husband for the necessary food furnished the family, himself included."

In the case at bar, the contract of employment between the husband and the wife would, if carried into effect, increase the pecuniary responsibility of the person thus made a surety for family supplies, and constitutes a property interest safe-guarding the county school superintendent to the extent

of the sum paid under the contract. In 13 A. L. R. 1396, is an extended note setting forth what has been held necessities by a number of courts having statutes similar to our own, making the separate property of the wife acquired after marriage liable for household necessities. These cases include instances where medical attendance, food, clothing, and furniture have been held as coming within the term "necessaries," even including wearing apparel purchased and worn by the husband alone. *Gilman v. Matthews*, 20 Colo. App. 170, 77 P. 366. Also, medical services rendered to the husband personally are a family expense within the meaning of the statute, making the expenses of the family chargeable upon the property of the wife. This latter item of necessities coming within the statutory provision is set out at length in *Evans v. Noonan*, 20 Cal. App. 288, 128 P. 794. A number of cases are there cited as to the holding of what constitutes necessities of life and so chargeable against a wife's separate earnings. Section 171, Civil Code, is also interpreted as well as applied. The court there said:

"It will be observed that the section as amended in 1905 (St. 1905, p. 206), excludes from liability her separate property held by her at the time of her marriage and that acquired by her by devise or succession after marriage, and, therefore, the application of the provisions of the section is necessarily limited to such of her separate property only as she may have acquired after her marriage by any other means than by devise or succession, such property, for instance, as her earnings or that which she might acquire by gift after her marriage. * * * But whatever might have been the legislative motive prompting the enactment of the amendment, it is plainly manifest that the intention was thus to make the wife jointly liable with her husband for the payment of debts contracted by either or both for necessities furnished to either or both while they are living together, restricting, however, the wife's liability by limiting the right to take her separate property in execution of a judgment for a debt so contracted to such of her separate property only as she may have acquired after marriage otherwise than by devise or succession."

The foregoing authorities lead us unavoidably to the conclusion that C. H. Nielsen, as the husband of the petitioner, had a direct and indirect pecuniary interest in the contract which he was purporting to execute as superintendent of schools of the county of Butte. The contract directly adds a sum of money for the support of the wife, and, indirectly, for his own support. We also think it is apparent that section 158, Civil Code, empowering husbands and wives to contract with each other and enter into business engagements respecting property, etc., which either might, if unmarried, relates to cases where the husband is acting for himself and in his own right and individual capacity, and not as the agent or trustee of

some other person or of the general public. In such cases the contract on the part of the husband which he is authorized to make must be such in which he has neither a direct nor an indirect pecuniary interest, even though the confidential relation between husband and wife might not prohibit the making of the contract.

The county superintendent of schools is a public officer and every public officer is an agent of the county, municipality, or state responsible for his election or appointment, and as such officer charged with the public trust of performing the duties of the office for the public interests. 21 Cal. Jur. 823. And, as said in section 67 of the same chapter, page 886 of the same volume:

"The rule has long been recognized that any contract by an officer which interferes with the unbiased discharge of his duty to the public in the exercise of his office, is against public policy and void. Acting upon the principle that no person can, at one and the same time, faithfully serve two masters representing diverse or inconsistent interests with respect to the service to be performed the legislature has prohibited the making of such contracts."

In *Hay v. Long*, 78 Wash. 616, 139 P. 761, the Supreme Court of Washington, in holding invalid a lease executed to a wife by her husband, while acting as agent for another, used language which we think pertinent to this case:

"The lease made by Athow was a lease to the community, and was therefore a lease to himself. But if it were not so, it has been held that a contract made by an agent with his wife is voidable at the instance of a cestui que trust or a principal, 'not on the ground of coverture, but of her relationship to the trustee. It would be evidence of unfairness quite as much as if the sale were made to the trustee himself, and falls within the spirit of the rule which forbids his own purchase.' *Dundas' Appeal*, 64 Pa. 325. 'The doctrine is familiar, and has been often recognized by this court, that an agent cannot, either directly or indirectly, have an interest in the sale of the property of his principal, which is within the scope of his agency, without the consent of his principal, freely given, after full knowledge of every matter known to an agent which might affect the principal. *Coat v. Coat*, 63 Ill. 74; *Ebelmesser v. Ebelmesser*, 99 Ill. 548; *Zeigler v. Hughes*, 55 Ill. 288; *Hughes v. Washington*, 72 Ill. 85. It is of no consequence in such case that no fraud was actually intended, or that no advantage was in fact derived from the transaction by the agent. *Kerr on Fraud and Mistake* (Bump's Ed.) 173, 174; *Perry on Trusts*, § 206; *Story's Eq. Jur.* § 315; *Bispham's Eq.* (2d Ed.) § 238, p. 299. The rule is not merely remedial of wrong actually committed. It is intended to be preventive of wrong. Public policy requires, as was tersely and forcibly said by the Chief Justice in *Staats v. Bergen*, 17 N. J. Eq. 554, that 'a trustee may not put himself in a position in which to be honest must be a strain on him.'"

In *Tyler v. Sanborn*, 128 Ill. 136, 21 N. E. 193, 4 L. R. A. 218, 15 Am. St. Rep. 97, the Supreme Court of Illinois held invalid a sale of land made to a wife by a husband, while acting as agent for another, even though the purchase was made from the separate funds belonging to the wife. After holding that the law which forbids such action on the part of the agent is not only remedial but preventive, when intended to promote honest and fair dealing in the faithful discharge of the trust imposed upon an agent, and, further, in order to shield the agent from the temptation of serving his own interest, while under legal obligations to serve the interests of another, the court in that case says:

"The husband is still the head of the family; and the expenses of the family and of the education of the children are, by section 15 of the statute in relation to husband and wife, charged upon the property of both husband and wife or of either of them, in favor of creditors. *Rev. Stats. 1874*, p. 577. Upon the death of the wife, intestate, without children surviving, the husband inherits one-half of her real estate (*Rev. Stats. 1874*, c. 39, par. 1); and in any event, upon her death, he is entitled to dower in her real estate; hence, the husband still has a pecuniary interest, greater or less, as circumstances may vary, in all the real estate of which his wife may be owner, during coverture. There is, moreover, apart from this pecuniary interest, an intimacy of relation and affection between husband and wife, and of mutual influence of the one upon the other for their common welfare and happiness, that is absolutely inconsistent with the idea that the husband can occupy a disinterested position as between his wife and a stranger in a business transaction. He may, by reason of his great integrity, be just in such a transaction; but unless his marital relations be perverted, he cannot feel disinterested—and it is precisely because of this feeling of interest that the law forbids that he shall act for himself in a transaction with his principal."

To the same effect is the ruling laid down in *Cal. Jur.* 978, relating to officers of a municipal corporation, that they must not use their official position for their own benefit or for the benefit of another or for the benefit of any one except the corporation itself, and may not represent a corporation in any contract or contracts in which they are personally interested, in obtaining an advantage at the expense of the municipality, for in such cases the city would not have the benefit of their unbiased judgment. In the case at bar the county of Butte was entitled to the unbiased judgment of the county school superintendent. Here we have contained not merely the personal and confidential relation existing between husband and wife, but also the pecuniary advantage which was being gained by the husband by reason of the contract which we have heretofore specified. In *Nuckols v. Lyle*, 8 Idaho, 589, 70 P. 401, the Supreme Court of Idaho held void a contract of employment of a school

teacher by her husband who was a member of the school board making the employment. In that case there was no question concerning the agreement as to the separate property character of the salary to be earned, but, in so far as the question of support, etc., is involved in the contract under consideration, the case of *Nuckols v. Lyle* is applicable.

This court, in the case of *Stockton Plumbing & Supply Co. v. Wheeler*, 68 Cal. App. 592, 229 P. 1020, in an opinion written by Justice Hart touching the question of contracts in which officers are interested, has said:

"The personal interest of an officer in a contract made by him in his official capacity may be indirect only, still such interest would be sufficient to taint the contract with illegality. If this interest in the contract is such as would tend in any degree to influence him in making the contract, then the instrument is void because contrary to public policy, the policy of the law being that a public officer in the discharge of his duties as such should be absolutely free from any influence other than that which may directly grow out of the obligations that he owes to the public at large."

The rules of law which we have hereinbefore set forth are also fully stated in *Dillon on Municipal Corporations*, vol. 2 (5th Ed.) § 773. By reference to the contract which we are considering it will be seen that the consideration moving the parties to enter into the same is not severable, the salary and the traveling expenses are both intermingled and constitute an inherent and essential part thereof, hence, if either one of said items comes within the rules which we have set forth, the whole contract is vitiated. Section 1608 of the Civil Code says:

"If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void."

Section 1607, Civil Code, requires that the consideration of a contract must be lawful within the meaning of section 1667, Civil Code. That section requires that, in order for a contract to be lawful, it must be one not contrary to an express provision of law; (2) or contrary to the policy of express law, although not expressly prohibited, or otherwise not contrary to good morals. These provisions, as we have set forth, are violated by both of the items of consideration entering into the contract. These sections of the Code are dealt with in the case of *Berka v. Woodward*, 125 Cal. 119, 57 P. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31, which case had to do with a contract attempted to be entered into by a member of a city council. This case follows the rule applicable in the case at bar, and cites a large number of authorities

having to do with such attempted violations of duty by city and county officers.

For the reasons which we have heretofore given, it must be held that the purported contract entered into, between the petitioner on the one part and her husband, as county school superintendent on the other part, is prohibited by law and contrary to public policy.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; HART, J.

75 Cal. App. 692

BUTLER v. CORNELL. (Civ. 3011.)

(District Court of Appeal, Third District, California. Dec. 21, 1925.)

1. Appeal and error ⚡1036(2)—Defendant could have suffered no prejudice, because of improper joinder, where one cause of action was later abandoned.

Defendant could not have suffered prejudice from improper joining of cause of action for work, labor, and services, and money advanced with cause of action for damages for forcible entry and unlawful detainer, where plaintiff had abandoned alleged cause of action for damages.

2. Pleading ⚡399—Failure of evidence to establish fraud immaterial, where fraud was not necessary element of cause of action, even though pleaded.

Fraud is not a necessary element to cause of action for work, labor, and services performed, and moneys advanced, notwithstanding that complaint alleged promises were fraudulently made without intention to perform them, and fact that evidence failed to establish fraud would be immaterial.

3. Appeal and error ⚡1002—Implied finding of jury from conflicting evidence conclusive on appeal.

Where there was sufficient evidence to support finding for jury either way on question whether parties were copartners, implied finding of jury from such conflicting evidence was conclusive on appeal, as Court of Appeals has nothing to do with weight of evidence.

Appeal from Superior Court, Del Norte County; Warren V. Tryon, Judge.

Action by Fred Butler against Dave Cornell. From a judgment for plaintiff, defendant appeals. Affirmed.

Hersch & McNulty, of Crescent City, for appellant.

John L. Childs and George W. Howe, both of Crescent City, for respondent.

FINCH, P. J. The defendant was conducting a cigar business in the city of Eureka and was desirous of leaving that city and establishing a similar business near the town of Requa. The complaint alleges that it was agreed between the parties that the plain-

tiff would pay certain expenses and render certain services in connection with the establishment of said business at Requa and that "defendant would either thereafter immediately enter into and form a partnership with plaintiff or would pay plaintiff for such services and would repay plaintiff all money paid for such expenses"; that the plaintiff performed such services and paid said expenses in the total value and sum of \$435.29; and that defendant refused to enter into the alleged partnership or to pay the plaintiff for such services and expenditures. The complaint also alleges that the parties secured a lease of certain land and that the defendant excluded the plaintiff therefrom to the latter's damage, but this claim was abandoned by plaintiff during the trial, and the question was not submitted to the jury and need not be considered further.

The answer, in addition to denials of certain allegations of the complaint, alleges that, prior to the time the alleged services were performed or expenditures made, the parties had entered into an agreement of copartnership for the purpose of conducting the alleged business at Requa, and that such services were performed and expenditures made "under and in pursuance of such agreement of copartnership, and as a part of the contribution of said plaintiff to said partnership business."

The plaintiff testified that the original agreement was:

"If I would help him get his goods out of that building (in Eureka), where his lease was up, and help him get built up there, and help him get started, if I wanted to be a partner, he would enter a partnership agreement if I felt I wanted to go up there; if not, * * * if I was not satisfied up there, he would pay me. * * * He said: 'If you are not satisfied, I will pay you for time and trouble and pay your money back.'"

The defendant testified that the parties entered into an agreement of copartnership as alleged in the answer. The court instructed the jury to the effect that, if the agreement between the parties was as alleged in the complaint, the plaintiff was entitled to recover the value of his services and the amount expended by him; but that, if the parties were copartners, and such services were performed and expenditures made in furtherance of the partnership business, then the defendant was entitled to a verdict. The jury returned a verdict in favor of plaintiff for the amount claimed by him for such services and expenditures, and judgment was entered accordingly in that amount. The defendant has appealed from the judgment. Appellant does not contend that the evidence fails to show that plaintiff rendered services of the value claimed and expended the amount alleged.

[1] It is contended that defendant's de-

murrer to the complaint on the ground that a cause of action for "work, labor, and services performed, and moneys advanced" was improperly joined "with a cause of action for damages for forcible entry and unlawful detainer." It need not be determined whether there was such improper joinder of causes of action. The plaintiff abandoned his alleged cause of action for damages for his exclusion from the premises, and the case was submitted to the jury upon the other issues. The defendant, therefore, suffered no possible prejudice by reason of the improper joinder, if it was such.

[2] The complaint alleged that the defendant's promises to plaintiff were fraudulently made without any intention to perform them. Appellant contends that the evidence fails to establish fraud. Fraud, however, was not a necessary element of plaintiff's cause of action, and it was sufficient to prove defendant's agreement to pay for the alleged services and expenditures and his failure to do so.

[3] It is contended that "the verdict of the jury is against the weight of the evidence" upon the question of whether the parties were copartners. As stated, there is sufficient evidence to support a finding either way upon that question. The implied finding of the jury from such conflicting evidence is conclusive on appeal, as this court has nothing to do with the weight of the evidence.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

75 Cal. App. 764

VAN CAMP SEA FOOD CO., Inc., v. STATE
FISH AND GAME COMMISSION et al.
(Civ. 5223.)

(District Court of Appeal, Second District, Division 1, California. December 23, 1925.)

1. Certiorari $\S$ 21—Certiorari will not lie to review order of fish and game commission (St. 1925, p. 595; Code Civ. Proc. $\S$ 1068).

Certiorari would not lie to review order of fish and game commission, made in response to petition under St. 1925, p. 595, to determine monthly capacity of petitioner's packing plant, because such commission could not lawfully exercise judicial functions, which is necessary in order for writ to lie under Code Civ. Proc. $\S$ 1068.

2. Constitution law $\S$ 80(2)—Fish $\S$ 9—Fish and game commission cannot be invested with judicial functions (Const. art. 6, $\S$ 1).

Fish and game commission, having state-wide jurisdiction as distinguished from local boards, cannot be invested with judicial functions because, except for local purposes, Const. art. 6, $\S$ 1, confines judicial power to specified courts.

Application by Van Camp Sea Food Company, Inc., for certiorari to review an order of the Fish and Game Commission of the State of California and others. Writ discharged.

Fredericks & Hanna and William A. Alderson, all of Los Angeles, for petitioner.

B. D. Marx Greene, of San Francisco, for respondents.

HOUSER, J. From the petition presented herein, it appears that the business of petitioner includes that of canning sardines and manufacturing fertilizer as a by-product of its fish-canning industry; that, in accordance with the provisions of the statute of this state, enacted at the session of the Legislature in 1925 (Stats. 1925, p. 595), petitioner made application to the respondent fish and game commission for the purpose of having determined by said commission the monthly capacity of the packing plant of said petitioner, to the end that its right to manufacture therein the maximum quantity of fish fertilizer as provided by the terms of the statute might also be determined and certified by said commission; that, in accordance with the prayer of said application, a hearing was had before said commission, and thereupon it made certain findings of fact from which certain conclusions were deduced, and which resulted in an order being made by said commission authorizing petitioner, "while actually engaged in packing sardines, a monthly allowance of sardines to be used in its reduction plant of 4,500 tons for each calendar month, based upon its aforesaid canning capacity of 18,000 tons per month, and being 25 per cent. of the monthly capacity of the packing plant. This order is made subject to the regulations required by the fish and game commission's general order No. 1, which order is made a part of this order."

"General order No. 1" referred to in said order of the commission, among other things, contained the following provision:

"In order to determine whether a packer is actually engaged in packing sardines, this commission will require that for each ton of sardines received by a packer during a calendar month he shall produce fifteen (15) cases of one pound ovals (48 cans to the case), or the equivalent if other size cans are used."

[1] It is contended by petitioner that that part of the order of the commission contained in "general order No. 1" was in excess of the jurisdiction of the commission and consequently void.

To the petition for the writ of certiorari, the respondent commission has interposed a demurrer on the ground that said petition does not state facts sufficient to constitute a cause of action or to authorize the issuance of the writ. In that connection the principal point relied upon by respondent is that the writ will lie only as against "an inferior

tribunal, board or officer exercising judicial functions," as provided by section 1068 of the Code of Civil Procedure, and that respondent commission was not, in said matter, exercising any judicial function.

Assuming, for the purposes of this case only (but without deciding the point), that, in the performance of the acts heretofore set forth, the respondent commission was attempting to exercise at least quasi judicial functions, the question to be determined is whether the respondent commission had the lawful power to exercise such functions.

The matter is primarily regulated by the provisions of section 1 of article 6 of the Constitution relating to judicial powers, which provides:

"The judicial power of the state shall be vested in the senate, sitting as a court of impeachment, in a supreme court, district courts of appeal, superior courts, such municipal courts as may be established in any city or city and county, and such inferior courts as the Legislature may establish in any incorporated city or town, township, county or city and county."

Consideration of the constitutional provision has been frequently before the appellate courts of this state, wherein orders made by different state commissions and local boards have been reviewed. As affecting solely the police power of the state, it has been held that the orders of a commission having a state-wide jurisdiction, exercising powers quasi judicial in their nature, and local boards, such as boards of supervisors, acting in a judicial capacity in hearing and determining questions such, for example, as involving the organization of irrigation districts, were not in violation of the constitutional provision. *County of Los Angeles v. Spencer*, 126 Cal. 670, 59 P. 202, 77 Am. St. Rep. 217; *Ex parte Whitley*, 144 Cal. 167, 77 P. 879, 1 Ann. Cas. 13; *Imperial Water Co. v. Board of Supervisors*, 162 Cal. 14, 120 P. 780; *Suckow v. Alderson*, 182 Cal. 250, 187 P. 965; *Brecheen v. Riley*, 187 Cal. 121, 200 P. 1042; *Gregory v. Hecke* (Cal. App.) 238 P. 787, 793.

[2] But, in contrast with the foregoing decisions, we find the cases of *Pacific Coast Casualty Co. v. Pillsbury*, 171 Cal. 319, 153 P. 24, and *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 P. 491, Ann. Cas. 1917E, 390, where, in substance, it was held that it was only under a special and independent constitutional provision that the Industrial Accident Commission was empowered to exercise judicial functions. It is there pointed out that, in the absence of a special constitutional provision conferring such power, an act of the Legislature attempting to create judicial powers in a state board, such as the fish and game commission, would be invalid. In the former case (171 Cal. 319, 153 P. 24), in speaking of the constitutional provision heretofore quoted herein, the court said:

"Under this provision the Legislature would be without authority to give judicial power to any general state board or tribunal. Except for local purposes the section disposes of the whole judicial power of the state and vests all of it in the courts expressly named therein, leaving none at the disposal of the Legislature."

The latest expression on the subject by the Supreme Court, contained in the case of Department of Public Works, etc., v. Superior Court (Cal. Sup.) 239 P. 1076, is to the effect that a commission, like the respondent herein (that is, one having state-wide jurisdiction, as distinguished from a local board), cannot be invested with judicial functions for the reason that, "except for local purposes," section 1 of article 6 of the Constitution confines all judicial power to certain specified courts. That case, which appears to be controlling in its effect, so far as the issue here involved is concerned, was a proceeding for a writ of prohibition to restrain the respondent superior court from proceeding with the hearing and determination of a petition for a writ of review. It appears that, acting under the authority contained in the Water Commission Act (Stats. 1913, p. 1012), the department of public works, division of water rights, which, like respondent herein, was a state commission, after pursuing certain procedure provided in the act, had issued its certificate to the applicant for the appropriation of water. Upon application made to the respondent therein, the superior court issued its writ of review concerning the right of said commission to issue said certificate, fixing a time and place for the return of the writ. In deciding whether a writ of prohibition would lie, restraining said superior court from proceeding with the hearing and determination of the petition for the writ of review, following a statement that the sole question for determination was whether the respondent superior court had jurisdiction to entertain and determine a petition for a writ of review under section 12 of the Water Commission Act, and after making a statement as to the general requirements necessarily precedent to the issuance of such a writ, the court said:

"It is apparent that at least one of those essentials is and was not present when the respondent court issued the writ of review, namely, the exercise by the petitioners of a judicial function. This is true, for the reason that it was not within the power of the Legislature to vest judicial power in the petitioners. Their authority under the Water Commission Act is state wide. Under section 1 of article 6 of the Constitution: 'The Legislature would be without authority to give judicial power to any general state board or tribunal. Except for local purposes the section disposes of the whole

judicial power of the state and vests all of it in the courts expressly named therein, leaving none at the disposal of the Legislature.' Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 P. 24; Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 P. 491, Ann. Cas. 1917E, 390. See, also, concurring opinion of Mr. Chief Justice Shaw in Tulare Water Co. v. State Water Comm., 187 Cal. 533, 202 P. 874.

"And in no other section of the Constitution do we find authority in the Legislature to vest judicial power in the petitioners under the Water Commission Act. The cases of Imperial Water Co. v. Board of Supervisors, 162 Cal. 14, 120 P. 780, and other cases of like import and relied on by the respondents are not in point, because they involved the scope or validity of judicial powers exercised by local tribunals, boards, or officers whose jurisdiction was limited to incorporated cities, towns, townships, counties, or cities and counties, and did not involve the authority of any tribunal, board, or officer exercising judicial powers and having state-wide jurisdiction."

A decision on certain incidental questions raised by the parties herein becomes unnecessary. It is ordered that the demurrer to the petition be and it is sustained, and that the writ heretofore issued shall be and it is discharged.

We concur: CONREY, P. J.; CURTIS, J.

75 Cal. App. 790

STAFFORD PACKING CO., Petitioner, v. FISH AND GAME COMMISSION of the STATE of California et al., Respondents. (Civ. 5247.)

(District Court of Appeal, Second District, Division 1, California. Dec. 23, 1925.)

Application for certiorari to review an order of the Fish and Game Commission with regard to the canning of fish and the making of fertilizer therefrom. Writ discharged.

William A. Alderson and Fredericks & Hanna, all of Los Angeles, for petitioner.

B. D. Marx Greene, of San Francisco, for respondents.

HOUSER, J. The pleadings, the facts, the relief sought by the petitioner, and the contentions of respective counsel in all essential particulars are identical with those set forth in the case of Van Camp Sea Food Co., Inc., v. Fish and Game Commission of the State of California, Civil No. 5223, 243 P. 702, this day decided by this court.

Relying upon that case as an authority, it is ordered that the demurrer to the petition be and it is sustained, and that the writ heretofore issued herein be and the same is discharged.

We concur: CONREY, P. J.; CURTIS, J.

75 Cal. App. 791

PACIFIC MARINE PRODUCTS CO., Inc.,
 Petitioner, v. **FISH AND GAME COMMISSION OF THE STATE OF CALIFORNIA et al.,**
 Respondents. (Civ. 5250.)

(District Court of Appeal, Second District, Division 1, California. Dec. 23, 1925.)

Application for certiorari to review an order of the Fish and Game Commission with regard to the canning of fish and the making of fertilizer therefrom. Writ discharged.

William A. Alderson and Fredericks & Hanna, all of Los Angeles, for petitioner.

B. D. Marx Greene, of San Francisco, for respondents.

HOUSER, J. The pleadings, the facts, the relief sought by the petitioner, and the contentions of respective counsel in all essential particulars are identical with those set forth in the case of Van Camp Sea Food Co., Inc., v. Fish and Game Commission of the State of California, Civil No. 5223, 243 P. 702, this day decided by this court.

Relying upon that case as an authority, it is ordered that the demurrer to the petition be and it is sustained, and that the writ heretofore issued herein be and the same is discharged.

We concur: **CONREY, P. J.; CURTIS, J.**

75 Cal. App. 792

SOUTHERN CALIFORNIA FISH CORPORATION, Petitioner, v. **FISH AND GAME COMMISSION OF THE STATE OF CALIFORNIA et al.,** Respondents.
 (Civ. 5251.)

(District Court of Appeal, Second District, Division 1, California. Dec. 23, 1925.)

Application for certiorari to review an order of the Fish and Game Commission with regard to the canning of fish and the making of fertilizer therefrom. Writ discharged.

William A. Alderson and Fredericks & Hanna, all of Los Angeles, for petitioner.

B. D. Marx Greene, of San Francisco, for respondents.

HOUSER, J. The pleadings, the facts, the relief sought by the petitioner, and the contentions of respective counsel in all essential particulars are identical with those set forth in the case of Van Camp Sea Food Co., Inc., v. Fish and Game Commission of the State of California, Civil No. 5223, 243 P. 702, this day decided by this court.

Relying upon that case as an authority, it is ordered that the demurrer to the petition be and it is sustained, and that the writ heretofore issued herein be and the same is discharged.

We concur: **CONREY, P. J.; CURTIS, J.**
 243 P.—45

75 Cal. App. 793

LOS ANGELES SEA FOOD PACKING CO., Inc., Petitioner, v. **FISH AND GAME COMMISSION OF THE STATE OF CALIFORNIA et al.,** Respondents. (Civ. 5252.)

(District Court of Appeal, Second District, Division 1, California. Dec. 23, 1925.)

Application for certiorari to review an order of the Fish and Game Commission with regard to the canning of fish and the making of fertilizer therefrom. Writ discharged.

William A. Alderson and Fredericks & Hanna, all of Los Angeles, for petitioner.

B. D. Marx Greene, of San Francisco, for respondents.

HOUSER, J. The pleadings, the facts, the relief sought by the petitioner, and the contentions of respective counsel in all essential particulars are identical with those set forth in the case of Van Camp Sea Food Co., Inc., v. Fish and Game Commission of the State of California, Civil No. 5223, 243 P. 702, this day decided by this court.

Relying upon that case as an authority, it is ordered that the demurrer to the petition be and it is sustained, and that the writ heretofore issued herein be and the same is discharged.

We concur: **CONREY, P. J.; CURTIS, J.**

75 Cal. App. 794

FRANCO-ITALIAN PACKING CO., Petitioner, v. **FISH AND GAME COMMISSION OF THE STATE OF CALIFORNIA et al.,** Respondents. (Civ. 5253.)

(District Court of Appeal, Second District, Division 1, California. Dec. 23, 1925.)

Application for certiorari to review an order of the Fish and Game Commission with regard to the canning of fish and the making of fertilizer therefrom. Writ discharged.

William A. Alderson and Fredericks & Hanna, all of Los Angeles, for petitioner.

B. D. Marx Greene, of San Francisco, for respondents.

HOUSER, J. The pleadings, the facts, the relief sought by the petitioner, and the contentions of respective counsel in all essential particulars are identical with those set forth in the case of Van Camp Sea Food Co., Inc., v. Fish and Game Commission of the State of California, Civil No. 5223, 243 P. 702, this day decided by this court.

Relying upon that case as an authority, it is ordered that the demurrer to the petition be and it is sustained, and that the writ heretofore issued herein be and the same is discharged.

We concur: **CONREY, P. J.; CURTIS, J.**

76 Cal. App. 26

BENJAMIN v. DAVIS. (Civ. 5013.)

(District Court of Appeal, First District, Division 1, California. Dec. 28, 1925. Hearing Denied by Supreme Court Feb. 25, 1926.)

1. Patents ⇨240—Plaintiff's patent, embracing merely new and useful improvements in other apparatus, protected only against duplication of very devices invented.

Where plaintiff's patent on centrifugal impact ore pulverizer was not basic, but embraced merely certain new and useful improvements, he could only be protected against duplication of very devices invented by him.

2. Patents ⇨234—Patent on centrifugal impact ore pulverizer held not infringed within contract to protect licensee against infringement.

Patent on centrifugal impact ore pulverizer held not infringed within meaning of contract by which patentee agreed to protect licensee from infringement.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Edward H. Benjamin against Norris K. Davis, with counterclaim by defendant. Judgment for plaintiff, and defendant appeals. Affirmed.

Boswell F. King and Carlos P. Griffin, both of San Francisco, for appellant.

Charles W. Slack and Edgar T. Zook, both of San Francisco, for respondent.

KNIGHT, J. This is an appeal by the defendant from a judgment entered in favor of the plaintiff for the payment of certain sums of money, with interest, which sums represent the full amount of certain minimum royalties provided to be paid to plaintiff by defendant pursuant to the terms of a written contract entered into between them, whereby plaintiff granted to defendant the sole right to manufacture a certain centrifugal impact ore pulverizer upon which letters patent had been issued to plaintiff by the United States Patent Office. Said contract provided, among other things, that plaintiff should protect the defendant against any infringement of the patent by others during the term of the agreement. Defendant in his answer admitted the nonpayment of the royalties, but set up as a defense and a ground of counterclaim an alleged infringement of the patent by one Marks, against which defendant claims plaintiff failed to protect him. The sole question presented for determination is whether or not there has been any infringement of said patent by the said Marks. The trial court found adversely upon the defendant's contention as to that issue, and it will therefore be necessary to ascertain only whether or not there is substantial evidence in the record to sustain that finding.

In support of the finding, the record discloses the following facts, most of which were established by the testimony of plaintiff:

The device which was the subject of the contract was a machine used for reducing ores or minerals by the use of the centrifugal force of a rapidly rotating shaft to which shoes are fixed, throwing the ore to the outer walls of the chamber with such force as to convert said ore into powdered form. The shaft revolves rapidly, making some 3,500 revolutions a minute, and, when the ore or other heavy material is dropped into this rapidly revolving shaft, there is danger of the shaft getting out of alignment, and, when the shoes wear down, there is danger of them being loosened from their fastenings and thrown against the walls of the pulverizer, breaking it to pieces.

Plaintiff claimed no basic patent to said machine; his invention relating to an improved type of one already in use and known as the Partridge machine. The latter machine was defective in the two respects of having no adequate means of maintaining the equilibrium of the shaft, or of knowing when the shoes were wearing down to the point of breaking off. The inventions claimed by plaintiff consisted of two improvements: First, the use of eight tension rods running through the machine to a bearing sleeve on the shaft and maintaining an even pressure thereon, which was compensated by adjustable springs on the outside of the casing of the machine to take up any unusual pressure in that direction; and, secondly, the device of a hole bored in the shoe from the rear so that, when the face of the shoe is worn down to the bottom of the hole, a whistling sound is noted, caused by the air currents through the hole in the rapidly revolving shoe. Neither of those improvements was attached to or made a part of the machine which it is claimed Marks was manufacturing. In the Marks type of machine a rubber ring or grummet was used to maintain the lateral tension on the shaft. This was the principle found by respondent to be impractical in the Partridge machine and of no value because of the rapid disintegration of the rubber. As a result of plaintiff's patent, a substitution for these rubber rings was made by providing the rods with springs which effected a perfect balance, adjustable to various kinds of ore which might be run through the machine. This feature of adjustability of springs in plaintiff's machine was absolutely wanting in the Marks machine.

[1, 2] Defendant admits that the design of each particular part of Marks' machine and of plaintiff's are widely different, but it is asserted that a combination of all elements, as set forth in paragraph 7 of plaintiff's patent, brings forth the practical application of

a certain principle which is alike in both machines. As before stated, plaintiff's patent is not a basic one; he did not invent or claim to have invented the centrifugal impact ore pulverizer. His patent embraces merely "certain new and useful improvements in Ore-Pulverizing Apparatus," the essential features of which are those already mentioned, and which are specifically set forth in plaintiff's patent. Under such circumstances he could only be protected against duplication of the very devices invented by him. 30 Cyc. 940, 941; Morley Sewing Machine Co. v. Lancaster, 23 F. 344; Adams Electric Ry. Co. v. Lindell Ry. Co., 77 F. 432, 23 C. C. A. 223; Sandusky Foundry & Machine Co. v. De Lavaud (D. C.) 258 F. 640; Pacific States Electric Co. v. Wright (C. C. A.) 277 F. 756; Railway Co. v. Sayles, 97 U. S. 554, 24 L. Ed. 1053. And it was only against infringement of those improved devices which are covered by his patent that he agreed to protect the defendant.

It is our opinion that there is ample evidence to support the contested finding, and therefore the judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

76 Cal. App. 33

PENDELL v. WARREN. (Civ. 4115.)

(District Court of Appeal, Second District, Division 2, California. Dec. 28, 1925.)

1. Appeal and error ⇨1012(1).

Action of trial court *held* final, where finding is assailed as not supported by the evidence, but point made relates to weight of evidence.

2. Sales ⇨38(1) — False representation by seller of truck that it was made in 1916 instead of 1914 held material.

Seller's representation that truck, having rental value of \$100 a month, was made in 1916 instead of 1914 to one buying it for use in his business, and not for resale, *held* material.

3. Sales ⇨38(1).

False representation by seller of used truck that he would procure registration in name of buyer *held* material.

4. Sales ⇨126(1)—Buyer, giving seller notice of rescission of contract 22 days after learning of one of several false representations, held not guilty of laches.

Buyer, giving seller notice of rescission of contract 22 days after learning that truck bought was made in 1914, instead of 1916, as represented, *held* not guilty of laches, though such notice was given some time after seller's failure to make good representation that he would procure license.

5. Trial ⇨397(5)—Where sale of truck was rescinded, issue as to rental value, raised by inadequate pleading which was not objected to, held material one, requiring finding.

Where cross-complaint asked rescission of contract for sale of truck, reasonable rental value, while in buyer's possession, *held* material issue, on which finding should have been made, though answer to cross-complaint raising it, which was not objected to at trial, was not termed counterclaim, since objection to such inadequacy cannot be raised for first time on appeal.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by H. G. Pendell against Edwin M. Warren. From a judgment for defendant, plaintiff appeals. Reversed, with directions.

William Ellis Lady, of Los Angeles, for appellant.

Swing & Wilson, of San Bernardino, for respondent.

WORKS, J. Plaintiff sold an automobile truck to defendant. This action was instituted for the purpose of enforcing a collection of the selling price. Defendant cross-complained for a rescission of the contract of sale, on the ground that the transfer was brought about by means of fraudulent misrepresentations made by plaintiff to him concerning the truck. In his answer to the cross-complaint plaintiff alleged the reasonable rental value of the truck for the period during which defendant had it in his possession; alleged that defendant used it in his business during the period; and demanded judgment for the reasonable rental value of the vehicle. A judgment of rescission was rendered under the allegations of the cross-complaint, but the trial court did not find upon the issues supporting plaintiff's demand for judgment for reasonable rental, and rendered judgment that plaintiff take nothing because of the action. Plaintiff appeals.

[1] It is contended that the evidence was insufficient to support the finding that appellant made the misrepresentations with which he was charged in the cross-complaint. It is apparent from the manner in which appellant argues this question that the point is without merit. Dealing with one of the alleged misrepresentations, appellant says that the evidence concerning it was "weak on the part of defendant," and that the evidence of appellant on the subject "wholly preponderates that of the defendant." With questions such as this we have nothing to do. Where a finding is assailed on the ground that it is not supported by the evidence, and the point really made is that the weight of the evidence is opposed to the finding, the action of the trial court in making it is final. An examination of evidence to which respondent calls our attention convinces us that appel-

lant could have taken no stronger ground in support of his point than he does take.

[2] The alleged fraudulent representations were made toward the close of 1920. One of them was that the truck was built in 1916. It was in fact built in 1914. It is contended that the representation that the vehicle was a 1916 model was not a material one, and this upon the theory that the value of the truck was not apparently increased by the represented decrease of its age from six years to four. Such a contention flies in the face of all natural laws affecting senility and longevity—those arising from wear and tear, rust, decay, and from that lapse of time which affects all the others, and sends even automobile trucks to the wrecker. Appellant points to the evidence of one witness to the effect that in 1920 a 1914 truck was as valuable for purposes of "resale" as one of the vintage of 1916. But there is no showing in the evidence that respondent bought the truck for resale. On the contrary, it appears that he used it for many months in his business. It is because of that fact that appellant makes his claim to judgment for the reasonable rental value of the vehicle. It appears to us from the very essentials of common sense that respondent was entitled to believe from the representation made by appellant that he would enjoy a use of the truck for a period of two years beyond the time when its actual years of existence would have consigned it to one of those receptacles of automobile "bodies" and "parts" which exist in such numbers in and about every large city. It seems to us, beyond a doubt, without more direct evidence to the contrary, that a 1914 truck was, in 1920, worth materially less to respondent than a 1916 truck would have been. It is not at all beside the point to remark here that appellant pleaded the reasonable rental value of the truck, during the time respondent had it, as \$100 per month, and he introduced evidence in support of the allegation. From these circumstances it can reasonably be deduced that the truck was of considerable value of itself; and the greater its value, the greater would have been the falling off in value, in successive periods of time, because of the fact that it was two years older than it was represented to be. The conclusion here reached derives some support from *Morris v. Fiat Motor Sales Co.*, 32 Cal. App. 315, 162 P. 663.

[3] The trial court found that at the time of the negotiations between appellant and respondent for the sale of the truck the vehicle was registered with the state in the name of a certain corporation, that fact being known to appellant; that appellant knew that respondent could not use the truck upon the public highways without procuring the consent of the corporation to a transfer of the registration from it to respondent, and knew that respondent would not accept the

truck, and would not execute the contract for its purchase, unless the corporation delivered its registration certificate to the truck to him; and that appellant, for the purpose of inducing respondent to conclude his purchase, promised respondent, without intent to keep his promise, that he (appellant) would immediately procure the registration of the truck with the state in the name of respondent, and would procure a transfer of the certificate of registration thereto from the corporation; and that appellant failed to perform these inducing promises. Appellant contends that these "representations" were immaterial, for the reason that it was the duty of respondent himself to procure a license to operate the truck, or suffer the pains and penalties of the law, if forsooth, he ventured upon the highway with it, but without a license there to operate it. This is one of those contentions which it is not difficult to state, but which it is most difficult to comprehend. There seems hardly to be a visible handle by which it may be ardently and forcibly grasped. The following appears to be the only means of approach to the subject, although it is a stealthy means, and savors much of wily subterfuge: Appellant apparently is convinced that it was the duty of respondent to fare boldly forth upon the road, mounted upon this licenseless truck, like Don Quixote astride the illy equipped Rosinante, and suffer arrest, merely to demonstrate that he could not lawfully emerge from the byway into the highway without a license so to do. We refuse to be impaled upon this horn of the dilemma. Matador-like, we deftly step aside and avoid it. Why need respondent suffer the ignominy of arrest? Why might he not remain in his own yard and await the procuring of the license by appellant, holding him to the dire consequences of a failure to procure it? We think he could. We hope he did. We think the inducing promises were material.

[4] Appellant contends that there was an undue delay upon respondent's part, after appellant's failure to procure the license to operate the truck, in giving notice of rescission of the contract of sale. There was some delay, taking the failure to procure a license as the basis of the notice, but we think it was not sufficient to amount to laches. We forbear to discuss the point at length, however, because of this circumstance: Respondent gave his notice of rescission twenty-two days after he learned that the truck was a 1914 model. We think this relieves him of the charge of laches altogether.

[5] Appellant's final contention is that the trial court erred in failing to find upon the issue as to the reasonable rental value of the truck while respondent was in the possession of it and while he used it in his business. Respondent answers that the issue was an immaterial one, and that a finding upon it

was therefore unnecessary. The issue as to reasonable rental value was tendered by a paragraph of the answer to the cross-complaint which read:

"Alleges that the reasonable rental value of the truck which plaintiff delivered to defendant and which truck plaintiff alleges the defendant used in his business was and is the sum of at least \$100 per month, and that by reason thereof defendant is indebted to plaintiff in the sum of \$100 per month during the entire period he has had possession of said truck in the event defendant is entitled to a judgment of rescission."

This paragraph was added to the answer to the cross-complaint by means of an amendment which was filed by leave of court during the trial. To the amendment appellant appended a prayer "for the same relief sought in his complaint and answer to defendant's cross-complaint, and in addition thereto the relief justified by this amendment, and for general relief." Respondent's contention that the issue as to rental value was not material is for the reason that the matter covered by the amendment to the answer to cross-complaint was not given a name—specifically, that it was not by the pleader termed a counterclaim. We think this view is untenable. Just preceding the granting of leave to file the amendment to the answer to cross-complaint, the following occurred at the trial:

"Mr. Lady: * * * We brought suit to recover on the sale of a truck, and he got possession of the truck in December, 1920, and they come in and rescind in September, 1921. There's about nine months he has had the use of our truck; and, if he is entitled to a rescission, we are entitled to a certain amount for the use of our truck. If he is entitled to rescind, I think we have a right to show how he paid the amount of money he did pay, and we have a right to show what the reasonable value of what that property now is. On the way out here I prepared a couple paragraphs in answer to the cross-complaint, as follows."

Then was read the paragraph of the amendment above set forth, and another paragraph somewhat related to it, but which it is unnecessary to quote. Mr. Lady then proceeded to remark further:

"I think these things should be alleged so the court can determine the matter. The only reason I suggest these two paragraphs is so we may have an issue on the question, or your honor can determine what is proper after hearing all the evidence. I don't know what will develop, and what the parties will be able to prove. We think we can defeat the defendant's

case on his cross-complaint, but in case we cannot, I think we have a right to cut his claim down and have a proper adjudication of that. I submit that to your honor for your honor's consideration."

The amendment, including the prayer, was then permitted to be filed; no objection being made. The trial then proceeded, and evidence was admitted, also without objection, upon the question of the reasonable rental value of the truck.

We need not pause to decide whether the issue now in question should be held to have been properly tendered, if objection to the amendment had been interposed when it was offered, or if objection had been made to the admissibility of evidence under it on the ground that it was insufficient. Upon the showing made by the record, a mass of authority supports the view that respondent cannot now for the first time suggest the inadequacy of the pleading. A few only of these cases will be cited.

"Counsel will not be allowed to try the case upon the theory that the issue was properly before the court below, and thus entice his adversary into a trap to be sprung in this court at the last moment. This court does not countenance technical objections to pleadings when the case was tried in the court below upon the theory that the issues were properly made." *Casey v. Leggett*, 125 Cal. 664, 58 P. 266.

"The record shows that the plaintiff tried the case upon the theory that defendant's failure to perform was in issue. Under these circumstances, this court will not entertain the suggestion, made for the first time on appeal, that the attempted denial was ineffectual for any purpose." *Bayly v. Lee*, 174 Cal. 137, 162 P. 96.

"When a complaint is not totally devoid of allegation upon a particular point and the objection that it is insufficient in that regard is first made on appeal, the trial having been conducted by the objecting party upon the theory that it was sufficient, all of which is the case here, it will be upheld." *Fowler v. Enriquez*, 56 Cal. App. 107, 204 P. 854.

Judgment reversed, with directions to the trial court to retry only the issues as to the reasonable rental value of the truck, and as to whether defendant used it while it was in his possession; to determine and adjudge what, if any, amount plaintiff shall recover under those issues; and, if it shall be determined that plaintiff should recover thereunder, to reframe its entire judgment accordingly.

We concur: FINLAYSON, P. J.; CRAIG, J.

76 Cal. App. 80

BALDWIN et al. v. AMERICAN TRADING CO. (PACIFIC COAST) et al.
(Civ. 5212.)

(District Court of Appeal, First District, Division 1, California. Dec. 30, 1925. Hearing Denied by Supreme Court Feb. 25, 1926.)

1. Mortgages ⇨294—Mortgagor's agreement, releasing equity of redemption, held valid as being a separate transaction from mortgage.

Corporate mortgagor's agreement, releasing equity of redemption of mortgage on corporate property, made in consideration of extension of time on mortgage, held valid, as being a transaction separate and distinct from the original mortgage.

2. Mortgages ⇨294—Rescission of mortgagor's agreement, releasing equity of redemption, should be prompt, with offer to restore status quo.

If corporate mortgagor's agreement, releasing its equity of redemption, was voidable for fraud and undue influence, objecting stockholders should have given prompt notice of rescission and offered to restore mortgagee to the status quo.

3. Corporations ⇨442—Corporate mortgagor's release of equity of redemption of mortgage on corporate property held not invalid as unauthorized transfer of all corporate property (Civ. Code, § 361a).

Contention that corporate mortgagor's agreement to release its equity of redemption of mortgage on corporate property was invalid under Civ. Code, § 361a, as providing for transfer of all the corporate assets and property without being authorized by two-thirds of stockholders, was untenable, especially where it appeared that the mortgagor's property was virtually disposed of, before the execution of the agreement, by the creation of liens against it.

4. Mortgages ⇨294—Failure to make detailed accounting between mortgagee and mortgagor held not ground for enjoining execution of agreement releasing equity of redemption.

Where corporate mortgagor's agreement releasing equity of redemption of mortgage on corporate property on failure to pay mortgage within certain time did not contemplate final accounting in event of failure to pay, and accounting was had up to within six months of stockholders' action to restrain consummation of agreement by transfers, fact that detailed accounting was not had during such six months is not ground for enjoining such consummation of agreement.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Suit by George C. Baldwin and others against the American Trading Company (Pacific Coast) and others. From an order dissolving temporary restraining order and refusing injunction pendente lite, plaintiffs appeal. Affirmed.

See, also, 232 P. 147.

Frank J. Golden and Humphrey, Grant, Zimdars & Warren, all of San Francisco, for appellants.

Knight, Boland, Hutchinson & Christin, of San Francisco, for respondents.

KNIGHT, J. This is plaintiffs' appeal from an order dissolving a temporary restraining order and refusing to grant an injunction pendente lite. On December 20, 1921, defendant La Zacualpa-Hidalgo Rubber Company, a corporation, entered into a written agreement with defendant American Trading Company, a corporation, whereby said rubber company agreed, in part, that, if within a period of 18 months thereafter an indebtedness owing to said trading company, amounting to a sum not less than \$167,823.46 or more than \$205,671.34, was not liquidated, said rubber company would cause to be transferred to said trading company certain real and personal property situate in the republic of Mexico, as full settlement of said indebtedness. On June 19, 1923, the day before said period of 18 months expired, and without having paid or offered to pay said indebtedness, plaintiffs, as stockholders in said rubber company, commenced this suit in equity to restrain said rubber company from executing said transfers as called for in said written agreement, upon the ground that said agreement is invalid; also to require an accounting by said trading company, and thereupon, in the event that said rubber company failed to discharge its obligations, that plaintiffs and other stockholders be authorized so to do. Upon filing the complaint in said action, plaintiffs procured a temporary restraining order enjoining the consummation of said transfers, which was followed by the presentation of a motion for an injunction pendente lite for the purpose of continuing in force said injunctive relief until said action was heard and determined. Upon the hearing of that motion said restraining order was dissolved, and the court refused to grant a temporary injunction. Plaintiffs have appealed, and, pending the appeal, the court granted a stay of proceedings.

The record upon which the trial court based its rulings consists of the verified complaint in the action and numerous affidavits submitted on behalf of certain defendants. Said affidavits disclose the following facts: For some time prior to 1914 three corporations, operating under the laws of the republic of Mexico, were engaged in certain enterprises in that country for the production of rubber and coffee. These corporations issued and sold a large number of so-called "acre certificates" which entitled the holder thereof to a portion of the revenue derived from one acre of land. During the operation of these enterprises said corporations incurred a large amount of debts. They borrowed from a

bank in Mexico an amount of money equivalent to about the sum of \$575,000, United States gold, and, to secure the payment thereof, gave a mortgage covering certain rubber plantations belonging to them. They also became indebted in a large sum of money to a number of other concerns, among them being said trading company. In 1914, at the instance of these latter creditors, and pursuant to the laws of Mexico, said corporations executed a so-called "escritura" whereby said corporations admitted their debts and confessed judgment therefor. Later, in 1915, on account of the urgent demands of the mortgagee and the escritura creditors for payment of the obligations due them, said corporations perfected a scheme for the refinancing of their affairs, as a result of which the "acre certificate" holders formed a new corporation under the laws of the state of Nevada, known as the La Zacualpa-Hidalgo Rubber Company (defendant herein) and transferred to it their so-called "acre certificates" in exchange for capital stock and the assumption by said newly formed corporation of the entire outstanding indebtedness of said three corporations. Said trading company was one of the principal creditors of said rubber company, and, for the purpose of receiving further financial aid and as a part of the refinancing scheme, the defendant Louis A. Ward, who was the executive vice president on the Pacific Coast for said American Trading Company, was persuaded to become a director in said rubber company, and through his efforts, and in order to prevent a foreclosure of said mortgage, said trading company was induced to purchase said mortgage, with the understanding that said trading company should thereafter hold the same as security for the payment of the total amount of indebtedness owing to said trading company, and also as security for any future advances which it might make for the benefit of said rubber company. Thereafter said rubber company, aided financially by said trading company, endeavored for several years to operate said enterprises, but the business was not successful. One of the escritura creditors, George A. Moore & Co., commenced a suit in California against one of the original corporations to recover an amount due under said escritura, and obtained a judgment which included the escritura indebtedness of said trading company, amounting to \$72,993.94; and said George A. Moore & Co. was about to enforce said judgment against the coffee interests of said corporation, falling in which the rubber plantations were to be resorted to for the purpose of satisfying said judgment.

Finally, in December, 1921, the financial affairs of said rubber company seemed to have reached the point of exhaustion. The escritura creditors were making urgent demands for the payment of their claims, and said trading company was threatening immediate

foreclosure of said mortgage. Thereupon, in order to obtain further extension of time for the payment of its debts, and thus prevent financial disaster, and for the further purpose of obtaining additional financial assistance from said trading company in the operation of its properties, particularly in the matter of making a survey for the discovery of oil, this agreement of December 20, 1921, was made. Said agreement first recites the various indebtednesses owing to said trading company, also the fact of the purchase of said mortgage by said trading company, the shipment of a consignment of rubber to said trading company for the purposes of sale, and the matter of the George A. Moore & Co. litigation. The agreement then provides as follows:

"Whereas, it is desired to settle the accounts between the parties hereto and their mutual rights and obligations in the premises: It is therefore mutually agreed as follows:

"(1) The first party (the rubber company) is indebted to the second party (the trading company) on every account in the sum of not less than \$167,823.46, and not more than \$205,671.34 (moneys advanced on open account, \$86,119.11; moneys advanced to purchase Hipotecario mortgage, \$46,548.29; moneys owing, the payments of which are secured by escritura, \$72,993.94), with accruing interest from December 20, 1921, and legal expenses heretofore referred to, subject to any alteration or correction in amount that the facts, when ascertained, may require.

"(2) First party hereto agrees to deliver forthwith to second party possession of the said rubber plantations and the personal property situate thereon, and agreed that any interest it may have in said plantations and the said Hipotecario mortgage and the obligation secured thereby, and said rubber in New York and San Francisco, may be held by second party as security for the payment of said indebtedness of amount named in paragraph number one and legal expenses heretofore referred to, and interest from December 20, 1921, at the rate of 8 per cent. per annum. * * *

Continuing, said agreement provides, in substance, that said trading company shall operate said properties, sell said consignment of rubber, and render an accounting of such operations to said rubber company on March 31, 1922, and quarterly thereafter; that said rubber company shall have the right to sell all of its real and personal property at any time within one year for a sum not less than the full amount of the indebtedness due said trading company, and upon the payment thereof be entitled to the return of all of said property; but, in the event that said rubber company failed to pay the full amount of said indebtedness within one year, said trading company should have the right at any time within the succeeding 6 months to sell said properties, including said mortgage, and, after satisfying its demands, pay any excess to said rubber company. Further provision was made for the advancement by said trading company of money for the purpose of making

a geological survey for the discovery of oil, also that during the life of said contract, but not exceeding 18 months from and after the date thereof, said trading company should advance to said rubber company \$4,500 a year for the purpose of defraying its necessary expenses, and that the amount thus paid should be added to its indebtedness, and be secured by said mortgage, and the real and personal property, and should ultimately be repaid with interest at 8 per cent. Said agreement further provided as follows:

"(7) In case the indebtedness of the first party to the second party in said sum named in paragraph No. 1, plus any indebtedness that may accrue thereunder, and interest, is not paid in full to the second party on or before 18 months from the date hereof, either from the operation of said properties or the sale thereof, as herein contemplated, or in some other manner, then and in that case, the said rubber plantation and the personal property situate thereon and said Banco Hipotecario mortgage shall thereafter belong to and be the property of the second party, free and clear of any claim of the first party thereto; and in which event the party of the first part will execute and deliver to the party of the second part or its nominee or nominees, any instrument or document of any character which may be deemed by the second party as necessary, requisite, or convenient to vest in said second party all the right, title, and interest of the first party in and to said plantations and the personal property thereon, and such transfer of the real and personal property shall be considered as full settlement of all indebtedness."

In addition to the foregoing facts, the affidavit of the defendant Ward shows that—

"Quarterly during the entire period up to December 31, 1922 (said trading company) made financial reports to said La Zacualpa-Hidalgo Rubber Company, and reports from December 31, 1922, up to June 20, 1923, will be made as soon as data therefor is received from the plantations."

Said affidavit further avers that, pursuant to said agreement, the amount due and owing said trading company from said rubber company on June 20, 1923, was \$200,272.99, and that, on account of plantation and other expenses, said trading company had expended approximately \$40,872.26, against which it has received from said rubber company \$20,000, and that therefore said rubber company owed said American Trading Company on June 20, 1923, approximately \$221,145.25; that there was then in the hands of said trading company 325 bales of rubber unsold; that the proceeds of sales of rubber had been applied toward the reduction of the advances mentioned in said agreement; and that those advances had been reduced approximately \$20,000. Other averments contained in said affidavits tend strongly to refute the estimated value of the properties of said rubber company as fixed by appellants in the complaint, and show further that, owing to the fact that

rubber can be produced much cheaper in the Malay States, the enterprises of said rubber company in Mexico cannot be expected to produce a profit.

Appellants contend that said contract is in effect a mortgage given as security for the future payment of money, and that the provision therein authorizing a transfer of the title to the property in the event of a failure to make said payments is in the nature of a forfeiture and a waiver of the right of redemption, and therefore is illegal and cannot be given effect. Supporting this contention, appellants cite a number of authorities which declare the well-established rule that parties to a contract of mortgage cannot legally stipulate, at the time of the execution of said mortgage, that the mortgagor debtor shall not enjoy the right of redemption. *Civ. Code*, § 2889; *Bradbury v. Davenport*, 114 Cal. 598, 46 P. 1062, 55 Am. St. Rep. 92; *Blodgett v. Rheinschild*, 56 Cal. App. 728, 206 P. 674. But appellants concede it to be the law also that a mortgagor debtor, at any time after the execution of the mortgage, may, by a separate and distinct transaction, sell or release his equity of redemption to the mortgagee. *Watson v. Edwards*, 105 Cal. 75, 38 P. 527; 3 *Pomeroy, Equity*, § 1193; *Phelan v. De Martin*, 85 Cal. 365, 24 P. 725; *McDonald v. Huff*, 77 Cal. 279, 19 P. 499.

[1] We are of the opinion that the transaction upon which this contract is grounded falls within the latter class. It is evident, we think, from the facts already narrated, that a lien existed against the properties of said rubber company several years before the date of the execution of said agreement of 1921. It first came into being when the mortgage was originally given to the Mexican bank, and that lien has never since been extinguished. In 1915 said trading company acquired all rights under said lien by the purchase of the said mortgage; the understanding at that time being, according to defendants' affidavits, that said mortgage should constitute a lien also for the payment of all other indebtedness due said trading company. In 1921, when said trading company was about to foreclose said mortgage, the agreement in question was made. Whatever equity of redemption may have previously existed was thereby released. It therefore becomes apparent that the execution of said agreement involved a separate and distinct transaction from the one under which the lien was created, and was entered into by said rubber company for the purpose of obtaining further extension of time, so that it might extinguish said lien and save itself from financial destruction. During the extension of time granted, however, said rubber company and its stockholders failed to perform the conditions of said agreement, and therefore are not entitled to restrain the operation of the terms thereof.

[2] Appellants next contend that said agreement should be declared void upon the ground that it was entered into under conditions not making for fairness and freedom from undue influence, and, moreover, "should be set aside at the option of a stockholder without any reason other than that it is his wish that it be set aside."

Those contentions are based mainly upon allegations in the complaint to the effect that the defendant Ward was a common director of the rubber company and the American Trading Company, and that, as a director of said rubber company, he exercised a dominating influence over two of the officers and directors of that company, thereby inducing them to enter into said agreement. There is no allegation in the complaint, however, that said contract is unfair in any respect, and the record shows that its execution was authorized by the board of directors of said rubber company at a meeting at which a majority was present, not including Ward; and, moreover, the agreement itself, when read in the light of the circumstances preceding its execution, shows, we think, that the result of the execution thereof operated to the benefit of said rubber company by granting to the stockholders thereof further time and additional opportunity to pay off its indebtedness and thereby save its property. The record further shows that the stockholders failed to take advantage of the opportunity thus afforded, and, although several stockholders' meetings were held thereafter, and a number of urgent communications were sent to them plainly describing the serious situation confronting them and urging that action be taken to pay off the indebtedness and redeem the property, apparently no such efforts were made; nor was the fairness or the validity of the agreement during that time ever challenged. On the other hand, during the period of said 18 months, said trading company, acting upon the faith of said agreement, advanced more money for the operation and maintenance of the rubber company's properties. It would therefore seem that, if said agreement be voidable upon the grounds urged by appellants, prompt notice of rescission should have been given and an offer made to restore said trading company to the status quo. It is our opinion that the facts of this case clearly distinguish it from those authorities cited and relied upon by appellants.

[3] Appellants further contend that said agreement provides "for the transfer of all of the assets and property of the corporation," and that said alleged transfer, not being authorized by two-thirds of the stockholders, is void under section 361a of the Civil Code. We believe this contention is disposed of by the case of *Shaw v. Hollister Land & Improvement Co.*, 166 Cal. 257, 135 P. 965, wherein it was held that a sale of all the tangible

property of a corporation without the consent of the stockholders is not in violation of said Code section. Furthermore, it would appear that the property of said rubber company was virtually disposed of before the execution of the agreement of December 20, 1921, by the creation of said liens against it, and that said agreement was made in furtherance of the operation of said liens.

[4] Lastly, it is contended that appellants are entitled to an accounting before said transfers of property may be consummated. Under a reasonable construction of said agreement, the implication seems clear, we think, that a final accounting was not contemplated in the event said rubber company failed to exercise its right within said period of 18 months to pay said indebtedness and redeem said property. As already stated, the affidavit of the defendant Ward shows that on June 20, 1923, the day following the commencement of this action, over \$220,000 was due said trading company, and nowhere in the record does it appear that there has been an offer made to pay said indebtedness. Moreover, according to Ward's uncontradicted affidavit, an accounting was had up to within 6 months of the commencement of this action and the approximate total of receipts and disbursements since then is set forth. We think that the fact that a detailed accounting was not had for the period covering the 6 months immediately preceding the commencement of suit would not under any circumstances serve as legal grounds for enjoining the consummation of the transfers of said property in accordance with the plain terms of said agreement.

For the foregoing reasons we conclude that the trial court did not err in refusing to grant said temporary injunction.

The orders appealed from are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

75 Cal. App. 779

BLACKMER v. PIERCE. (Civ. 5270.)

(District Court of Appeal, First District, Division 2, California. Dec. 24, 1925.)

1. Appeal and error $\S$ 925(2)—Where record showed no evidence in response to allegation, it will be assumed none was offered.

In action for balance due on sale of trees, where record did not show any evidence in response to allegation of answer to cross-complaint as to consent to sale to another, appellate court will assume no evidence was offered.

2. Trial $\S$ 397(3)—Absence of finding as to notice that seller could not make full delivery was not error, where such issue was not raised.

In action for balance due on sale of trees, absence of finding as to notice to buyer that seller could not make full delivery held not error, where pleadings did not raise such issue.

3. Trial ☞397(3)—Finding unnecessary on question whether buyer demanded delivery, where he failed to allege that seller could comply.

Where buyer of trees did not allege that seller had, at time of delivery, any trees measuring to calls of contract, court was not bound to make finding on allegation that buyer demanded delivery as per contract; it being immaterial.

4. Trial ☞397(3) — Finding unnecessary on question of performance of contract to sell trees when it was not in issue.

Where pleading of seller of trees was common count for goods sold and delivered, and contained no allegation of performance, and record did not show that answer to cross-complaint, which alleged performance, was on trial, or that any evidence was introduced as to such allegation, finding on such subject was unnecessary.

5. Appeal and error ☞694(1)—Sufficiency of evidence not decided, when evidence not before court.

Appellate court could not determine whether findings were supported by evidence, where evidence was not before it.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by Ezra A. Blackmer against R. E. Pierce. From a judgment for plaintiff, defendant appeals. Affirmed.

Bowker & Sheridan, of Ventura, for appellant.

Chas. F. Blackstock, of Oxnard, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover \$3,316.20, alleged to be the balance due and owing to him for a lot of walnut trees sold and delivered. The defendant answered and filed a cross-complaint. The plaintiff answered the cross-complaint, and a trial was had before the trial court sitting without a jury. The trial court made findings of fact and ordered judgment entered in behalf of the plaintiff as prayed. From that judgment the defendant has appealed, and has brought up the judgment roll.

From the pleadings it can be ascertained that the plaintiff is a nurseryman and engaged in rooting and grafting walnut trees. On the 18th of November, 1919, the defendant and plaintiff entered into a written contract for the purchase and sale of 5,000—

"Placencia Perfection walnut trees grafted on Royal Hybred black walnut root, the same now being situate on lot No. 118, Tapo ranch, for delivery spring 1921, for the price of \$1.50 per tree; trees to be 8 feet and up, consecutively; trees to be free from insect pest or disease, and to pass county horticultural inspection. Twenty-five per cent. of the purchase price, or \$1,875, at the time this contract is made and entered into, receipt of which is hereby acknowledged by seller, the balance

when the trees are delivered. If from any cause beyond the control of the seller, such as damage by the elements, he is unable to make delivery of trees herein sold, upon return of the first payment hereinbefore mentioned to buyer the parties hereto shall mutually be released from the provisions of this agreement. * * *

[1, 2] On the 16th day of April, 1920, the parties entered into another contract to buy and sell other trees located on lot 118. The plaintiff's complaint, the defendant's answer, the defendant's cross-complaint and the plaintiff's answer to the cross-complaint each and all treat the dealings between the parties as one cause of action. In the defendant's cross-complaint it is alleged that the plaintiff delivered to the defendant 1007 walnut trees. It is not alleged that any objection was made by the defendant to any one of said trees, or that the defendant objected to accepting the said 1,007 trees. The appellant complains that—

"There is no finding by the court upon the issue that the sale by plaintiff of 400 of the 5,000 trees to be delivered under the contract dated November 18, 1919, to a person other than the defendant, was with defendant's consent."

There was no allegation on the subject in any other pleading than the answer to the cross-complaint. But the record before us does not show that any evidence was introduced in response to that allegation. In support of the judgment we must assume that no evidence was offered on the subject when as here the record is silent. The appellant then claims that—

"There is no finding of the court upon the issue that plaintiff at any time notified defendant that he could not make delivery in full under the contracts, or that he at any time returned or offered to return to defendant the money which defendant had advanced upon the contracts."

An examination of the pleadings discloses that the pleadings made no issue on that subject. There was neither allegation nor denial on the subject. Moreover it has not been made clear to us that the proper construction of the contract was to the effect that, if the seller could not make a full and complete delivery, then and in that event he was not called upon to make a delivery in part if he was able to do so.

[3] The appellant makes another point that—

"There is no finding upon the issue that defendant demanded of plaintiff the balance of 3,993 trees due under said contract dated November 18, 1919."

Turning to the contract, it is perfectly clear that the contracting parties were dealing regarding trees that were growing and which were not to be delivered until 16 or 17

months thereafter, and that it was only certain specified trees which would come within the calls of the contract. In the appellant's pleadings there is nowhere an allegation that the seller had at the time of delivery grown any trees which measured up to the calls of the contract. If he had not done so, it was an idle act on the part of the buyer to make a demand therefor. It cannot be assumed under these circumstances that the trial court omitted to make a finding on a material allegation; but, on the other hand, the allegation regarding a demand was under the facts as shown by the record an immaterial matter, and the court was not bound to make a finding thereon.

[4] Again, the appellant complains that—

"There is no finding of the court to the effect that plaintiff performed all of the terms and conditions by him to be performed under the contracts."

The plaintiff's pleading was a common count as for goods sold and delivered. It contained no allegation on the subject of performance, and therefore no finding was necessary. In the plaintiff's answer to the cross-complaint, the plaintiff alleged that he had done and performed, but the record does not show that the cross-complaint or the answer thereto were on trial, or that any evidence was introduced on the allegation referred to.

[5] The appellant then cites, under points 4, 5, 6, and 8, certain findings of the trial court, and claims that they are "erroneous." In his argument he seems to contend that those findings are not supported by the evidence. They may not be. We have no means of ascertaining the fact. The evidence is not before us.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

76 Cal. App. 19

RUPPE v. UTTER. (Civ. 5195.)

(District Court of Appeal, First District, Division 1, California. Dec. 28, 1925. Hearing Denied by Supreme Court Feb. 25, 1926.)

1. Landlord and tenant ⚡104—Partnership lease was not terminated, where no forfeiture was ever attempted to be declared by landlord.

Partnership lease was not terminated, where notice given by landlord was merely to effect that a transfer by one partner of his interest would work a forfeiture, and none was ever attempted to be declared.

2. Landlord and tenant ⚡104—Covenant against subletting when violated by lessee does not ipso facto terminate lease.

A covenant against subletting or assigning when violated by lessee does not ipso facto

terminate lease, as lessor may declare same void or ignore breach and treat lease as subsisting.

3. Landlord and tenant ⚡104—Joint covenant not to assign without consent of lessor is not broken by action of one of covenanters in attempting to assign or sublet.

Where lease runs to two lessees jointly, and there is a covenant not to assign without consent of lessor, covenant is joint, and is not broken by action of one of covenanters in attempting to assign or sublet.

4. Partnership ⚡232—Month to month arrangement, effected by partner conducting business, after dissolution, with landlord for use of premises, inured to benefit of both retiring and active partner.

Where partnership lease of premises had not been terminated on dissolution, any month to month arrangement, effected by partner conducting business with landlord for use of premises, inured to benefit of retiring partner as well as the other partner.

5. Partnership ⚡232—Permit to conduct undertaking business, issued to active partner after dissolution of partnership, obtained by unauthorized representations that he was sole owner of business, held not to affect retiring partner.

New permit to conduct undertaking business of partnership, issued to active partner after dissolution, held not to affect rights of retiring partner, where it was obtained by representations that active partner was sole owner of business when he had no legal authority to make such change.

6. Partnership ⚡300—After partnership's dissolution, partner, unauthorizedly using as his own partnership premises, personal property, and permit to do business, is required to account.

Where, after partnership dissolution, partner, without authority, used as his own partnership premises and its personal property, together with permit to do business, he was required to account for all profits arising from such use.

7. Partnership ⚡282—Partner is entitled, on dissolution, to have leasehold interest, permit to do business, and good will converted into cash.

Partnership leasehold interest, permit to do business, and its good will are assets which each partner, on dissolution, is entitled to have converted into cash.

8. Good will ⚡1.

Good will is property, capable of transfer from one owner to another.

9. Partnership ⚡301.

Competition of retiring partner is an element to be considered in fixing value of good will of partnership.

10. Partnership ⚡229—Retiring partner's right to share in asset of good will of partnership is not affected by forming other connections.

Retiring partner's right to share in asset of good will of partnership is not affected be-

cause after dissolution he formed other connections and advised his friends thereof and solicited their business.

11. Partnership — 229.

Retiring partner, after dissolution of partnership, might form other connections and advise his friends thereof and solicit their business.

12. Partnership — 300 — Partner's right to possession of assets after dissolution was merely to wind up partnership affairs and he is accountable for profits derived therefrom.

Partner, in winding up affairs of partnership after dissolution, was a mere trustee, and his right to possession of assets was merely to wind up partnership affairs, and, where he used such assets in business, he must account for profits derived therefrom.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by Louis E. Ruppe against Lawson F. Utter. From a judgment for less than the amount sued for, plaintiff appeals. Reversed.

Wm. Schreider, of Los Angeles, for appellant.

Lewis Cruickshank, of Los Angeles, for respondent.

TYLER, P. J. Action brought by plaintiff against defendant for an accounting after dissolution of a copartnership.

The complaint alleges that plaintiff and defendant entered into and formed a partnership on the 24th day of May, 1915, for the transaction of a general undertaking, embalming, and funeral directing business. The partnership was known and designated as "Moneta Avenue Undertaking Company," and was situated at 4254 Moneta avenue, in the city of Los Angeles. The copartners were to share equally in the property and profits of said business. The partnership was terminated and dissolved on or about April 5, 1922. At the time of its dissolution there were accounts receivable, which it is alleged amounted to the sum of \$36,000. These accounts were amicably divided between plaintiff and defendant, and do not enter into the controversy. There was also belonging to the partnership certain furniture, furnishings, fixtures, embalming tools, and implements, and stock in trade consisting of caskets, draperies, and supplies which plaintiff alleged to be of the value of \$17,500, but which defendant in his answer claimed did not exceed in value the sum of \$8,000.

This property was sold under the judgment or decree made by the court, and the funds derived therefrom, amounting to the sum of \$11,146.26, were divided equally between the parties. This item is therefore also eliminated, so that the tangible property of the partnership is in no manner here involved. The remaining items in the complaint consist of

the demand for an accounting of one-half of the proceeds or profits made by defendant in continuing the business with the use of the fixtures, stock in trade, and permit of the former copartnership after dissolution, together with the value of the leasehold and the good will thereof.

Trial was had and judgment rendered in favor of plaintiff for the rental value of the use of the personal property which was fixed in the sum of \$58.33 per month from the 6th day of April, 1922, to the 21st day of August, 1923, the date of the entry of the judgment, a period of some 16 months, making in all a total sum of \$933.28. Appellant claims that, as the evidence shows that defendant retained the property of the partnership after dissolution, and continued to carry on the business with the use thereof at a profit, he should have been held to account for such profits.

It appears from the evidence that, after the parties had entered into the copartnership, they continued to transact business under their agreement up to April, 1922. The enterprise was a successful one, for in the year preceding the dissolution, according to plaintiff's testimony, the net profits thereof amounted to some \$39,500.

The articles of copartnership provided, among other things, that, in the event either of the copartners desired to sell his interest in the business, he should give to the other copartner a 10-day option to purchase the same at the price and on the same terms as the interest might be offered to any third party. About March 25, 1922, the partners became dissatisfied with their association, and plaintiff, in conformity with the partnership agreement, addressed a written communication to defendant Utter advising him that he had been offered \$30,000, excluding the book accounts, for his interest in the business, and that he would sell to Utter at that figure. In response to this offer Utter asked if plaintiff would purchase his interest for the sum of \$25,000. Plaintiff agreed to do so, and procured a certified check for this amount to carry out this arrangement. Utter then refused to sell, whereupon plaintiff, on April 6, 1922, sold his interest to others for the sum of \$30,000. On the same day he notified Utter of the sale.

It further appears from the evidence that Utter at first was willing to accept the purchasers as his partners, but later refused to have anything to do with them. Ruppe thereupon returned to them the purchase price, and received a reconveyance of their interest.

At the time of the dissolution of the partnership the firm owned a certain lease in the premises in which their business was being conducted, extending to and including the 31st day of March, 1923, at a monthly rental of \$200. Utter remained in possession of these premises after the dissolution and there

continued the undertaking business, and he used in the conduct of said business the personal property, including the furniture, furnishings, and stock in trade, and the like, of the former copartnership. Up to June 10, 1922, about 2 months after the dissolution, he kept the original sign over the doors in front of the establishment, and thereafter replaced it with another of practically the same import. At the time of the attempted transfer the landlord of the premises notified plaintiff Ruppe that any conveyance by him of his interest would be in violation of the terms of the lease justifying its cancellation. The lease contained a clause which precluded an assignment without the consent of the landlord in writing. The place where the property was located was zoned for the character of business conducted by the parties, and it was so conducted by them under a permit issued by the city council of the city of Los Angeles. About the 15th day of May, 1922, Utter, without the knowledge or consent of plaintiff, surrendered the permit and made application for, and was granted, a new one in his own name.

Under all these facts defendant characterizes himself as the sole owner of the business, for which reason he claims he was under no obligation to account to plaintiff for any of the profits derived from such business after the dissolution, but was only bound to account for the reasonable value of the use of the furniture and fixtures. The trial court took this view, and entered findings accordingly.

[1-3] The evidence does not warrant this conclusion. In the first place, the partnership lease was never terminated nor canceled. The notice given by the landlord was one merely to the effect that a transfer by Ruppe of his interest would work a forfeiture. None, however, was ever attempted to be declared. A covenant against subletting or assigning when violated by the lessee does not ipso facto terminate or render void the lease. The lessor has the option of declaring the same void or ignoring the breach and treating the lease as subsisting. Then, too, the notification merely stated that the landlord "shall expect to take" proceedings to cancel the lease. No such proceedings, however, were ever taken. Aside from this, it is well established that, where a lease runs to two lessees jointly, and there is a covenant not to assign without the consent of the lessor, the covenant is a joint one, and is not broken by the action of one of the covenanters in attempting to assign or sublet. *Spangler v. Spangler*, 11 Cal. App. 321, 104 P. 995; *Randol v. Scott*, 110 Cal. 590, 42 P. 976.

[4] The lease not having been terminated, any month to month arrangement effected by Utter with the landlord for the use of the premises inured to the benefit of Ruppe as well as defendant. *Donleavey v. Johnston*, 24 Cal. App. 319, 141 P. 229.

[5] With reference to the permit to conduct the business the evidence shows, as above narrated, that it was used by Utter up to May 16, 1922, at which time he surrendered it, and caused to be issued to himself a new one in his own name. It further appears that the new permit was obtained by representations that he was the sole owner of the business. He had no legal authority to make this change, and it amounted to no more than an attempt on his part to acquire a privilege, which, under the facts of the case, he was not entitled to.

[6-9] The evidence shows without conflict that Utter used the premises and personal property of the partnership, together with the permit to do business, as his own without right or warrant, and he should be made to account for all profits arising from such use. The leasehold interest, the permit to do business, and the good will of the partnership were as much assets as the fixtures which each partner was entitled to have converted into cash. 30 Cyc. 687, 697; *Donleavey v. Johnston*, supra. Good will is property recognized and protected by the law as such, and capable of sale and transfer from one owner to another. It is an asset which may be sold in connection with a business. How far its value might be affected by the competition of the retiring partner is an element, of course, to be taken into consideration in fixing of such value. 28 Corp. Jur. p. 735.

[10-12] There is no question that the good will of this concern had been a valuable one. For the year 1920 the business had yielded a net profit of \$32,000, each of the partners receiving \$16,000 as his share. The following year, and just prior to the dissolution, the business had yielded a net profit of \$39,500, according to testimony of plaintiff. Nor is plaintiff's right to his share in this asset in any manner affected as claimed, or impaired by the fact that after the dissolution he formed other connections and advised his friends of this fact and solicited their business. This, as above indicated, he had a right to do. 28 Corp. Jur. 735. Defendant, of course, had the same right. In the exercise of this right, however, he was not authorized to prolong his possession of the assets of the firm for the purpose of continuing the business and deriving profits therefrom. Having done so, he must be held to account to his retiring partner for any profits so made. His right to the possession of the assets was merely for the purpose of winding up the partnership affairs. The trial court in confining the relief granted to the mere value of the use of the property, misconceived the effect of the evidence, and its finding under the facts narrated that defendant conducted the business for his exclusive benefit finds no support therein. Defendant occupied the position of a mere trustee. Having used the assets in question in conducting the business, he must

be made to account for the profits derived therefrom.

The judgment is reversed.

We concur: KNIGHT, J.; CASHIN, J.

198 Cal. 103

In re BERGER'S ESTATE.**LARGE v. DIERCKEN et al.**

(S. F. 11282.)

(Supreme Court of California. Feb. 1, 1926.
Rehearing Denied March 1, 1926.)**1. Wills ⚡481—Wills are ambulatory and create no rights until death of testator.**

Wills are ambulatory by nature and create no rights which the court can recognize or enforce until death of testator.

2. Wills ⚡168—Executed will may be revoked by statute.

A previously executed will may be revoked by statute, as the right to execute a will as well as its form or manner of revocation are matters of statutory regulation.

3. Wills ⚡168—Legislature may limit class of persons competent to make will or declare change in status a revocation of will.

The Legislature may limit the class of persons competent to make a will or declare that a change in personal status of such persons after its execution shall operate as revocation of will.

4. Wills ⚡290—Destruction or cancellation presumed when status of one making will so changed as to effect revocation under statute.

A will is presumed to be destroyed or canceled when there has been such a change in status or personal relations of one making will as under statute effects its revocation.

5. Wills ⚡201—A will revoked by statute was not revived by subsequent statute changing condition of revocation (Civ. Code, § 1300, as amended by St. 1905, p. 606, § 4, and St. 1919, p. 1239, § 1).

Under Civ. Code, § 1300, as amended by St. 1905, p. 606, § 4, revocation of woman's will by marriage was final and complete and not ambulatory, and hence will was not revived by St. 1919, p. 1239, § 1, making revocation dependent on husband surviving.

6. Wills ⚡168—Statute changing manner of revocation of woman's will by marriage not retroactive (Civ. Code, § 1300, as amended by St. 1919, p. 1239, § 1).

St. 1919, p. 1239, § 1, amending Civ. Code, § 1300, to make revocation of woman's will by marriage dependent on husband surviving, held not retroactive.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Application by Claudeus Large for the probate of the will of Constance Berger, formerly Constance Diercken, deceased. From a decree admitting the will to probate, Ferdinand Louis Diercken and others, contestants, appeal. Reversed.

P. A. Bergerot and A. P. Dessouslavy, both of San Francisco, for appellants.

Chas. J. Heggerty and Jno. W. Bourdette, both of San Francisco, for respondent.

Cullinan & Hickey, of San Francisco, for Hynes.

WASTE, C. J. On November 6, 1911, Constance Berger, then Constance Diercken, executed a will leaving her entire estate to Claudeus Large, and appointing him sole executor. On May 6, 1913, she married Harry L. Boyle, from whom she was divorced on November 4, 1916. On March 8, 1918, she married Jean Baptiste Berger, who predeceased her on July 15, 1923. Mrs. Berger died January 4, 1924, leaving no issue. Upon her death Claudeus Large offered the will made November 6, 1911, for probate. The heirs at law of Mrs. Berger objected to its admission upon the ground that it was executed at a time when the decedent was an unmarried woman, and was revoked by her subsequent marriage to Boyle. The proponent and petitioner interposed a demurrer to the opposition, which was sustained without leave to amend. The court admitted the will to probate, and letters testamentary, without bond, were ordered issued to Claudeus Large. The heirs of Constance Berger have appealed.

[1-4] The sole question presented by the appeal is whether the will of Mrs. Berger was finally and completely revoked by her marriage to Boyle in 1911, at which time section 1300 of the Civil Code provided, "A will, executed by a woman, is revoked by her subsequent marriage, and is not revived by the death of her husband," or whether it was valid and governed by the section as amended in 1919 and in force at the time of Mrs. Berger's death in 1924. The amended section provides (Stats. 1919, p. 1239):

"If, after making a will, the testatrix marries, and the husband survives the testatrix, the will is revoked, unless provision has been made for him by marriage contract, or unless he is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received."

The contention of the appellants is that the will was revoked eo instanti by the marriage to Boyle and could not thereafter be considered as having either a present or a potential existence. Respondent, in reply, takes the position that a will, being ambulatory in character during the life of the maker, is governed by the law in force at the maker's death, from which it follows, he ar-

gues, that under the provision of the statute in force when Mrs. Berger died, the will stood unrevoked and entitled to be admitted to probate. While the question thus presented is a novel one in this state, it has been many times considered in other jurisdictions.

Wills are ambulatory by their nature and create no rights which the court can recognize or enforce until they become operative by the death of the testator. "Acts which remain thus inchoate, * * * are in the nature of unexecuted intentions. The author of them may change his mind, or the state may determine that it is inexpedient to allow them to take effect." *Moultrie v. Hunt*, 23 N. Y. 394, 399; *Goodsell's Appeal*, 10 A. 557, 55 Conn. 171, 175. It is entirely competent for a statute to revoke by its provision a previously executed will. The right of any person to execute a will, as well as the form in which it must be executed, or the manner in which it may be revoked, are matters of statutory regulation. The power of the Legislature to limit the class of persons who shall be competent to make a will, or to declare that a change in the personal status of such persons after its execution shall operate as a revocation of the will, or be a sufficient reason for denying it probate, is unquestioned. In order to determine whether a will has been revoked, or whether after its execution there has been such a change in the status or personal relations of the maker as will in law effect its revocation, we have only to determine whether the changed condition is within the conditions named in the statute. In *re Comassi*, 40 P. 15, 107 Cal. 1, 4, 28 L. R. A. 414. When that is shown to be the fact, the law presumes that such a changed condition has been wrought in the life of the testator as to cause him to destroy or cancel a previous will. *Sanders v. Simcich*, 2 P. 741, 65 Cal. 50, 52. Section 1300 of the Civil Code, as enacted in 1872, read:

"A will, executed by an unmarried woman, is revoked by her subsequent marriage, and is not revived by the death of her husband."

It was amended in 1905 by substituting the words "executed by a woman" for the words "executed by an unmarried woman," the code commissioner saying:

"The purpose of the amendment is to apply the same rule to wills executed by married and unmarried women with respect to the revocation by subsequent marriage."

By the common law, a married woman had no power to make a will, and the marriage of a woman revoked any will that she had previously made. In *re Comassi*, supra. This rule has been very generally adopted as the common-law rule in the United States and has been re-enacted by statute in many states. Page on Wills, 1901, § 284. It does not rest alone upon mere presumption, but upon the material change which marriage works in the circumstances and condition

of every woman and the new interests she sustains by the act of taking a husband. Schouler on Wills (6th Ed.) § 639. See, also, Kent's Commentaries, vol. 4, star page 521. The state of New York enacted a statute providing that the will of an unmarried woman was revoked by her subsequent marriage. 2 R. S. p. 64, § 44. In an early case involving the question we are now considering, the Court of Appeals of that state said:

"We concur in the conclusion reached by the surrogate that the will was revoked by the subsequent marriage of the testatrix. It was the rule of the common law that the marriage of a woman operated as an absolute revocation of her prior will. (Forse and Hembley's Case, 4 Co. 61.) The reason of the rule is stated by Lord Chancellor Thurlow in *Hodsdon v. Lloyd* (2 Bro. Ch., 534). He says: 'It is contrary to the nature of the instrument which must be ambulatory during the life of the testatrix; and as by the marriage she disables herself from making any other will, this instrument ceases to be of that sort, and must be void.' The rule that the marriage of a femme sole revoked her will was made a part of the statute law of this state by the Revised Statutes. (2 R. S. 64, § 44.) The language of the statute, that the will of an unmarried woman shall be deemed revoked by her subsequent marriage, is the declaration of an absolute rule. The statute does not make the marriage a presumptive revocation which may be rebutted by proof of a contrary intention, but makes it operate eo instanti as a revocation. (4 Kent, 528.) It is claimed by the contestants that the testamentary capacity conferred upon married women by the recent statutes in this state takes away the reason of the rule of the common law, and that upon the maxim cessante ratione legis, cessat lex ipse, the rule should be deemed to be abrogated. Upon the same ground it might have been urged at common law that the marriage of a femme sole should only be deemed a revocation or suspension of her prior will during the marriage, and that when the woman's testamentary capacity was restored by the death of her husband, leaving her surviving, the will should be revived; but the contrary was well settled. (Forse and Hembley's Case; 1 Jarman, 106; 4 Kent, 598.) But the courts cannot dispense with a statutory rule because it may appear that the policy upon which it was established has ceased. The married woman acts confers testamentary capacity upon married women, but they do not undertake to interfere with or abrogate the statute prescribing the effect of marriage as a revocation. It was quite consistent that the Legislature should have intended to leave the statute of 1830 in force although the new statutes took away the reason upon which it was based. The Legislature may have deemed it proper to continue it for the reason that the new relation created by the marriage would be likely to induce a change of testamentary intention, and that a disposition by a married woman of her property by will should depend upon a new testamentary act after the marriage." *Brown v. Clark*, 77 N. Y. 369.

See, also, *In re Kaufman*, 131 N. Y. 620, 30 N. E. 242, 15 L. R. A. 292; *Matter of*

McLarny, 47 N. E. 817, 153 N. Y. 416, 60 Am. St. Rep. 664.

The exact question was also considered by the Supreme Court of Illinois. The court said:

"If the statute of 1872 [declaring that a marriage shall be deemed a revocation of a prior will] is to have any effect at all, a marriage since its adoption, whether of a man or woman, must operate, per se, as a revocation of a prior will, and so we hold." *McAnnulty v. McAnnulty*, 11 N. E. 397, 120 Ill. 26, 60 Am. Rep. 552.

See, also, *Hudnall v. Ham*, 56 N. E. 172, 183 Ill. 486, 496, 48 L. R. A. 557, 75 Am. St. Rep. 124, and *Ford v. Greenawalt*, 126 N. E. 555, 292 Ill. 121, 125.

It was provided by section 3072, Hill's Ann. Laws, state of Oregon, that the will of an unmarried woman shall be deemed revoked by her subsequent marriage. In *Booth's Will*, 61 P. 1135, 66 P. 710, 40 Or. 154, the single question presented was whether the will of an unmarried woman was revoked by her subsequent marriage, and the court quoted approvingly from *Brown v. Clark*, supra, and affirmed the decree of the lower court refusing to admit the will to probate. In *Pennsylvania*, section 16 of the act of April 8, 1833 (P. L., 250), provided that "a will executed by a single woman shall be deemed revoked by her subsequent marriage." It was held that a will executed by a woman before marriage was absolutely inoperative as a will, her marriage having revoked it under the express language of the statute. *Est. of Craft*, 30 A. 493, 164 Pa. 520; *Fidelity Trust Company's Appeal*, 15 A. 484, 121 Pa. 1, 16. It would seem to follow from the foregoing authorities and others to the same effect which we could cite, that it is beyond dispute that both at common law, and under statutory enactments adopting the common-law rule that a will made by a woman shall be revoked by her marriage, the marriage of the woman produces absolute and complete revocation. *Phaup v. Wooldridge*, 14 Grat. (Va.) 332. If that is so, it would seem to also follow that the revocation is as complete as if made by the act of the testatrix, and the will cannot be given life and validity except by some testamentary writing executed and attested in the manner prescribed by law. See note to *Graham v. Burch* (49 N. W. 697, 47 Minn. 171) 28 Am. St. Rep. 339, 360.

[5] Notwithstanding the rule so clearly established by the authorities, respondent contends that revocation, like the will itself, is ambulatory in every case, and dependent for effectiveness upon the law in force at the time of the death of the testator. From this premise he argues that if, after the time an act is done which under the law in force at that time would have the effect of a revocation, the law is so repealed, or amended prior to the death of the testator as to deny the

effect of revocation to the act, then the will is not revoked. Applied to the facts of the present case, respondent's contention is that because section 1300, supra, was amended after the marriage of Mrs. Berger (née Diercken) to Boyle in 1913 and before she died in 1924, in such manner as to make the survival of the husband, and failure to provide for him, the condition on which the will of testatrix is revoked, the will of Mrs. Berger was not in fact revoked at all. There are two answers to the contention. The first is that respondent is mistaken in his premise. Revocation being a "thing done and complete" is not in its nature ambulatory. The rules of law applicable to the reviving of wills revoked by the act of the makers are equally applicable to the reviving of wills revoked by act of the law, e. g., the effect of marriage; for in either case the will, being revoked, is of no effect until new life is given to it. *Sawyer v. Sawyer*, 52 N. C. 134. The principles laid down in the cases can be well expressed in the statement of a general rule that—

"Where a will is revoked in toto by act of the testator, or by operation of law, it is dead for all purposes, and no difficulty in determining the operation and effect of the revocation can arise." 40 Cyc. 1210.

When it is determined that the changed condition of the testator, as in this case the marriage, is within the condition named in the statute, the law will effect the revocation. In *re Comassi*, supra. When the contingency provided for by the Legislature becomes operative, the will is rendered dead as completely as if the testator had destroyed it by any of the means known to the law. *Estate of Meyer*. 186 P. 393, 44 Cal. App. 289, 295.

[6] The second answer to respondent's contention lies in the fact that it depends for its support upon a retroactive application of section 1300, as amended in 1919, some six years after the marriage of Constance Diercken to Boyle. That cannot be done. Section 1300, as amended in 1919, is not retroactive in terms. No indication can be gathered from it that the Legislature intended that it should be retroactive. Consequently we must regard the intention to have been that it should have only a prospective, and not a retrospective, operation. *Estate of Frees*, 201 P. 112, 187 Cal. 150, 155; 23 Cal. Jur. 629; *Swan v. Sayles*, 42 N. E. 570, 165 Mass. 177, 178.

Respondent has cited a number of authorities which hold that the law of the domicile of a testator at the time of his death prevails over that of the place of the execution of a will; but the question of the retroactive effect of an amended statute on a will pre-

viously revoked by operation of law is not involved in the cases. Daniels on the New York Law of Wills, § 403, is cited as holding that a determination as to whether a propounded instrument was revoked by marriage is controlled by the law in force at the time of the decedent's death, and not by the law as it existed at the time when the instrument was executed. He says:

"If a change is made in the statute, the will of a person who died after the change went into effect is governed by the new law, unless there is some provision therein which limits its application."

No one will dispute the accuracy of the rule, if there is a valid will, unrevoked, and existing at the time of the death of the testator. The author rests his assertion on decisions of the New York Supreme Court dealing with the statute providing that a man's will should be deemed revoked if the wife or issue of the marriage should be living at the death of the testator. Among them are: *Matter of Dexter*, 189 N. Y. S. 366, 116 Misc. Rep. 17; *Matter of Cutler*, 186 N. Y. S. 271, 114 Misc. Rep. 203; *Matter of Coburn*, 30 N. Y. S. 383, 9 Misc. Rep. 437; *Matter of Gaffken*, 187 N. Y. S. 255, 114 Misc. Rep. 693. They expressly hold that the statute they construe was not retroactive. Mr. Daniels could not have intended his declaration to have application to the provision of the New York law that "a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage," for in the section dealing with that subject he says (section 398): "The will of the unmarried woman becomes a nullity immediately upon her subsequent marriage." We deem it unnecessary to take the time to distinguish the authorities relied on by respondent. We have been cited to no decision from New York, or other jurisdictions, holding that a will finally revoked is revived by a subsequently enacted statute changing the manner of revocation. As holding a contrary view, see *Smith v. Clemson*, 6 Houst. (Del.) 171, 180.

Other contentions made by respondent, affording opportunity for argument by analogy, are not sufficient to overcome the conclusion we have reached that the will made by Mrs. Berger (née Diercken) on November 6, 1911, was revoked eo instanti by her marriage to Henry L. Boyle on May 6, 1913. Consequently it was not entitled to be admitted to probate.

The order appealed from is reversed.

We concur: RICHARDS, J.; SHENK, J.; LAWLOR, J.; SEAWELL, J.

198 Cal. 137

WRIGHT v. RODGERS et al. (S. F. 11179.)

(Supreme Court of California. Feb. 1, 1926.)

1. Damages §78(6)—Agreement for stipulated damages for breach of real estate contract not void, unless it is penalty or fixing of actual damage is practicable.

Agreement to pay stipulated sum in damages for breach of contract for sale or exchange of realty is void only when in nature of penalty, or within inhibition of Civ. Code, §§ 1670, 1671, because fixing of actual damages is neither impracticable nor extremely difficult.

2. Damages §78(6)—Matters considered in determining whether agreement for stipulated damages is for penalty, stated.

In determining whether agreement to pay stipulated sum in damages for breach of contract for sale or exchange of realty is agreement for penalty, parties' intention, and whether agreement is in nature of things a penalty, though language declares it to be liquidated damages, must be considered.

3. Damages §77—Intention clearly declared in agreement that sum fixed shall be liquidated damages controls.

Intention, declared in agreement for exchange of realty, that sum fixed shall be liquidated damages for breach, controls, in absence of ambiguity or uncertainty.

4. Damages §78(2).

If provision in contract fixing damages for breach is penalty, no expression to contrary would change it into liquidated damages.

5. Damages §79(5)—Provision fixing damages for breach of contract to exchange realty valid because of presumed impracticability of fixing actual damages (Civ. Code, §§ 1670, 1671, 3387, 3389).

In view of Civ. Code, §§ 3387, 3389, provision in contract to exchange realty fixing damages for breach is valid as within exception to section 1670 in section 1671; impracticability of adequately measuring actual damages being presumed.

6. Damages §163(3)—Nonsuit in action for liquidated damages for breach of realty exchange contract held erroneous (Civ. Code, §§ 1671, 3306, 3307, 3387).

Plaintiff having proved express contract sued on for payment of liquidated damages for breach of agreement to exchange realty, his readiness and ability to perform, and defendant's breach, was entitled to benefit of presumption, under Civ. Code, § 3387, that breach could not be adequately relieved by pecuniary compensation to make out prima facie case under section 1671, and court erred in granting motion for nonsuit, though presumption is disputable; defendant having offered no evidence of damages under sections 3306, 3307.

7. Damages §79(5)—Statute as to determination of damages by breach of contract to convey realty does not affect validity of provisions for liquidated damages, where actual damages cannot be adequately measured (Civ. Code, §§ 1671, 3306, 3307, 3387).

Civ. Code, §§ 3306, 3307, as to ascertainment of detriment by breach of agreement to convey realty, did not eliminate section 3387, as to presumption of impracticability of adequately measuring damages, nor affect validity of agreements, in such cases for liquidated damages under section 1671.

In Bank.

Appeal from Superior Court, Santa Cruz County; Benjamin K. Knight, Judge.

Action by W. E. Wright against Joseph Rodgers and another. From a judgment of nonsuit, plaintiff appeals. Reversed.

W. F. Stafford, of San Francisco, for appellant.

Sans & Hudson, of Watsonville, for respondents.

RICHARDS, J. This appeal is from a judgment in favor of the defendants after an order granting their motion for a nonsuit. The action was one commenced by the plaintiff to recover damages for the alleged breach of a contract entered into between plaintiff and defendants for an exchange of their respective pieces of real estate, and incidentally for the transfer by defendants to the plaintiff of certain specified items of personal property upon or used in connection with the real estate which said defendants had agreed to convey. This contract was in writing and bore date as of December 27, 1922. On or about January 23, 1923, none of said properties having in the meantime been transferred, the defendants notified said plaintiff of their refusal to make said exchange of properties or to be bound by or to perform the terms and conditions of said agreement. The contract between the parties as finally executed contained the following provision:

"Ninth. The parties hereto do hereby further bind themselves, their heirs and assigns, unto each other, in the sum of \$2,200.00 to be paid by the party failing to keep and perform the covenants and agreements herein contained and specified, unto the other party hereto, said amount hereby being agreed upon as settled and liquidated damages for such nonperformance."

Upon the refusal of the defendants to carry out or perform or be bound by the terms of said written agreement, the plaintiff brought this action for the recovery of the sum of \$2,200 as liquidated damages pursuant to the foregoing clause in said agreement, and in his complaint alleged that he sought such recovery for the reason that it would be and was and is impracticable or extremely difficult to fix the actual damages sustained by the parties to said contract, and

that he was therefore entitled to sue for and recover said sum as liquidated damages and not as a penalty. The defendants answered said complaint, denying the execution of said agreement as to that portion thereof relating to liquidated damages, and also denying the averments of the plaintiff as to his ability to perform said agreement in a number of specified particulars. They also denied the plaintiff's averments to the effect that it would be impracticable or extremely difficult to fix the actual damages for the breach of said agreement, and in that behalf averred that the value of the respective properties of the parties was readily and easily determinable, and that any damage suffered by either party through a breach of said contract could be easily determined. They further denied that the plaintiff had suffered any damage by reason of their refusal to keep or perform the terms of said agreement. The defendants also presented a cross-complaint seeking affirmative relief, but its averments on the issues raised thereby are not involved in the questions presented upon this appeal. Upon the trial the plaintiff offered said written agreement in evidence and also gave testimony as to his ability and offer to perform the same and of the defendants' refusal to be bound thereby. He, however, offered no evidence as to any actual damages suffered by him by reason of the defendants' failure and refusal to be bound by or to perform said agreement, nor did he tender any evidence other than that of the terms of the agreement itself as to the impracticability or difficulty in the way of fixing the actual damages arising from the breach of said agreement. At the close of the plaintiff's testimony he rested his case; whereupon the defendants moved for a nonsuit upon several enumerated grounds, the first of which was that the provision in said contract for the payment of liquidated damages was void. This was the only ground of said motion discussed upon the hearing thereon, and the action of the court in granting the same was evidently predicated upon the proposition that the plaintiff, having failed to make proof of any actual damages as a result of the defendants' breach of said agreement, had not made out a case. The only question raised or discussed upon this appeal is as to the correctness of the court's ruling upon said ground of nonsuit.

[1-5] An agreement between the parties to a contract for the sale or exchange of real estate for the payment of a stipulated sum in damages in the event of the breach of said contract on the part of either is not necessarily void. It is only so when (1) it can be determined that such agreement is in the nature of a penalty and not an agreement for liquidated damages, or (2) when it can be determined that the agreement for liquidated damages is one which comes within the inhibition of sections 1670, 1671, of the

Civil Code; that is to say, it is an agreement for the fixation of the amount of damage to be paid in anticipation of the breach of a contract when from the nature of the case it would be neither impracticable nor extremely difficult to fix the actual damage. The first question which arises in this case is as to whether or not the particular agreement of the parties embraced in the clause of their contract for the exchange of properties above set forth is an agreement for a penalty. If it is, it is conceded to be void. In the determination of this question two things are to be considered: First, whether it was the intention of the parties to the agreement that the sum fixed upon as damages for the breach thereof by either should be a penalty; second, whether such agreement is, in the nature of things, a penalty, regardless of the language of the agreement declaring it to be "liquidated damages." In the clause in said agreement here under review, the parties have clearly manifested their intention that the sum fixed therein as damages should be liquidated damages, and in the absence of any ambiguity or uncertainty in its terms this declared intention should control in so far as the intent of the parties is concerned. 17 Corpus Juris, p. 966, and cases cited; *Madler v. Silverstone*, 104 P. 165, 55 Wash. 159, 34 L. R. A. (N. S.) 1; *Calbeck v. Ford*, 103 N. W. 516, 140 Mich. 48. This brings us to the second contention, which is whether the said provision is, in the nature of things, a penalty. If it is, then no expression in the agreement that it should be otherwise regarded would be controlling, since the parties could not, by their agreement so to do, change that which is by nature a penalty into liquidated damages. We look, therefore, to the agreement between the parties as a whole for the purpose of determining whether that portion thereof which undertakes to fix in advance the damages to either party caused by its breach by the other is to be regarded as a penalty for such breach. The contract between the parties is one for the exchange of their respective real properties. Had this contract been one by which one of the parties thereto was to buy the real property of the other, the question as to whether the clause therein providing for liquidated damages in the event of a breach thereof would present little difficulty. There was confusion in the earlier decisions of this court touching this subject, due, apparently, to the fact that the parties to such agreements had stipulated that in the event of failure on the part of the purchaser to continue his installment payments on account of the purchase price the seller might cancel the contract and declare a forfeiture of the payment made thereon as liquidated damages. In the case of *Drew v. Pedlar*, 25 P. 749, 87 Cal. 443, 22 Am. St. Rep. 257, this court declared that a stipulation in such a contract that the purchase money paid should

be taken as liquidated damages for the breach of the contract by the purchaser is void under sections 1670 and 1671 of the Civil Code. This decision was followed for a time, but in the case of *Glock v. Howard*, 55 P. 713, 123 Cal. 1, 43 L. R. A. 199, 69 Am. St. Rep. 17, the question was made the subject of an exhaustive review by the learned writer of the main opinion in that case, wherein the several sections of the Civil Code bearing upon the subject were examined and the case of *Drew v. Pedlar*, *supra*, reviewed and limited, and the conclusion was arrived at that contracts for the purchase and sale of real property came fairly within the exception to section 1670 of the Civil Code embraced in section 1671 thereof. The writer of the opinion was led to this conclusion by a consideration of sections 3387 and 3389 of the Civil Code, which read as follows:

"Sec. 3387. It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation, and that the breach of an agreement to transfer personal property can be thus relieved."

"Sec. 3389. A contract otherwise proper to be specifically enforced, may be thus enforced, though a penalty is imposed, or the damages are liquidated for its breach, and the party in default is willing to pay the same."

These sections of the Civil Code apparently re-enact the common-law rule regarding contracts for the sale of real property, as well as the rule in equity permitting the specific performance of such contracts. 17 *Corpus Juris*, *supra*. It is true that the case of *Glock v. Howard*, *supra*, presents the singular situation of an evenly divided court as to the particular ground upon which the judgment should be reversed, but the case is so well reasoned that it has notwithstanding become a leading case and has been so often cited with approval that the statements both of the main and of the concurring opinion may be taken as stating the settled law of this state touching the validity of agreements of the character considered therein and of the rights of the respective parties to recovery thereunder. We are unable to perceive that there is any distinction to be drawn between contracts for the purchase and sale of real property and contracts for the exchange of real property. If there is any such distinction, it should be in favor of upholding the clause in the latter providing for liquidated damages in the event of a breach thereof, for the reason that as to both parties the property sought in exchange is real property, to which the principle of *pretium affectionis* applies, and to which, also, the presumption as to the impracticability of adequately admeasuring damages, referred to in section 3387 of the Civil Code, is to be given application.

[6, 7] Having thus determined that the clause in the contract of the parties hereto

relating to stipulated damages was a valid and binding obligation, we come to the trial of the cause. The plaintiff offered in evidence the contract between the parties for the exchange of their respective real properties bearing date as of December 27, 1922; and also offered in evidence the letter written on behalf of the defendants dated January 20, 1923, declining to go further with the transaction. He also offered himself as a witness on his own behalf, and testified that he was the owner of the property which he had proposed in said agreement to exchange for the defendants' said real estate, and that he had always been ready and willing to perform the portion of the agreement of December 27, 1922, to be by him performed. No other testimony was offered. When the plaintiff rested his case, the defendants moved for a nonsuit upon several grounds, but upon the first and chief ground that the provision in said contract providing for liquidated damages for a violation thereof was void. The other grounds of said motion need not be considered, since they refer to matters of defense. The order of the trial court in granting said motion clearly indicates that the first ground urged was the ground upon which the trial court acted in granting the motion for nonsuit. We are of the opinion that the trial court was in error in granting said motion. The plaintiff having brought his action upon an express contract for the payment of money in the form of liquidated damages for the breach of an agreement for the transfer of real property, and having produced in evidence what we have herein determined to be a legal and binding obligation for the payment of the sum of money for which suit was brought, having shown the defendants' breach of the agreement of which such obligation formed a valid part, and having testified that he was ready, able, and willing to perform said agreement, was entitled to the benefit of the presumption provided for in section 3387 of the Civil Code to make out a *prima facie* case. It is true that such presumption is a disputable presumption and that the defendants might have offered evidence to overthrow it by a showing in conformity with the provisions of sections 3306 and 3307 of the Civil Code which point out the method for the ascertainment of the detriment caused by a breach of an agreement to convey an estate in real property. These sections of the Civil Code were not, however, intended to eliminate section 3387 thereof, nor were they designed to provide that agreements for liquidated damages in the case of breaches of contracts to convey real property should not in proper cases be brought within the exception set forth in section 1671 of the Civil Code. They were obviously intended to point out the kind of proof to be presented in actions brought to recover the actual damages caused by a breach of such agreements and

also probably to point the sort of proof to be presented in an attempt to overthrow the disputable presumption embraced in section 3387 of the Civil Code. The defendants herein did not, however, see fit to avail themselves of the form of proof provided for in said sections of the code. They rather chose to rest their case upon a motion for nonsuit, the effect of which would be to not only leave the presumption above referred to undisputed, but also to leave the plaintiff in a position to claim that the agreement for liquidated damages when aided by said presumption was a valid and enforceable agreement. In other words, the plaintiff had made out a prima facie case.

The motion for nonsuit was therefore improperly granted, and hence the judgment based thereon was erroneous. It is therefore reversed.

We concur: WASTE, C. J.; SHENK, J.; LAWLOR, J.; SEAWELL, J.

76 Cal. App. 58

VAIL et al. v. PACIFIC FISH PRODUCTS CO. et al. (Civ. 5273.)

(District Court of Appeal, First District, Division 2, California. Dec. 29, 1925. Hearing Denied by Supreme Court Feb. 25, 1926.)

1. Appeal and error $\hookrightarrow$ 1177(6).

Where court interrupted defendants' proof of partnership between them and plaintiffs by ruling otherwise, appellate court cannot determine relationship existing.

2. Account $\hookrightarrow$ 1.

Though evidence does not show partnership between parties to action for moneys expended, defendants may be entitled to accounting.

3. Trial $\hookrightarrow$ 165.

On motion for nonsuit of cross-complainants, evidence must be taken most strongly in their favor.

4. Account $\hookrightarrow$ 18.

Evidence held to show that relation between parties to action, wherein defendants sought accounting, was fiduciary, if not partnership.

5. Joint adventures $\hookrightarrow$ 5(2).

Request for accounting on erroneous theory of partnership, within Civ. Code, § 2395 et seq., does not preclude relief on theory of joint adventure.

6. Account $\hookrightarrow$ 12.

If evidence shows necessity for accounting, no action at law can be maintained in meantime for unascertained sums.

7. Partnership $\hookrightarrow$ 329—Evidence introduced at interrupted hearing on cross-complaint for partnership accounting held to require complete hearing.

In action for moneys expended for defendants, evidence introduced before interruption

by court at hearing on cross-complaint, alleging partnership and asking accounting, held such as to require complete hearing had.

8. Account $\hookrightarrow$ 12—Action at law held probably unauthorized until complete accounting between parties.

In action for money expended for defendants, where notes evidencing first two counts were part of larger transaction giving rise to unliquidated larger part of account, to which third count was addressed, action at law was probably unauthorized until accounting of all of parties' affairs as prayed in cross-complaint.

9. Appeal and error $\hookrightarrow$ 671(4)—Without explanation of erasure from, or evidence of circumstances attending execution of, contract, Court of Appeals cannot determine parties' intention if not as evidenced by contract.

Where erasure from contract of name of port from which court found that vessel was to be towed was not explained by either party, and no evidence was offered as to circumstances when contract was written, Court of Appeals cannot ascertain parties' intentions if different from those evidenced by face of contract.

10. Money paid $\hookrightarrow$ 1—Payments for another held not improper, in absence of evidence of lack of good faith.

In action for moneys expended for defendants, payments of customs duties and salaries held not improper charges, in absence of evidence of lack of utmost good faith in making them.

11. Joint adventures $\hookrightarrow$ 4(1)—Partnership $\hookrightarrow$ 70—Trusts $\hookrightarrow$ 179.

Whether parties occupied relation of trustee and beneficiary partners, or joint adventurers, utmost good faith is required.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by N. R. Vail and another against the Pacific Fish Products Company and others, in which defendants filed a cross-complaint. From the judgment, all parties appeal. Reversed.

Kemp & Clewett and H. S. Clewett, all of Los Angeles, for appellants and respondents.

Meserve & Meserve and Stephens & Stephens, all of Los Angeles, for respondents and appellants.

STURTEVANT, J. The plaintiffs commenced an action against the defendants and alleged their claims in three common counts, each being for moneys laid out and expended for the defendants. The defendants answered, and in their answer, first, they denied each of the allegations contained in each count in the plaintiffs' complaint; second, to each count they interposed a separate defense to the effect that the subject-matter of that particular count in plaintiffs' complaint was a part of a larger transaction, to wit, a copartnership enterprise between the plaintiffs and the defendants as copart-

ners; third, the defendants pleaded a defense to the effect that the subject-matter of all the counts contained in the plaintiffs' complaint was a part of the subject-matter of a larger transaction, to wit, said copartnership, and pleaded the facts constituting the copartnership and the business transactions had thereunder down to the 24th day of December, 1918, at which time the copartnership was dissolved; that during the existence of said copartnership the plaintiffs received large sums of money for the account of the defendants, and have refused to apply them as provided in the partnership agreement, and that an accounting should be had; fourth, defendants then pleaded seven counts against the plaintiffs, each being for a different claim for moneys alleged to be due and owing to the defendants by reason of transactions had between the parties under the alleged copartnership agreement. The defendants closed their answer with a prayer that an accounting be had, etc. The plaintiffs answered the cross-complaint, and thereafter the cause came on for trial before the court sitting with a jury. The jury returned a general verdict and many special verdicts. The verdicts were incorporated in a judgment in favor of the plaintiffs and against the defendants in the sum of \$16,086.30, from that judgment the defendants have appealed and have brought up a bill of exceptions. From the same judgment the plaintiffs have appealed and have joined in bringing up the same record to support their appeal.

When the cause was called for trial it was stipulated between counsel that the special defense, to the effect that the plaintiffs and the defendants were copartners and that no accounting had ever been had, and that therefore no action could be maintained by one copartner against the other until such an accounting had first been had, should be tried by the trial court sitting without a jury and before calling a jury to try the other issues. Thereupon the following documents, parts of which we have italicized, were offered and received in evidence:

"Defendants' Exhibit No. 1.

"This agreement, made this 17th day of March, 1917, by and between the Pacific Fish Products Company, a corporation organized and existing under and by virtue of the laws of the state of California, party of the first part, and N. R. Vail and W. D. Coberly, parties of the second part, witnesseth:

"That whereas, *the party of the first part is the owner of the floating cannery John G. North*, owning the same free and clear of all incumbrances; and

"Whereas, the party of the first part agrees to furnish to the parties of the second part a good and sufficient surety bond in the sum of \$10,000 for the faithful performance of this agreement; and

"Whereas, said ship has been fully equipped with all of the machinery and appliances necessary for canning the products to be obtained in

the enterprise hereinafter provided for, which said equipment is owned by the party of the first part and is all fully paid for; and

"Whereas, the party of the first part is free of debt to any person or corporation; and

"Whereas, *the parties of the second part control the power schooner Vaquero*:

"Now, therefore, it is understood and agreed that:

"First. Said floating cannery shall be towed to a point in Mexican waters to be selected by the parties hereto by the schooner Vaquero and there placed in operation and continued in operation at said point or at such other points as the parties hereto may agree upon, for the period of ten years from the date hereof, unless the enterprise be abandoned as hereinafter provided.

"Second. *The parties of the second part hereby agree to deliver to the party of the first part sums up to ten thousand dollars (\$10,000), said sums to be hereinafter designated as the Vail fund.* Said fund shall be paid to the party of the first part as needed for said enterprise such portions thereof as may be required for payroll and local expenses at the point of operation of the cannery, in cash, such portions thereof as may be required by furnishing transportation in and towage by said schooner Vaquero at the rates hereinafter provided, and also such portion thereof as may be required by the expenditure thereof, in the purchase of cans, labels, shook, supplies required in the operation of the cannery, and also a stock of merchandise and supplies to be used for trading purposes. All of said merchandise and supplies and those thereafter purchased for the party of the first part shall be billed to it at cost to the parties of the second part.

"Third. *The parties of the second part agree during the term of this contract to transport upon said schooner Vaquero the cans, shook, supplies and merchandise required in the enterprise, and the canned product, and the party of the first part agrees to deliver the same to said schooner for transportation upon the following basis:*

"(a) While the operations of the cannery are conducted at a point no further distant from Port Los Angeles than Magdalena Bay, *the said Vaquero shall, if such service is required by the cannery, visit the cannery at least once every two weeks, and for the freight carried the party of the first part shall pay to the parties of the second part transportation charges as follows:*

"I. For all north-bound freight, at the rate of \$10 per ton weight or measure (i. e., on the basis of weight of 2,000 pounds to the ton or on the basis of measurement treating 40 cubic feet as equivalent to a ton), the weight or measure basis as applied to the various classes of freight in each cargo shall be applied at the option of the parties of the second part.

"II. For all south-bound freight, at the rate of \$9 per ton weight or measure defined and applied as aforesaid, provided, however, that the measure basis shall not apply to empty cans or shook which are to be carried on a straight weight basis of \$9 per ton.

"III. If operations are carried on at a point further distant from Port Los Angeles than Magdalena Bay, the calls shall be made less frequently and the transportation charges shall be raised, all raises to be based upon the charges hereinbefore provided for, upon a fair pro rata increase.

"IV. A charge of \$1 per nautical mile shall

be paid by the party of the first part to the parties of the second part for the towage of the cannery.

"(b) *The title to all merchandise, supplies, canned product and freight delivered to said schooner Vaquero shall pass to parties of the second part as soon as it is so delivered*, whether it be the canned product to be carried on the north-bound voyage, or whether it be the supplies, merchandise, etc., to be carried on the south-bound voyage, but is understood that the parties of the second part may from time to time waive the benefit of such arrangement for any definite period or periods, provided, however, it is understood and agreed that the parties of the second part are to be under no liabilities if loss or damage to any of said property results from fire, piracy, theft, riot, insurrection, the acts of God or the public enemy, or the perils of the sea.

"(c) It is understood and agreed by and between the parties hereto that the parties of the second part will cause all freights, both south-bound and north-bound, to be insured against marine loss and the premium on said insurance to be charged to operating costs of the enterprise.

"(d) The parties of the second part shall have the right to divert, from time to time, or permanently, from the enterprise the schooner Vaquero, if they provide during the period of diversion adequate means of transportation in lieu of the Vaquero.

"Fourth. *The canned product which the party of the first part agrees in every case to deliver to the parties of the second part for transportation northward, as aforesaid, shall after its delivery into the United States, be sold by the parties of the second part, using all reasonable diligence to obtain the highest market price and best advantage, and selling directly to brokers, or at the option of the parties of the second part, it may be delivered to Frank Van Camp of Los Angeles, to be sold by him, and the money as received by the parties of the second part or the said Frank Van Camp, as the case may be, shall after the deduction of transportation charges due parties of the second part and subject to the provisions hereinafter made for certain cases, be paid over to the treasury of the party of the first part.*

"It is further agreed that all bills, invoices and vouchers and records of all parties are to be subject to the inspection of other parties hereto.

"Fifth. After the delivery of the first pack to the parties of the second part and the transportation thereof to Port Los Angeles, the parties of the second part agree to loan and advance such further sums as may be required for the use of the enterprise up to the amount of \$15,000, provided the value of the pack so delivered at Los Angeles is \$15,000 or more; but if the value be less than \$15,000 then the advances shall be only made up to the value thereof. *All returns derived from the sale of said pack and of all future packs shall be collected by and retained by the parties of the second part until such additional advance has been repaid with interest at the rate of 6 per cent. per annum.* The arrangement provided for in this paragraph may be renewed from time to time if the proper financing of the enterprise requires renewals.

"Sixth. *The net profits of the enterprise shall*

be divided between the parties hereto, the party of the first part receiving two-thirds thereof and the parties of the second part receiving one-third thereof. The net profits shall be arrived at by ascertaining the gross receipts which shall consist of all money collected from all products sold, including the proceeds of the sales of merchandise from the cannery store, and from such total shall be deducted the cost of operation, which shall be made up of a salary of \$250 per month paid to J. E. Heston while he acts as the manager of the cannery in the place of operation, a salary of \$150 per month to be paid to the said W. D. Coberly while he is working for the enterprise, all wages paid to laborers and mechanics in the cannery and to fishermen, the sums paid for sea products, for merchandise, supplies and transportation and the cost of ordinary repairs to the appliances of the cannery, to be paid to local officials or authorities or to holders of fishing concessions in Mexico and for dockage and premiums if any paid for insurance on the cannery, pack and supplies shipped, or any of them, and sums paid out in selling the pack, including payments to agents, jobbers or brokers as commissions, if required.

"Seventh. *Before any net profits, however, are divided between the parties hereto, there shall be accumulated a fund of \$10,000 hereinafter referred to as the 'working capital,' which said fund, together with said Vail fund, shall be kept in the enterprise undistributed until the final liquidation of the enterprise. It is understood and agreed between the parties hereto that the \$10,000 working capital provided for in this paragraph shall be held in reserve for the purpose of purchasing additional equipment in the way of boats, barges, fishing equipment and gear that may be needed in the further development of this enterprise to increase its output, it being understood that the title to such equipment shall be taken by the parties hereto as tenants in common, the one-third in the parties of the second part and the two-thirds in the party of the first part.*

"Eighth. If at any time prior to the full term of this contract said enterprise proves a failure or it is demonstrated that a continued operation of the enterprise will result in a loss, either party hereto may require a liquidation of the enterprise and a termination of this agreement; and upon such liquidation the ship cannery, together with the equipment with which it is now equipped, shall be withdrawn from the enterprise by the party of the first part, and all of the other assets of the enterprise, including the Vail fund, the working capital, the pack unsold, outstanding accounts, supplies, merchandise and extra equipment aside from the present equipment of the floating cannery, shall be divided between the parties hereto, the one-third thereof to the parties of the second part and the two-thirds to the party of the first part. In the event, however, that if when the time arrives for said division, the parties of the second part shall not have received by way of division of net profits a sum equal to the advancements made to said Vail fund, and have not received out of collections the further advances made against a pack, as provided for in paragraph 5 hereof, then in that event, before any division of assets is made, *said additional advancements shall be fully repaid, and the difference between the amount of said Vail fund and the amount,*

if any, received by the parties of the second part by way of net profits, shall be paid to the parties of the second part; and in any of such cases the parties of the second part shall have a lien upon all said assets and the right of possession thereof to convert said assets into money and apply the same to the satisfaction of such sums to which the parties of the second part are first entitled.

"Ninth. In the event that through the failure of the enterprise said Vail fund cannot be restored to the parties of the second part, either by way of net profits or as provided in the foregoing paragraph, *there shall be no liability on the party of the first part to repay the same.*

"Tenth. The party of the first part shall strictly comply with all pure food laws of the United States and with the various states of the Union in the canning and labeling of all sea food packed.

"Eleventh. *It is understood and agreed that this arrangement shall not constitute the parties hereto partners in the said enterprise, or in any branch thereof.*

"Twelfth. In the event that neither party hereto is prevented or delayed in the performance of any condition, covenant or agreement herein contained by reason of strikes, boycott, fire, piracy, theft, riot, insurrection, the acts of God or the public enemy, or the perils of the sea, then such delay or prevention shall be excused.

"Thirteenth. It is further understood and agreed by and between the parties hereto that the party of the first part shall enjoy all privileges, rights and freedom of operation necessary or convenient in said enterprise under any concessions, licenses, privileges or grants from the Mexican government or authorities, or from the Cia Industrial Mexicana S. A. (a Mexican corporation), granted to the parties of the second part, or their agents, paying to the parties of the second part, however, the cost to the parties of the second part of said rights and the royalty accruing by reason of its operations to the grantor thereof, if any. In the event that the parties of the second part operate or authorize others to operate other enterprises under such rights a fair pro rata charge based upon relative productions shall be made to the party of the first part. [Corporate Seal.] Pacific Fish Products Co., by John E. Heston, Pres., Stanley P. Allen, Secretary. N. R. Vail. W. B. Coberly.

"Defendants' Exhibit No. 2.

"This agreement, made this 17th day of March, 1917, by and between the Pacific Fish Products Company, a corporation organized and existing under and by virtue of the laws of the state of California, party of the first part, and N. R. Vail and W. B. Coberly, parties of the second part, witnesseth:

"That whereas the parties hereto are this day entering into a contract with respect to Mexican fishing, etc., now therefore, as part of the same transaction, it is understood and agreed:

"First. Parties of the second part shall have the right to withhold the schooner Vaquero, or any other vessel which they put into service for the transportation and towage provided in said contract, when they deem the political conditions locally in Mexico or international to be such as to make the voyage to Mexican waters dangerous or hazardous to the vessel in use or to be such as to lead the parties of the second part

to believe that the voyage might result in the destruction, detention or confiscation of the vessel.

"Second. That the agreement of the parties of the second part contained in said contract to furnish transportation and towage is subject to the right of the parties of the second part to be relieved therefrom in case of the commandeering of the vessel in service by the government.

"Third. That all towage shall be done at the risk of the party of the first part.

"Fourth. That the party of the first part is indebted to the Van Camp Sea Food Company in the sum of nine hundred thirty (\$930.00) dollars.

"Fifth. That instead of selling directly to brokers as provided in paragraph 4 of said contract, the parties of the second part may sell directly to the trade or through brokers. The brokerage (including any selling charge made by Frank Van Camp or his corporation) shall be paid out of the proceeds of the sale. [Corporate Seal.] Pacific Fish Products Company, by John E. Heston, Pres., Stanley P. Allen, Sec'y. N. R. Vail. W. B. Coberly."

"Defendants' Exhibit No. 3.

"This agreement, made this 11th day of May, 1917, by and between the Pacific Fish Products Company, a corporation, party of the first part, and N. R. Vail and W. B. Coberly, parties of the second part, witnesseth:

"That whereas on the 17th day of March, 1917, the parties hereto entered into a contract with respect to fishing operations;

"And whereas the parties of the second part claim to have loaned and delivered to the party of the first part sums in the form of money delivered, drafts paid, and supplies and equipment purchased and furnished all in addition to the \$10,000 fund provided for in said contract, and the \$3,000 note given to the parties of the second part on March 21, 1917, which said excess is hereafter referred to as the 'disputed fund,' which said disputed fund the parties of the second part claim is an obligation due and owing them from the party of the first part, but whereas the party of the first part claims that there is no obligation on which to repay said disputed fund, and the parties hereto desire to compromise their differences with respect to said disputed fund;

"And whereas funds are required to further prosecute the fishing and canning operations and it is desired to obtain more funds for said purpose:

"Now therefore it is agreed that the parties of the second part shall and do hereby extend to the party of the first part a credit of seven thousand dollars (\$7,000) to be disbursed as hereinbefore provided, and in consideration thereof the party of the first part delivers to parties of the second part its promissory note bearing interest at the rate of 6 per cent. per annum, payable at maturity, the principal of said note being payable at four months from this date; said credit shall be paid out by the parties of the second part, firstly in liquidation of outstanding accounts not yet paid but incurred by the parties of the second part in the purchase of supplies for the cannery, and next to the payment of the now outstanding drafts drawn for the expenses of the cannery and then upon written orders or O. K. of any officer or director

of the party of the first part in purchasing the supplies or equipment, furnishing transportation, obtaining boats and fishermen, and in furnishing cash to J. E. Heston for the operation of the cannery and in purchasing equipment. All of said expenditures, payments and purchases, however, to be first subject to the approval of the parties of the second part or the approval of either of them.

"Said W. B. Coberly shall forthwith proceed to the cannery and remain there and assist in the attempt to fill the cans which are now there, and if when the said \$7,000 credit has been exhausted the said Heston and Coberly shall reach the conclusion that the results at the cannery justify a further expenditure up to \$3,000, the parties of the second part agree to extend a further credit and advancement to the party of the first part up to \$3,000 to be expended and disbursed in the same manner as is herein provided for the expenditure and disbursement of said \$7,000. Provided, however, that there shall be no obligation on the party of the first part to repay said further credit up to said \$3,000 except that the parties of the second part are hereby given a first claim and lien upon all packs from said cannery until said \$3,000 has been repaid out of the proceeds of packs, and the parties of the second part are hereby authorized to apply the proceeds from the sale of packs as collected in liquidation of said further credit, together with interest thereon at the rate of 6 per cent. per annum from dates of expenditure to date of payment. Similarly the parties of the second part may apply the proceeds of said sale to the payment of said \$7,000 note or any portion or portions thereof. The date of maturity of said \$3,000 note given March 21, 1917, is hereby extended to date four months from the date of this agreement.

"In consideration of the premises said disputed account is hereby compromised upon the following basis:

"The parties of the second part waive all claims against the party of the first part for the repayment thereof except out of the proceeds of future packs, and the party of the first part gives to the parties of the second part a lien and charge upon future packs for the repayment of said disputed fund, together with the right to apply the proceeds of future packs to their satisfaction thereof. [Corporate Seal.] Pacific Fish Products Company. [Signed.] Pacific Fish Products Company, Frank Van Camp, V. P., Stanley P. Allen, Secy. N. R. Vail. W. B. Coberly.

"Defendants' Exhibit No. 4.

"Dated December 20, 1917.

"The Pacific Fish Products Company, party of the first part, and N. R. Vail and W. B. Coberly, parties of the second part, do hereby make the following amendments and additions to the contract between them dated March 17, 1917, with respect to a fishing enterprise in Mexico:

"(1) It is agreed that the open account, with interest at 6 per cent. (6%) per annum, of the party of the first part in favor of the parties of the second part, amounts to \$4,631.76 over and above the \$10,000 Vail fund referred to in the main contract.

"(2) It is further agreed that the equipment account for money expended in equipping the cannery in favor of the parties of the second

part amounts to \$4,500 over and above the \$10,000 Vail fund referred to in main contract, and open account above referred to.

"(3) The party of the first part agrees to execute and deliver to the parties of the second part their promissory notes of \$4,500 and \$4,631.76, above referred to, dated December 20, 1917, and payable July 1, 1918, bearing interest at the rate of 6 per cent. per annum, upon the surrender to them of two promissory notes for \$3,000 and \$7,000 respectively, executed by first party and dated March 17 and May 11, 1917. It being understood and agreed that the exchange of notes as herein stated shall take place as soon as it is ascertained that the floating cannery is to return to Mexico under this agreement.

"(4) The operations in the preparation of the cannery for the next season's pack are to be suspended until the parties have been notified that a Mexican concession for next season's operation has been obtained.

"(5) The party of the first part agrees to finish the equipment of the floating cannery as soon as the concession above referred to is obtained, and the parties of the second part agree to advance the funds for same which is to be charged to the \$20,000 account hereinafter provided for, and the salaries of Coberly and Heston shall commence as soon as concession is granted.

"(6) The parties of the second part hereby arrange a credit with the Vail Company of \$20,000 in favor of the party of the first part; said sum to be disbursed, however, in the manner provided and for the purposes provided in the main contract for the \$10,000 Vail fund, except that no expenditures shall be made by the Vail Company except upon the written order or O. K. of the party of the first part or one of its officers; and provided, further, that in all disbursements due care is to be exercised to make all purchases at the best market price and the same to be billed to first party at cost to second party.

"(7) The party of the first part hereby gives to the parties of the second part its promissory note in the sum of \$20,000 to represent, and in consideration of the obtaining of such credit with the Vail Company. But in the event that the party of the first part should not use all of said credit, then the amount remaining thereof is to be paid over by the Vail Company to the parties of the second part and credited upon the \$20,000 note. The \$20,000 note is to bear interest at 6 per cent. per annum, and is to be payable on or before July 1, 1918. But interest shall stop when partial payments are made thereon, and interest shall only run on the items of payment out by Vail Company on account of said credit from the respective dates of payment.

"(8) As long as the cannery remains in operation upon a profitable basis of operation, the parties of the second part agree from time to time to extend the payment of such notes during such period. But upon the termination of such operation and the liquidation of the enterprise whenever it should occur, the said notes shall, at the option of the parties of the second part, immediately mature, notwithstanding any previous extension thereof.

"(9) First, the \$4,531.76 open account note, and, second, the \$4,500 note for the equipment account above mentioned, shall be repaid to the

parties of the second part out of the first profits of future packs, even though these profits are available before the date of maturity of the notes. But interest on the amount of the note so paid shall in each case cease to accrue. *In the event that the enterprise is abandoned at a future date, as provided in the main contract, then all outstanding accounts, money, packs, and other assets of the party of the first part, other than the John G. North and its cannery equipment, shall be applied as follows:*

"First. To the repayment of the \$20,000 note or any part thereof then unpaid.

"Second. To the repayment of the open account note of \$4,631.76, or any part thereof then unpaid.

"Third. To the repayment of the Vail fund of \$10,000.

"Fourth. To the payment of the equipment note of \$4,500 above mentioned, or the balance thereof remaining unpaid.

"(10) *But if the Vail fund cannot be repaid as provided in the preceding paragraph, or if the same be so paid only in part, then the party of the first part shall not be liable for its return and it shall be considered lost to the parties of the second part;* however, this does not relieve the party of the first part from any liability on their notes or other obligations excepting the Vail fund.

"(11) Frank Van Camp is hereby appointed by the parties of the second part as the exclusive selling broker for future packs, and he shall have the right to appoint subbrokers, and for his services, or for the services of the subbrokers, as the case may be, he is to receive a total of 6 per cent. of the selling price, which shall include all of his selling expenses of every character. And the party of the first part agrees on behalf of said Van Camp that he will faithfully, promptly, and efficiently dispose of each pack, using all due diligence to obtain the best market therefor.

"(12) *The salary of W. B. Coberly, while he is engaged in assisting the enterprise, shall be the same as that of Heston, as provided in the main contract.* And in this connection it is understood and agreed that while operating in Mexican waters the said Heston shall have exclusive and final authority on all questions which relate to the catching of fish, the canning of the same and the operation of the cannery, and that while there Coberly will render such assistance to him as he may direct as said Coberly can furnish with due regard to the other duties of Coberly. *Coberly shall have the final and exclusive authority in dealing with the Mexican authorities and officials in all matters pertaining to imports and exports under the concessions from the government.*

"(13) It is understood and agreed that this agreement is made for the express purpose of going ahead with the enterprise; and if the concessions above referred to are not obtainable then this agreement, except as hereinafter provided, shall be deemed not to have been entered into and shall be null and void, and the rights of the parties and their respective obligations, whatever they may be, shall be as they exist on the date of this agreement and shall in no way be impaired or altered by this agreement.

"(14) The freight rate for operations carried on at San Lucas Bay shall be the same as that

provided in the main contract for operations at Magdalena Bay, while the Vaquero is in the service, but not otherwise.

"(Ink addition):

"(14½) It is further agreed to send a fishing boat to Cape San Lucas, as soon as permit is granted, for the purpose of finding out whether fishing conditions there warrant the return of the floating cannery to Mexican waters.

"(15) The parties of the second part agree to loan immediately to the owners of at least five good fishing boats under contract with the party of the first part for fishing in the Mexican operations for next season, and also for United States operations for the period of one year, or to the end of the 1918 fishing season, the loans to be in no case in excess of \$2,500 on each boat with interest at 7 per cent. per annum unless the character of the boat and owner justifies, and the loans are to be secured by a mortgage as a first lien thereon. And the party of the first part is to procure for the parties of the second part insurance from the Tuna Packers' Association to the limit of the said association, and in case the coverage under the policy on any boat does not extend to the full amount of the loan, then any surplus above the insurance is hereby guaranteed by the stockholders of the party of the first part in proportion to their respective holdings of stock, all as set out following the names of each appended to this agreement. But if the loans on fishing boats or any of them herein provided for shall be made before the cancellation of this contract, as hereinbefore provided, nevertheless such cancellation shall not release the said guarantees; in such case the party of the first part agrees upon demand of the parties of the second part to transfer the fishing contract with such fishermen to the parties of the second part: All to the end that said loans shall be properly protected and the value thereof utilized.

"In witness whereof, the party of the first part has caused its corporate name seal to be hereunto affixed by its duly authorized officers, and the parties of the second part have hereunto set their hands the day and year first above written. The Pacific Fish Products Company, by John E. Heston, Pres. Attest: Stanley P. Allen, Secretary. N. R. Vail. W. B. Coberly.

"The undersigned stockholders of the Pacific Fish Products Company, each owning and holding the number of shares of stock in said corporation set opposite his or its respective name, do hereby execute this agreement: First, for the purpose of approving and ratifying the same as such stockholders; and, second, for the purpose of guaranteeing, in proportion to their respective holdings of stock, the surplus loans above the insurance on the boats, as provided in paragraph 15 of this contract. T. E. Heston, John E. Heston, owning 180 shares of stock. Douglas F. Allen, by Stanley P. Allen, Atty. in fact, owning 100 shares of stock. Stanley P. Allen, Frank Van Camp, for Van Camp Sea Food Co., owning 220 shares of stock.

"The undersigned, Stanley P. Allen, in consideration of the execution of the foregoing contract by the parties of the second part therein named, and for the purpose of introducing them so to do, does hereby guarantee that the said Douglas F. Allen, his son, will perform each and every obligation binding upon him by reason

of the execution by the said corporation, of the foregoing contract and any of the instruments therein referred to, and by reason of the execution of the guaranty above mentioned with respect to fishing boats. Stanley P. Allen.

"Defendants' Exhibit No. 5.

"This agreement, made this 15th day of February, 1918, by and between Pacific Fish Products Company, party of the first part, and N. R. Vail and W. V. Coberly, parties of the second part, witnesseth:

"That whereas the party of the first part requires more money for the contemplated voyage to Mexico for further fishing operations than the funds already provided, the parties of the second part lend to the party of the first part five thousand dollars (\$5,000), and the party of the first part gives to the parties of the second part its promissory note for such amount.

"And in the event that it shall be determined after operations in Mexico that the success of the packing operations justifies the parties of the second part in lending to the party of the first part a further sum, then in that event the parties of the second part agree to lend to the party of the first part a further sum up to 75 per cent. of the value of fish then actually in cans at the cannery or in transit, such sums to be used in the purchase of supplies, etc., and furnishing for transportation in the furtherance of the enterprise [ink addition] such advances to take the place of loans provided for in main contract of May 17, 1917.

"It is agreed that the John G. North shall be towed to San Lucas Bay by the Northfork, on the basis of two hundred dollars (\$200) per day for each day in excess of the average running time between Port ~~Los Angeles~~ San Diego and Magdalena Bay, consumed in towing the John G. North to San Lucas Bay.

"The parties of the second part are directed to pay for such towage out of the consideration for the five thousand dollar (\$5,000) note above mentioned.

"If there is any profit in the hauling of any return freight on the Northfork under an arrangement which may be made with the owner thereof for the return trip, the party of the first part shall have the benefit thereof.

"When the party of the first part has freight needed to be carried in the operation of the enterprise, it agrees to give to the parties of the second part at their Los Angeles office notification thereof and the quantity thereof, to the end that arrangements may be made or ships obtained to handle the same, within a reasonable time thereafter; but should the parties of the second part in response to a request made by the party of the first part, furnish the Vaquero or any other vessel to carry freight, and should it occur that, by reason of the small amount thereof, either through miscalculation of the party of the first part or otherwise, there should be a loss to the parties of the second part upon the trip upon which such freight is carried, which loss would not have occurred had the freight both ways been adequate to fill the ship, then the party of the first part will stand the loss, the same to be charged as a cost and expense of the enterprise. [Corporate Seal] Pacific Fish Products Co., by John E. Heston, President, Stanley P. Allen, Secretary. N. R. Vail. W. B. Coberly, by N. R. Vail."

[1] In addition to the foregoing, some correspondence was offered and received in evidence, and thereupon the trial court read Defendants' Exhibits 1, 2, 3, 4, and 5, and then remarked, "I think I will not go any farther but simply hold that these people are not partners." Thereupon the defendants objected to the introduction of any evidence by the plaintiffs in support of their case, because the agreement between the parties showed that they were copartners, and no copartner can maintain an action against another until an accounting has been had. The defendants, for the same reason, offered the same showing in support of a motion for judgment in favor of the defendants for costs. "The Court: The objection is overruled, and your motion is denied." Thereafter the jury was called in, and the court proceeded to hear the evidence on the issues presented by the plaintiffs' complaint and the answer of the defendants thereto. The first point assigned by the defendants is that the trial court erred in the rulings above set forth because the indentures quoted showed that the parties were partners. *Chapman v. Hughes*, 104 Cal. 302, 37 P. 1048, 38 P. 109. The plaintiffs have replied that under the facts the parties were not partners. *Lyden v. Spohn-Patrick Co.*, 155 Cal. 177, 180, 100 P. 236.

[2-5] Although the respective contentions of counsel are interesting, we are not at liberty to pass on the question as to whether the parties were or were not partners. The cross-complainants were attempting to show that fact. They had introduced in that behalf only a part of their evidence. They were interrupted by the ruling of the trial court. Conceding that the evidence introduced at the time of the interruption did not show the parties to be partners, it cannot be known what relation would have been shown to exist when all of the evidence of the cross-complainants had been introduced. Moreover, assuming for the purposes of this decision that such evidence would not have disclosed the relation to be that of partners, it does not follow that the cross-complainants should have been denied the relief which they were asking. The evidence which had been introduced, weighed in the face of a motion for a nonsuit, must be taken most strongly in favor of the cross-complainants. *Hoff v. Los Angeles Pacific Co.*, 158 Cal. 596, 112 P. 53. As to whether it showed the relation to be that of partners we will concede at once is debatable. Nevertheless, it showed the relation to be of a fiduciary nature. Again, conceding that the relation shown was not that of partners, as that expression is used in our statute (Civ. Code § 2395 et seq.), there is yet another relation, that of joint adventure, which is sometimes designated a limited partnership. *Keyes v. Nims*, 43 Cal. App. 1, 184 P. 695; 33 C. J. 839. Many of the passages which we have italicized are the ordinary earmarks of a

joint adventure contract. 33 C. J. 839, §§ 5, 6, 7, 12, 14, 16, 68, 79, 83, and 92. The fact that the cross-complainants asked relief on the theory that the parties were partners did not preclude the trial court from giving them relief on the theory that the parties were joint adventurers. *Butler v. Union Trust Co.*, 178 Cal. 195, 172 P. 601.

[6, 7] For the same reason that we may not at this time determine whether the relation existing between the parties was that of partnership, we cannot determine whether it was that of joint adventurers, nor can we determine that one party was acting as trustee for the other. The proof introduced by the appellants before they were interrupted tended to show that the plaintiffs were not entitled to recover all of their advances—that the recovery of a substantial amount of those advances was by the terms of the contracts contingent on the result of the success of the enterprise. That result could not be known till an accounting was had. If, on a full hearing, it transpired that an accounting should be had, then it follows that in the meantime no action at law should be maintained by the plaintiffs to recover those unascertained and unmeasured sums. As far as we are at liberty to go, in view of the condition of the record, is to state that the evidence which the cross-complainants had introduced was of such a nature that the hearing on the cross-complaint should not have been interrupted until a full and complete hearing had been had thereon. *Butler v. Union Trust Co.*, supra.

[8] In what we have said we are not unmindful of the rule that when balances have been completely ascertained an action at law can be maintained in some instances by the trustee or the beneficiary. 2 *Perry on Trusts*, § 843; 33 C. J. p. 866, § 83; *Gleason v. White*, 34 Cal. 258. And in this connection we have not overlooked the fact that the first and second counts of the plaintiff's complaint are each alleged to be evidenced by certain promissory notes. However, it will also be noted in this connection that each of those notes was but a part of a larger transaction and part of which is evidence by Defendants' Exhibit No. 5, supra. Moreover, the cross-complaint sought an accounting of all of the affairs between the parties. Assuming that each \$5,000 promissory note constituted a rest or a balance, nevertheless it is equally clear that the third count was addressed to the unliquidated, unascertained and unsettled larger portion of the account existing between the parties. As the record stands the subject-matter of the first count, of the second count, and of the third count was so interwoven with the main transaction that at this time it appears that an action at law was probably not authorized until an accounting between the parties had first been had.

Worms v. Lake, 120 Misc. Rep. 210, 198 N. Y. S. 861.

The most of the remaining points presented by the parties grow out of certain matters that arose by reason of instructing the jury. As we have held that the trial court should have heard the application of the cross-complainants for an accounting, it is not likely that the same questions will arise again. For that reason those points need not be determined at this time.

[9] The record discloses that the parties disagreed in construing the written contracts which they had executed. One instance of disagreement arose as to the meaning of Defendants' Exhibit 5 in so far as it purports to state the compensation to be paid for towing the John G. North to San Lucas Bay. The paragraph in question contains an erasure. The erasure was not accounted for by either party. No evidence was offered regarding the circumstances that existed at the time the contract was written, and the record does not show from where the John G. North was to be towed. The trial court construed the contract as providing for towage from Port Los Angeles to Magdalena Bay. One party asserts that the name Los Angeles was stricken out, and, consequently, the construction adopted by the trial court was error. The other party contends that the trial court inadvertently used the name "Los Angeles" when it should have used the name "San Diego." It is patent that this court cannot in this condition of the record ascertain the intentions of the parties if such intentions were different from those evidenced by the face of Defendants' Exhibit 5; nor can this court fully understand said passage in the absence of the information above referred to.

[10] Much of what we have said regarding the last item applies also to the items of expenditure which were made in payment of the alleged custom duties which the plaintiffs claim to have paid to a Mexican official, and to the several items charged by the plaintiffs as salary paid to another Mexican official purporting to be for compensation for inspection by said official but which services the defendants claim were never rendered. We do not understand the defendants to claim that the moneys were not paid out. We do understand them to claim that the moneys were paid under such circumstances that said payments were "purely gratuitous" and therefore not chargeable against the defendants. *Molloy v. Rourke*, 83 Conn. 196, 76 A. 517.

[11] Whether the parties occupied the relation one to the other of trustee and beneficiary, partners or joint adventurers, the utmost good faith is required of the trustee in whom confidence is reposed (*Jones v. Kinney*, 146 Wis. 130, 131 N. W. 339, Ann. Cas. 1912C, 200, 202, note); but the appellants did not introduce evidence showing any lack of the utmost good faith by Mr. Coberly in mak-

ing the payments. As the record stands, we cannot say that any of the payments made to Mexican officials were not proper charges in behalf of the plaintiffs.

The judgment is reversed; and the defendants appealing to recover their costs.

We concur: LANGDON, P. J.; NOURSE, J.

76 Cal. App. 29

EPSTEIN v. GRADOWITZ et ux.
(Civ. 5271.)

(District Court of Appeal, First District, Division 2, California. Dec. 28, 1925.)

1. Appeal and error ⇨939—Request to clerk for transcript presumed filed in time where record did not disclose contrary (Code Civ. Proc. §§ 953a, 1963).

Though judgment was entered August 15th and request for clerk's and reporter's transcript was not made till December 1st, where record did not indicate date of notice of entry of judgment, appellate court will, under Code Civ. Proc. § 1963, presume section 953a, providing request must be made within 10 days, was complied with.

2. Appeal and error ⇨1071(1).

Immaterial conflicts in findings will be disregarded, where judgment was supported by findings which were sustained by evidence.

3. Equity ⇨57—In view of equity maxim as to regarding that as done which should have been done, one partner cannot recover from another on note after having failed to surrender it as he had agreed (Civ. Code, § 1541, 3203).

Where one partner agreed to surrender note in consideration of another assuming certain partnership debts, but failed to surrender it, he cannot recover thereon, since equity will regard that as done which should have been done, despite Civ. Code, § 3203, requiring renunciation to be in writing, and section 1541, as to extinguishment of obligation by release.

Appeal from Superior Court, Los Angeles County; Benjamin F. Warner, Judge.

Action by Louis Epstein against Meyer Gradowitz and wife. From a judgment for defendants, plaintiff appeals. Affirmed.

C. W. Hall and E. F. Gerecht, both of Los Angeles, for appellant.

J. Everett Brown, of Los Angeles (Edward Winterer, of Los Angeles, of counsel), for respondents.

LANGDON, P. J. This appeal is by the plaintiff from a judgment against him in an action upon a promissory note.

[1] The respondent objects to consideration of the appeal, stating that the request to the clerk for clerk's and reporter's transcript was filed too late. This notice was

dated and filed December 1, 1922. The record shows that the judgment was entered August 15, 1922. There is nothing in the record to indicate the date upon which plaintiff was served with notice of entry of judgment. Section 953a of the Code of Civil Procedure provides that the notice to the clerk requesting transcript must be filed within 10 days after notice of entry of judgment. Because there is nothing in the record to disclose the contrary, we must presume that the proceeding before us is regular and that the request to the clerk was filed in time. Section 1963, Code Civ. Proc.

The plaintiff brought an action upon a promissory note for \$2,450, executed and delivered by the defendants. The defendants answered, setting up that there was no consideration for the note; that there was a complete failure of consideration for the same; that plaintiff is not the legal owner and holder thereof; and that said note should have been returned to the defendants. Defendant Meyer Gradowitz set up a separate and affirmative defense and with relation to the facts therein alleged the court found: That the plaintiff and defendant Meyer Gradowitz were copartners in a wholesale produce business from January, 1921, to September, 1921, under the firm name of Gradowitz & Epstein; that said Gradowitz had invested \$1,169.40 in said business and executed the note in dispute to equalize his interest in the business with that of his partner; that in September, 1921, the said business was indebted \$4,300 and plaintiff sold his interest therein to one Cohn, who became a partner with Gradowitz under the firm name of Gradowitz & Cohn; that at the time of said sale, plaintiff canceled the note in dispute and agreed to deliver it to said Gradowitz and that said Gradowitz and Cohn agreed to pay and did pay the debts of the former partnership in the sum of \$4,300; and that plaintiff failed and neglected to return to Gradowitz the note.

[2, 3] A large part of the argument made for reversal of the judgment grows out of the fact that the findings of the court were made by reference to paragraphs of the pleadings. This is always an unsatisfactory method of drawing findings, and inaccuracies and conflicts are frequent when such method is adopted. It was found that certain paragraphs of the complaint and of the answers of the different defendants and of the amended answer and of the separate defenses were true. As alternative defenses were set up in the answers, the findings present some conflicts and obscurities. However, appellant cannot avail himself of these matters. Where immaterial conflicts occur in the findings, and the judgment is supported by findings which are abundantly sustained by the evidence, the others will be

disregarded. *Butler v. Delafield*, 1 Cal. App. 367, 372, 82 P. 260; *Wheat v. Bank of California*, 119 Cal. 4, 7, 50 P. 842, 51 P. 47. All of the findings in the instant case are in favor of the defendants. The court practically found that every defense set up against the note was true. Some of these defenses were alleged in the alternative and negative some of the others. However, appellant is not injured by this inconsistency, because if any of the defenses against the note are sustained by the evidence, the judgment is proper. This court may accept the finding that plaintiff is not the holder of the promissory note, but that said note is the property of defendants. That is in consonance with the detailed finding hereinbefore quoted that by agreement of the parties, said note was to be surrendered and delivered to defendants. The mere accident that plaintiff retained physical possession of the note cannot alter the rights of the parties. There are no innocent holders involved and equity will regard that as done which should have been done. If plaintiff neglected to deliver the note to defendants after agreeing to do so, he cannot take advantage of that fact.

Plaintiff meets this situation by invoking the aid of sections 3203 and 1541, Civil Code. We fail to see how either section changes the determination of this action. The former section relates to the discharge of a negotiable instrument and provides that a renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon. The latter section provides that an obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or in writing, with or without a new consideration.

With reference to section 3203, respondent urges first that the instrument involved here is not negotiable, because of its peculiar wording. We are not called upon to decide this point, however. The answer of defendant Meyer Gradowitz alleged, and his testimony was to the effect, that plaintiff agreed to surrender the note upon consideration of being released from payment of the partnership debts and that when asked to do so, he, apparently, made an attempt to find the note and stated that he could not find it and that it was lost. Under well-established principles, in such a situation, plaintiff will be held to do the thing which he agreed to do, and for which he accepted a valuable consideration. For the same reason section 1541 is inapplicable. Plaintiff agreed to release defendants from the obligation of the note, and this agreement carries with it an obligation to do everything necessary to accomplish the result, legally. It was an agreement made upon a new consideration, i. e., that plaintiff be released

from the partnership debts. Because the plaintiff did not perform his agreement does not render the agreement void. Appellant loses sight of the controlling fact that defendants' affirmative defense in this action is, in effect, a proceeding to compel plaintiff to keep his agreement to surrender and cancel the note after having accepted and enjoyed the consideration for such agreement.

There are a number of alternative matters urged by appellant, but we think the foregoing disposes of the appeal and that further discussion of the record is unnecessary. There are conflicts in the evidence, of course; but we are concerned only with the portion of the record which supports the judgment.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

76 Cal. App. 91

PEOPLE v. HOVERMALE. (Cr. 1235.)

(District Court of Appeal, Second District, Division 1, California. Dec. 30, 1925. Rehearing Denied Jan. 28, 1926. Hearing Denied by Supreme Court Feb. 25, 1926.)

1. Witnesses $\S$ 383—Question to accused's alibi witness, for impeachment, whether witness stated that he drove the automobile at time of robbery, held relevant and material.

In a prosecution for robbery, question to accused's alibi witness, for impeachment, whether witness had not stated to another that he (witness) drove the automobile at the time of the holdup, held relevant and material.

2. Criminal law $\S$ 1186(4)—Witnesses $\S$ 388 (10)—Question to accused's alibi witness, for impeachment, whether witness stated that he drove automobile at time of robbery, held defective as to element of place, but not prejudicial (Const. art. 6, $\S$ 4½).

In a prosecution for robbery, question to accused's alibi witness, for impeachment, whether witness did not state to another at a certain time that witness drove the automobile at time of holdup, held defective as to element of place, but not prejudicial error within Const. art. 6, $\S$ 4½, in view of witness' positive negative answer.

3. Criminal law $\S$ 448(2), 1170½(2)—Question whether alibi witness had not related all details to another held to call for conclusion, but not prejudicial error on denial by witness.

In prosecution for robbery, question, for impeachment, to accused's alibi witness, whether he had not told another in a certain conversation all of the details of the holdup, was objectionable as calling for conclusion of witness; but not prejudicial error, in view of witness' positive and consistent denial of knowledge of holdup or the making of any statements concerning it.

4. Witnesses $\hookrightarrow$ 379(2)—Question, for impeachment, to accused's alibi witness, whether he told another accused held a gun on motorman of car robbed, held proper.

In a prosecution for robbery on interurban car, question for impeachment, to accused's alibi witness, whether he had not told another in a certain conversation that accused held a gun on the motorman, held not error.

5. Criminal law $\hookrightarrow$ 824(8)—Admission of impeaching evidence not reversible where no limiting instruction asked.

Admission of testimony to impeach accused's alibi witness held not ground for reversal because of possible inference that jury may have misused such evidence, where accused requested no instruction to limit consideration of evidence to impeachment purposes.

6. Criminal law $\hookrightarrow$ 823(6)—Failure of instruction to advise acquittal, if evidence tending to establish alibi created reasonable doubt, held not prejudicial in view of other instructions.

Failure of instruction on alibi to advise acquittal, if evidence tending to establish alibi was sufficient to create reasonable doubt, held not prejudicial, in view of other instructions authorizing acquittal if jury were not convinced beyond reasonable doubt of accused's guilt.

7. Criminal law $\hookrightarrow$ 781(6)—Refusal to instruct as to oral admissions of party held not error (Code Civ. Proc. § 2061, subd. 4).

Refusal to instruct that the oral admissions of a party, within Code Civ. Proc. § 2061, subd. 4, should be viewed with caution, and that accused's admissions, if any, to witnesses testifying, must be so considered, held not error.

8. Criminal law $\hookrightarrow$ 829(9)—Refusal to give requested instruction on presumption of innocence held proper, in view of general instruction thereon.

Refusal to instruct that the presumption of innocence with which accused is clothed throughout the trial goes with the jury in their retirement to consider their verdict, and that they must examine the evidence in the light of that evidence, held proper in view of general instruction given on presumption of innocence.

9. Criminal law $\hookrightarrow$ 829(12)—Refusal to give specific instruction as to weight to be given testimony offered through depositions held not error where fully covered by general instructions.

Refusal to give specific instruction as to weight to be given testimony offered for defendant through depositions held not error, where the subject was fully covered by general instructions given by the court concerning the weighing of evidence.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

James E. Hovermale was convicted of robbery, and he appeals. Affirmed.

Homer C. Mills, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

HAHN, Justice pro tem. James Hovermale and Roy Smith were charged jointly with the crime of robbery by an indictment returned by the grand jury of Los Angeles county. The prosecution proceeded with the trial against Hovermale in the absence of Smith, who at that time had not been apprehended. From the judgment of the court upon a verdict of guilty, and the order denying his motion for a new trial, defendant Hovermale prosecutes this appeal.

From the record it appears that on the evening of November 7, 1923, between the hours of 7:40 and 8, a Pasadena Short Line car of the Pacific Electrical Railway Company was boarded by three men at Valley Junction, a stopping point in a sparsely settled section of Los Angeles city. Immediately upon the car getting under way one of the trio passed rapidly through the car to the front platform, the other two remaining on the rear platform. A few minutes after the car had started, and while the conductor was occupied in collecting fares, a report was heard similar to that of an exploding track torpedo. The conductor immediately turned to go to the rear platform but was confronted by one of the two men, who had boarded the car at the last stop, with a revolver and a command "hands up." About the same time the man who had passed to the front of the car was seen pointing a revolver at the motorman. The third one of the trio proceeded immediately through the car relieving passengers of their money and jewelry. When the bandits began their operations, it was first noticed that all three of them had dark-colored handkerchiefs tied across their faces, covering the nose and lower portion of the face. The bandit who covered the conductor seemed to be the one who directed operations, as he gave commands to the conductor and passengers as well as directed the work of the one who was relieving the passengers. He was described as a young man weighing about 150 pounds, standing five feet six inches to five feet seven inches in height. As it was the theory of the prosecution that this one of the trio was in fact the defendant Hovermale, we will not give space to a detailed description of the other two bandits. After the passengers had been relieved of their valuables, the operation occupying 10 or 15 minutes, the motorman was ordered to slow down his car, and thereupon all three bandits left the car and disappeared in the darkness.

The defense offered by the defendant was that of an alibi. Appellant does not urge, as a ground of appeal, the insufficiency of the evidence to support the verdict. His contentions for a reversal of the judgment are based upon: First, alleged errors committed by the court during the trial in the admission of certain testimony; second, errors

committed by the court in giving certain instructions and in refusing instructions requested by the defendant; and, third, misconduct on the part of the district attorney during his argument to the jury.

[1] Considering the points in the order named, our attention is directed to certain questions propounded by the district attorney in the cross-examination of one C. R. Godfrey, a witness produced on behalf of the defendant, and whose testimony was given by deposition. The question objected to, as well as practically all of the questions propounded to the witness in cross-examination, were for the purpose of impeachment. The first one of the questions objected to, as well as the answer, is as follows:

"Q. Do you know one H. W. Fifield? A. I do.

"Q. Did you not state to H. W. Fifield early in January or February, 1924, that you drove the machine at the time of the Pacific Electric holdup on November 7, 1923? A. No."

[2] To the latter question the defendant objected on the ground that "it was incompetent, irrelevant, and immaterial hearsay, and if intended for impeachment purposes no proper foundation has been laid, and it is intended to impeach on an immaterial matter." The court overruled this objection, and the defendant now assigns that ruling as error. The witness in his direct examination testified that the defendant Hovermale was his brother-in-law, and that on November 7, 1923, between the hours of 6 and 11 o'clock p. m., during which time the alleged robbery took place, the defendant with his family was visiting with the witness at the witness' home in Monrovia. The question objected to was for the purpose of impeachment and was both relevant and material. It is, however, urged that no proper foundation was laid for impeachment purposes. As to the elements of time and persons present we feel the objection is without merit. *Plass v. Plass*, 122 Cal. 4, 54 P. 372. As to the element of place the question was defective, and this leads to the inquiry as to whether or not the ruling of the court operated to the detriment of the defendant. The deposition of the witness Godfrey contained a number of questions propounded by the district attorney in cross-examination, relating to this alleged conversation between the witness and one H. W. Fifield. These questions were manifestly for the purpose of impeachment. Some of the questions asked and answers given were allowed to be read to the jury, and the objections to others were sustained by the court. All of the questions asked of the witness by the district attorney relating to an alleged conversation with Fifield were answered by the witness by a denial that he ever had any such conversation in which he either related any of the details or circumstances of the robbery or that he himself par-

ticipated in it. We cannot conceive how the witness could have been misled in any way in answering the question under consideration by the fact that the particular place where the conversation was claimed to have taken place was omitted from the question. His answers were so unequivocally in the negative as to any such conversation, and the subject-matter was of such an unusual and serious character, that it is inconceivable that the witness either would have forgotten such a conversation if he had had it, or that, under the circumstances, he would have given any other answer than the one given even though a place was fixed in the question. The witness was defendant's brother-in-law. His testimony on direct examination was the strongest presented on the part of the defense in support of the defendant's alibi. The witness had positively and definitely stated that the defendant was visiting with him at his home at the time of the robbery. To have admitted, after giving such testimony, whatever the form of the question, that he had told Mr. Fifield anything that would have in fact positively rendered ineffective his direct testimony, seems quite beyond the bounds of reason. Considerable latitude has been recognized by the authorities in this state in the framing of questions of this character. *People v. Bosquet*, 116 Cal. 75, 47 P. 879; *Plass v. Plass*, 122 Cal. 5, 54 P. 372. Furthermore, section 4½ of article 6 has a direct bearing upon the point under consideration, and when so viewed, we have no hesitancy in concluding that the error complained of was not such as to justify a reversal.

[3, 4] The defendant next urges that the question:

"Did you not also tell H. W. Fifield in the same conversation, at the same time, all of the details of the Pacific Electric holdup? And also say to him that James Hovermale held a gun on a motorman?"

The defendant next urges that the question calls for the opinion and conclusion of the witness and the overruling of his objection to the question was prejudicial error. While the first question does call for a conclusion of the witness it was one of a series of questions that had been propounded on cross-examination and relating to the time, place, and incidents of the alleged holdup. As previously stated, these questions were all propounded, in cross-examination, for the purpose of laying the foundation for impeaching the witness. To each and all of the questions so propounded to the witness on cross-examination he gave negative answers. He consistently and positively denied any knowledge of the holdup, or of having made any statements concerning the same or any purported details of it to Fifield, or that the defendant Hovermale had been involved in it. Appellant cites, in support of his con-

tention on this point, the case of *People v. Nonella*, 99 Cal. 333, 33 P. 1097. An examination of this case clearly shows that it is not in point. There the court held, and this is very apparent from reading the opinion, that the questions asked of the wife of the defendant, which served as a basis for the impeaching testimony offered later, differed very markedly from the questions that were asked of the impeaching witness and which constituted the error. Likewise, the case of *People v. Morotti*, 61 Cal. App. 689, 215 P. 719, cited by the appellant, is not in point. There the attempt to impeach the complaining witness was by the introduction of a written statement signed by the aunt of the complaining witness and a county probation officer, which statement purported to give the conclusion of the signers of what the complaining witness had told the signers some days previous to the trial. Without extending the review to other authorities which we have examined bearing upon this point, we are of the opinion that the ruling of the court, upon the objection that the question asked for the conclusion of the witness, was not a prejudicial error, and as to the other portion of the question the ruling was not in error.

[5] It is next urged by the defendant that the admission of the testimony of one H. W. Fifield which purported to give an entire conversation with C. R. Godfrey was highly prejudicial to the defendant. This testimony was offered by the district attorney for the purpose of impeaching the testimony of the witness Godfrey, who had testified in direct examination on behalf of the defendant that the defendant, his brother-in-law, with his family, were visiting at Godfrey's home at the time of the robbery. The court, in overruling the defendant's objection and admitting the testimony, clearly stated that it was admitted solely for the purpose of impeachment. But appellant urges that the jury might, and in effect did, consider this testimony as bearing directly on the question of defendant's presence at, and participation in, the robbery. It may be admitted that jurors untrained in legal matters may not grasp the points of differentiation in the rules of evidence, and, further, jurors may intentionally or ignorantly permit evidence to influence them in the consideration of the defendant's guilt in a manner contrary to the instructions of the court. But this inference, for manifestly it is nothing more than an inference, does not destroy the right to have evidence introduced for a limited purpose. This, indeed, is quite common in both civil and criminal actions, and when the case is being tried before a jury, the possibility that the jurors may make improper use of the evidence is usually met, by the party likely to be affected, with a requested instruction from the court directing the jury to consider the admitted evi-

dence only for the purpose for which it was admitted. We have carefully examined the record in this case and do not find any request made by the defendant, of the court, to instruct the jury that the testimony of Fifield could only be considered by them for the purposes of impeachment of the testimony of one Godfrey. Manifestly, where no such instruction was requested, the defendant cannot at this time complain of any injury that he may consider that he has suffered by reason of a possible inference that the jury may have misused the evidence introduced.

[6] The next group of errors have to do with instructions requested by the defendant and refused by the court. The first instruction referred to reads as follows:

"The court instructs the jury that the defendant has introduced evidence in this case in support of his defense of an alibi; an alibi means that the defendant was elsewhere than at the place where the crime charged was committed at the time of its commission, and that therefore he could not have committed it. The rule is that, if the testimony addressed to the alibi is sufficient to raise a reasonable doubt of the defendant James E. Hovermale's presence at the scene of the crime at the time it was committed, then a reasonable doubt of his guilt arises, and he is entitled to an acquittal."

This instruction was refused by the court on the ground that it was "substantially covered." The instruction given reads as follows:

"It is the contention of the prosecution that the defendant committed the crime charged in the city of Los Angeles. The defendant, on the other hand, has introduced evidence for the purpose of showing that he was in the city of Monrovia at the time when it is charged that the crime was committed.

"The defendant could not have been in these two places at the same time; and in this contradiction of witnesses the jury has to determine for themselves where lies the truth. In so judging, they will take into consideration the appearance and apparent candor and fairness of the respective witnesses; the probability or improbability of their statements; its coincidence or failure to coincide with other facts or features of the case which they may deem established; and generally those rules of ordinary experience and general observation by which intelligent men decide as to controverted propositions of fact."

The instruction given sufficiently covers all that was necessary on the mere question of alibi; but it does not advise the jury that if the evidence tending to establish the alibi was sufficient to create a reasonable doubt the jury should acquit. However, it does appear from the general instructions in several places that the court instructed the jury that if they were not convinced beyond a reasonable doubt of the guilt of the defendant they should render a verdict of acquittal. Manifestly, if the jury believed that the defendant was in Monrovia at his

brother-in-law's house on the evening of November 7, or if they had any reasonable doubt upon the question of his being there, they could not possibly have concluded beyond a reasonable doubt that he was one of the trio who perpetrated the robbery.

Appellant has cited the case of *People v. Visconti*, 31 Cal. App. 169, 160 P. 410, 411, as supporting his contention that the failure to give the requested instruction was prejudicial error. There a similar instruction was offered and refused, but it appears that no instruction whatever was given by the court on the subject of alibi. In the instant case there was an instruction given upon that subject, but not with the full detail as contained in the refused instruction. It is significant, however, that the Supreme Court, in denying a rehearing in the case of *People v. Visconti*, supra, makes this statement:

"In denying the application we deem it proper to say that we are not to be understood as intimating that the refusal to give such an instruction as was refused in this case would in all cases be deemed by us sufficient for reversal. Especially is this true in view of the provisions of section 4½ of article 6 of the Constitution. In denying the application for hearing in this court we assume that the district court of appeal concluded, in view of the circumstances of this particular case as shown by the record, that the refusal of the trial court to permit the requested instruction operated substantially to the prejudice of the defendant."

[7] Appellant complains of the refusal of the court to give the following instruction:

"The court instructs the jury that under the laws of this state, evidence of the oral admissions of a party to an action ought to be viewed by the jury with caution, and if you should believe beyond a reasonable doubt that the defendant, James E. Hovermale, has made any admissions to witnesses testifying in this case, you will so consider such testimony."

Appellant concedes that the refusal of such an instruction has been held not to be prejudicial error. It was so held in *People v. Ruiz*, 144 Cal. 251, 77 P. 907; *People v. Wardrip*, 141 Cal. 229, 74 P. 744. It may be suggested further that subdivision 4 of section 2061, Code of Civil Procedure, under which the instruction was drawn, has been declared unconstitutional. *Hirshfeld v. Dana*, 193 Cal. 156, 223 P. 451.

[8] Appellant urges that the court committed prejudicial error in refusing the following instruction:

"The court instructs the jury that the presumption of innocence with which the defendant, James E. Hovermale, is clothed throughout the trial of this case, goes with you in your retirement to consider your verdict, and you must examine the evidence in this case in the light of that presumption."

The case of *People v. McNamara*, 94 Cal. 509, 29 P. 953, is cited as supporting ap-

pellant's contention. In that case the following instruction was held erroneous:

"This defendant, like all persons accused of crime, is presumed to be innocent until his guilt is established to a moral certainty and beyond all reasonable doubt, and this presumption of innocence goes with him all through the case, *until it is submitted to you.*"

The case was reversed because the court attached to the instruction the last six words which are in italics. In the instant case there was no limitation in the instruction given by the court on the subject of presumption of innocence, and this general instruction as given by the court has been held by our Supreme Court to be sufficient. *People v. Jailles*, 146 Cal. 301, 79 P. 965; *People v. Patino*, 9 Cal. App. 192, 98 P. 199.

[9] Criticism is made of the refusal of the court to give a specific instruction as to the weight to be given to the testimony offered on behalf of the defendant through depositions. The subject, we feel, is fully covered by the general instructions given by the court concerning the weighing of evidence.

The third point urged by appellant, as a ground for reversal, has to do with certain statements made by the district attorney in his argument to the jury and which statements are assigned as prejudicial error. We have carefully examined the criticized remarks, but find no merit in appellant's contention that they were prejudicial to his rights.

Judgment and order denying defendant's motion for a new trial are affirmed.

We concur: CONREY, P. J.; CURTIS, J.

76 Cal. App. 105
PEOPLE v. SMITH. (Cr. 1257.)

(District Court of Appeal, Second District, Division 1, California. Dec. 31, 1925. Rehearing Denied Jan. 28, 1926. Hearing Denied by Supreme Court March 1, 1926.)

1. Criminal law ⚡622(1)—Denial of motion for separate trial held not abuse of discretion (Pen. Code, § 1098).

Denial of motion for separate trial held not abuse of discretion in view of Pen. Code, § 1098.

2. Criminal law ⚡586, 1151.

Granting continuance of trial lies in discretion of trial court, and his decision is final in absence of abuse of discretion depriving accused of substantial rights.

3. Criminal law ⚡603(2)—Refusal to grant indefinite continuance for absent witness held proper under showing made.

Refusal to grant motion for indefinite continuance based upon absence of witness who was expected to testify held proper, where it was not shown that the witness intended to tes-

tify and that his failure to appear was not attributable to his own fault.

4. Criminal law ⚡303.

Motion of district attorney to dismiss prosecution is merely recommendation to court.

5. Criminal law ⚡620(2)—That district attorney, by making certain person codefendant, was permitted to introduce testimony which otherwise would have been inadmissible, held not ground for reversal.

That district attorney, by making certain person codefendant, was permitted to introduce testimony of such person which otherwise would have been inadmissible, *held* not ground for reversal.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Russell Smith was convicted of robbery, and he appeals. Affirmed.

Homer C. Mills, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

HAHN, Justice pro tem. Appellant Russell Smith was jointly charged with Mark Godfrey and Roy Smith, by an indictment returned by the grand jury of Los Angeles county, with the crime of robbery. Roy Smith not having been apprehended at the time of trial, the case proceeded against defendants Mark Godfrey and Russell Smith. The jury returned a verdict of not guilty as to defendant Mark Godfrey and a verdict of guilty against defendant Russell Smith. From the judgment of the court upon the verdict of guilty, and the order of the court denying his motion for a new trial, appellant Smith prosecutes this appeal.

This, in effect, is a companion case to that of *People v. Hovermale* (Criminal No. 1235) 243 P. 878, which was decided by this court on the 30th day of December, 1925. The robbery in question occurred on the evening of November 7, 1924, between the hours of 7 and 8 o'clock. A Pacific Electric Pasadena Short Line car en route to Pasadena stopped at Valley Junction, an outlying station in a sparsely settled portion of Los Angeles city, and was boarded by three men. One of these men went to the front end of the car, the other two remaining upon the rear platform. Shortly after the car got under way and while the conductor was in the process of collecting his fares, a report was heard which suggested to one or more of the witnesses that a track torpedo had exploded, and to others a pistol shot, which, in fact it proved to be. The conductor, immediately turning to go to the rear of the car, was confronted by one of the two men who had remained on the rear platform with a revolver pointed at him and a stern command to

put up his hands. About the same time the man who had gone to the front end of the car was seen pointing a revolver at the motorman. The third one of the trio, shortly after the command of "hands up," proceeded to relieve the passengers of their money and valuables. The one who covered the conductor seemed to be in charge of the operations, for he was the one who gave commands to the conductor and passengers, as well as to the other two bandits. The theory of the prosecution was that there were actually four men involved in the perpetration of the robbery. In addition to the three who boarded the car, a fourth man remained in a Ford touring car; that this fourth man had driven the three who actually perpetrated the robbery to the point where they boarded the car and then drove the Ford touring car to the point where it was agreed that the three bandits would leave the car; that the fourth man actually did pick up the three bandits and drove them away from the scene of the robbery; that of the three men that boarded the car, James Hovermale, the defendant in the case hereinabove referred to, was the one who directed the conduct of the robbery; that Roy Smith, the codefendant not apprehended, was the one of the trio who went to the front of the car and covered the motorman with his revolver; that Mark Godfrey, the one of the defendants acquitted, was the one who gathered up the money and valuables from the conductor and passengers; and that the defendant Russell Smith was the fourth man who drove the Ford touring car which brought the three bandits to the car, and, after the robbery had been completed, drove them away.

Appellant does not urge as a ground for reversal the insufficiency of the evidence to support the verdict, but does contend for a reversal of the judgment upon the following grounds: First, that the trial court erred in denying his motion for a separate trial; second, that prejudicial error was committed by the court in denying his motion for a continuance of the trial; third, that the district attorney was guilty of misconduct during the course of the trial and which was prejudicial to the rights of the appellant; fourth, that the court committed serious error in refusing certain requested instructions.

[1] The first point urged is one that has had extended consideration by the appellate courts of this state in recent decisions, and for this reason we do not feel that it is necessary to cover the ground by extended discussion in this case. The affidavit which was filed in support of the motion for a separate trial was of no greater weight, to say the least, than the showing made in several of the cases herein referred to, where the appellate courts of this state have held ad-

versely to the position taken by the appellant here. We are satisfied that the court, in denying appellant's motion for a separate trial, did not abuse its discretion. In fact, upon the showing made, if the motion had been granted, it might well have been urged that the purpose of the Legislature in amending section 1098 of the Penal Code would have gone for naught.

[2, 3] Appellant in his second point urges that the court's refusal to grant a continuance of the trial operated as prejudicial to his rights. It is, of course, unquestioned that this is a matter that lay in the discretion of the court, and this court would be justified in sustaining appellant's contention only when it appears there had been an abuse of discretion by the court which operated in some way to deprive the appellant of some substantial right. In support of the motion for a continuance there was offered the affidavit of the defendant which alleged, among other things, that C. R. Godfrey, who resided at Brigham, Utah, was a necessary and material witness for the defendant; that affiant on May 4, 1925, had forwarded to the said Godfrey at his home in Utah money with which to pay his expenses to come to Los Angeles; that on May 14, 1925, which was five days prior to the commencement of the trial, said Godfrey not having arrived in Los Angeles, a telegram was sent to the wife of the said Godfrey at Brigham, Utah, inquiring as to when the said Godfrey would arrive in Los Angeles; that in reply the said wife of Godfrey wired that he (Godfrey) had left Brigham, Utah, on May 6, 1925, for Los Angeles, and that she had heard nothing from him since. The affidavit, which bears date of May 18, 1925, the day prior to the commencement of the trial, further sets forth that at the time of the making of the affidavit Godfrey had not appeared, and further that the defendant expected that Godfrey, if present, would testify to certain matters set forth in the affidavit. There is absolutely nothing in the affidavit which shows that the desired witness Godfrey had ever informed affiant or any one on his behalf that he would come to Los Angeles and testify on behalf of the defendant. Nor is there any showing as to when the witness Godfrey would arrive, if ever, in Los Angeles, and indicate his willingness to appear as a witness on behalf of the defendant. The only information before the court as to the whereabouts or intention of Godfrey was the statement that a telegram had been received from Godfrey's wife saying he had left Brigham, Utah, on May 4th, for Los Angeles. Manifestly if Godfrey had left Brigham for the purpose of coming to Los Angeles, and we must assume that he knew the date for which the trial was set, he had abundant time to have reached Los Angeles before the date of the trial, and if perchance he had met with ac-

cident or delay it would not do violence to reason to assume that he would have wired or in some way communicated with the defendant explaining his delay. We are of the opinion that the showing was wholly insufficient to have justified, especially in these days of crowded calendars, an indefinite postponement of the case. Had the facts been such as to have indicated the delay of Godfrey was due to unavoidable accident, it would appear that the defendant had sufficient time to have made the necessary inquiry and to have made such a showing as would have convinced the court that Godfrey was in good faith on his way to Los Angeles for the purpose of appearing as a witness in this case and his failure to arrive was in no sense due to his own fault. It may be further suggested that, although the trial consumed some four days before its completion, there was no showing that during that four-day period the said Godfrey had not arrived or could not have been secured by reasonable effort on the part of the defendant. Although authorities on this point have been cited by both appellant and respondent, we do not deem it necessary to either cite authorities or discuss those cited.

[4] The third assignment of error may be best stated in appellant's own language as set forth in his brief:

"That the deputy district attorney was guilty of misconduct, which prevented the defendant Russell Smith from having a fair and impartial trial, in this, that he never intended to try the defendant Mark Godfrey upon the charge contained in the indictment, except to pretend to try him, in order to have introduced into the record testimony material against said Mark Godfrey but immaterial as to the defendant, Russell Smith, and highly prejudicial to said Russell Smith, when said deputy district attorney had reason to believe, and did believe, said Mark Godfrey had committed no crime as charged in the indictment, and in his argument to the jury, advised the jury to find the said Mark Godfrey not guilty, and further stated that if the jury did not agree with his desires in the matter, he would personally apply to the court to set aside the verdict, in the event it should be guilty."

The only basis for the foregoing assertion of the appellant as to the purpose of the district attorney must find its support, if any, in the argument made by the district attorney to the jury. For there is nothing else in the record that would indicate that the prosecutor was actuated by any other than the usual purpose in the prosecution of a case, unless some other inference may be drawn from the fact that the district attorney called as a witness, in the direct presentation of his case, appellant's codefendant, Mark Godfrey. The record, however, shows that when Mark Godfrey took the stand he was represented by counsel and definitely stated he had been duly advised as to his rights by counsel, and that he de-

sired to take the stand and give testimony as to matters connected with the case.

It is true, as suggested by appellant, that an unusual situation is presented in the trial of criminal cases when the district attorney, as in the instant case, in his argument to the jury, stated that in his own opinion the explanation made by the codefendant, Mark Godfrey, of his part in the holdup could be believed, and that he himself believed it, and that believing that Mark Godfrey was forced into his part in the holdup by Hovermale, one of the bandits, he recommended to the jury that they acquit Mark Godfrey of the charge. With refreshing frankness, the district attorney explained to the jury his reason for placing Mark Godfrey on the stand and also his reason for concluding that Mark Godfrey should not be held legally responsible for his part in the holdup.

While it is true, under ordinary circumstances, the district attorney, either feeling that one charged with crime is not guilty or that he has not the evidence sufficient to warrant a prosecution, disposes of the case by recommending to the court a dismissal, we know of no rule of law or legal procedure that requires the district attorney to move the dismissal of any case simply because, in his opinion, the defendant is not guilty, or there is insufficient evidence to convict. At most, the motion for a dismissal is merely a recommendation to the court. If the court, for any reason, differs with the district attorney as to the result that might be obtained in the trial of the case, there can be no doubt that the court has a full right to refuse such dismissal. In fact, it might be urged with considerable force that in such a serious charge as this, where the grand jury has presented an indictment charging any person or persons with such an offense, it might well be a better practice for the district attorney to submit to a court and jury all of the evidence within his knowledge and let the court and jury, that is particularly charged with the duty of determining guilt or innocence of one charged with crime, assume the responsibility.

[5] It is urged at considerable length by appellant that the motive of the district attorney in putting Godfrey on trial was not to do Godfrey justice, but rather to do what the appellant contends was an injustice to him, in that the district attorney might thus be enabled to get before the jury testimony which would be ruled out if the appellant here went to trial alone. Two answers may be urged to this contention: First, that we

know of no rule or reason that requires the district attorney to present the case of the people in a manner that will best serve the interests of any particular defendant. Assuming, for the sake of argument, that the prosecution was enabled, by having Godfrey a defendant in the case, to present evidence that otherwise would not have been admissible, surely the district attorney had the right to present evidence in any manner that was allowable under the law and the practice, and that in doing so he may have gained an advantage that would not have been his under other circumstances, could not reasonably be held to have operated to the prejudicial injury of the appellant here. Furthermore, as a second answer, it may be pointed out that we do not note in the record any objection urged by appellant to any ruling made by the court on the testimony of Godfrey, or any other testimony that was allowed to be presented to the jury and which would not have been admissible if Godfrey had not been on trial. Had the case against Godfrey been dismissed, unquestionably he could have been, and would have been, used by the district attorney in the same way that he took the stand in the trial of the case. We feel there is no merit in appellant's contention on this point.

The remaining points urged by appellant for a reversal have to do with instructions requested by the appellant and which were either refused or given by the court in modified form. We have carefully reviewed all the instructions given by the court, as well as those refused, and without entering into a detailed discussion as to the merits of each point as urged by appellant, in relation to the several instructions refused, as they are both numerous and somewhat lengthy in form, we feel the situation is fairly met by saying that we find no prejudicial error in the court's ruling on these instructions. Some of the instructions which are the subject of discussion were identical with those offered and refused in the Hovermale Case, and in which opinion we held that there was no prejudicial error in the rulings of the court on the matter of instructions. Our review of the instructions given by the court convinces us that the court fairly and fully advised the jury upon all matters which were before the court and which were properly the subject of the court's instruction.

The judgment and order of the court denying the defendant's motion for a new trial are affirmed.

We concur: CONREY, P. J.; CURTIS, J.

76 Cal. App. 153

**DUARTE et al. v. INDUSTRIAL ACCIDENT
COMMISSION OF CALIFORNIA et al.**
(Civ. 5421.)

(District Court of Appeal, First District, Division 1, California. Jan. 5, 1926.)

1. Master and servant ⇐417(7).

Questions of fact and weight of evidence are matters for determination of Industrial Accident Commission.

2. Master and servant ⇐405(4)—Evidence held ample to support finding death was not caused by injury in employment.

Evidence held ample to support finding of Industrial Accident Commission that death of employee was not proximately caused by injury occurring in course of, or arising out of, employment or that deceased sustained any injury at the time asserted in connection with such employment.

Proceeding for compensation under the Workmen's Compensation Act by Ynosencia Martinez Duarte, widow, and others, as claimants, for the death of Ysaac Duarte, known as Esau Duarte, opposed by the American Smelting & Refining Company, employer. The Industrial Accident Commission denied compensation, and claimants bring certiorari. Award affirmed.

H. L. Bradford, of Los Angeles, for petitioners.

Warren H. Pillsbury, of San Francisco, for respondents.

Chickering & Gregory, of San Francisco, for respondent American Smelting & Refining Co.

TYLER, P. J. [1,2] Certiorari to review the findings and award of the Industrial Accident Commission denying compensation for the death of one Ysaac Duarte, husband and father, respectively, of the petitioners.

The deceased was an employee of respondent American Smelting & Refining Company. After rehearing, benefits were finally denied by the commission upon the ground that there was a want of sufficient evidence to establish that death was proximately caused by any injury occurring in the course of employment, or arising out of the same, or that the employee sustained any injury at all at the time asserted in connection with such employment.

In support of her claim for death benefits, the widow of Duarte testified, in substance, that on the 16th day of October, 1924, her husband left their place of residence to attend to his daily labor for the American Smelting & Refining Company, whose smelting works then and now are located at the town of Crockett. That in the evening of said day, and upon his return from work, he complained to her that he had been injured in the course of his employment. The in-

jury had occurred while he and a fellow employee were attempting to lift a car loaded with metal that had been derailed for the purpose of replacing it upon the track. That they had used as a lever a pole in connection with their work which the other employee had let go of, and in consequence the same had struck her husband on the chest and injured him. She further testified that she called in a physician, who placed bandages on her husband's chest; that he was subsequently attended by other physicians, but his condition became worse, and he died on the 23d day of October following. Dr. Fernandez, the physician first called to attend the deceased, testified that Duarte had informed him that he had been injured while at work, and that he thought he might be suffering from a fractured rib, and bandaged him accordingly. That deceased returned to his work for two days, and then quit.

Petitioners also introduced certain hearsay testimony to the effect that the deceased and others had stated that Duarte had been injured while at work. In addition thereto two Mexicans, Cesario Ruiz and Joe Villa were produced as witnesses, and they testified to having witnessed the accident.

Ruiz, through an interpreter, stated in effect that on the day the alleged accident occurred he saw the deceased, together with an American, attempting to replace an ore car upon its track; that they were using a long pole as a lever, and the American had let go his hold upon the car, which resulted in throwing the weight upon the lever, causing it to fall back and strike deceased upon the chest. The testimony of Villa was to the same effect. This, in substance constitutes the evidence relied on by the petitioners to prove that an injury occurred in the course of employment. As against this evidence it appears that the company was never advised of any injury until after the death of Duarte.

One Anderson, employed by defendant company in connection with its personal and safety work, testified that deceased never complained to him of having received any injury, and he knew nothing concerning the same until the day that Duarte died. Charles Richards, a foreman, testified that the deceased had called for his pay and reported for duty on the 18th day of October after his alleged accident, but he was laid off for lack of work. He also testified that no complaint was made by Duarte of having been injured. Other testimony was to the effect that, while deceased did complain of being sick, he never claimed to have been injured. To disprove the testimony of Ruiz and Villa that they had witnessed the accident, the company introduced testimony to show that deceased had never worked with an American, except on rare occasions, and on the day when the alleged injury is claimed to have been suffered

the deceased was working in company with a Mexican named Rodriguez.

Petitioners claimed that deceased was injured on the morning of Thursday, October 16, 1924. Rodriguez testified that he had worked with the deceased on Thursday and the following Friday and Saturday pushing cars and carrying ore, and that no accident had happened during that time, and that he did not know, nor had he ever heard of, Ruiz. He also testified that deceased had complained of having hurt his chest and of feeling sick on the last day he worked with him, but did not claim that he had suffered any injury during his employment. To disprove the testimony of Ruiz that he and his fellow Mexican colaborer were working together at the time of the accident and had witnessed the same, several of the foremen of defendant company were examined, and the time cards of both Ruiz and Villa were introduced in evidence. The time cards of Ruiz showed that his statement that he was working with Villa was untrue. Ruiz was proved by the testimony of a foreman and by the time cards to have been working on the night shift from October 12th to the 28th. Villa's testimony to the effect that he was working with Ruiz on the day of the accident was also disproved, as it was shown that he was working in an entirely different department and at different work than that to which he had testified.

On rehearing one Santiago Muro was produced as a witness on behalf of the petitioners. He testified that he was working for respondent company on the day of the accident, and, after its happening as alleged, Ruiz had told him that the deceased was injured. The time card of this witness was also produced, and it showed that on this day he was working on the night shift.

Under all these circumstances the commission was justified in disregarding these various witness and in concluding that petitioners had failed to prove the happening of an accident. Then too, the medical testimony does not clearly show that death was caused by an injury. An autopsy showed no fracture, but did show that deceased was suffering from a complication of diseases. His liver was enlarged, and his lungs were in a far advanced state of tuberculosis. His kidneys were badly diseased; one being filled with pus. The direct cause of death was a rupture of an aneurism of the aorta above its junction with the heart. Dr. Beard, the autopsy surgeon, gave as his opinion that the aneurism was of long standing, of at least two years duration, and was probably syphilitic, and, considering the nature of the rupture, in his opinion, it must have produced instantaneous death, as the entire pericardium was filled with blood.

The case as a whole presents questions of fact and weight of evidence. These were

matters for the commission to determine. There is ample evidence in the record to support its findings.

The award is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

76 Cal. App. 137

FURLONG v. ALEXANDER et al.
(Civ. 4116.)

(District Court of Appeal, Second District, Division 2, California. Dec. 31, 1925.)

1. Appeal and error  **757(1)**—Failure of appellants, complaining of excessiveness of judgment by erroneous computation of interest, to include in record element of time, constituted noncompliance with statute (Code Civ. Proc. § 953c).

Appellants, appealing under Code Civ. Proc. § 953c, and complaining of excessiveness of judgment by alleged erroneous computation of interest, but failing to include in record element of time, thereby did not comply with section 953c.

2. Appeal and error  **757(1)**—Provision in statute applicable to alternative method of appeal, requiring inclusion in record of portions desired to be called to court's attention, is merely directory (Code Civ. Proc. § 953c).

Provision in Code Civ. Proc. § 953c, for an alternative method of appeal, and requiring inclusion in record of portions which parties desire to call to appellate court's attention, is merely directory.

3. Appeal and error  **901.**

It is incumbent on appellant to show error in rendition of judgment, reversal of which is sought.

4. Appeal and error  **1011(1).**

Trial court's finding of fact on conflicting testimony is final in appellate court.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by James J. Furlong against William J. Alexander and another. Judgment for plaintiff, and defendants appeal. Affirmed, as modified.

John C. Miles, of Los Angeles, for appellants.

W. L. Albert, of Los Angeles, for respondent.

WORKS, J. [1] This is an action to recover on two promissory notes. Plaintiff had judgment, and defendants appeal. It is contended that the amount of the judgment should be reduced in the sum of \$151.23, for the reason that the trial court erred in the computation of the interest due upon the notes and by that means rendered judgment for a sum which was in excess of the amount actually due to the extent stated. In arguing their contention, appellants say that the

total amount of the judgment was \$3,229.63, giving the items which together go to make up the total. They then assert that the aggregate sum should have been \$3,078.40, and state the items which, according to their computation, go to form that total. The difference between \$3,229.63 and \$3,078.40 is \$151.23, beyond a doubt, but there is a factor which appellants have omitted in their endeavor to convince us that the judgment was excessive in the sum last stated. The element of time in the computation of interest was wanting. The date from which interest was to be figured on each of the notes is stated in the brief, but the date to which it was to be computed is shown as to neither of them. To be more exact, appellants fail to show either to what date the court figured interest in arriving at the amount of the judgment, or to what date it should have been figured in order to render correct judgment; nor do they even show to what date, either correctly or incorrectly, they themselves have computed interest in their endeavor to convince us that the judgment is excessive. It is provided in section 953c of the Code of Civil Procedure, which concerns what is known as the alternative method of appeal—and the present appeal was taken after that method—that—

The parties must "print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court."

[2] In the respect above mentioned appellants have failed to comply with this rule. The provision, however, has been held to be merely directory (*People v. Woods*, 190 Cal. 513, 213 P. 951), and we have therefore been forced by the dereliction of counsel to examine the record ourselves for the purpose of supplying the missing information. After such examination we have computed the interest upon the two notes. We find that the interest upon one of them was correctly ascertained by the trial court, but that upon the other the interest allowed was excessive, not in the sum of \$151.23, but in the sum of \$47.93.

[3] Appellants insist that in rendering its judgment the trial court failed to allow them a credit of \$100.60, to which they were entitled. To support this contention, appellants quote a portion of the record of the trial showing a stipulation to the effect that they should have the credit mentioned, and containing a statement of the court that it would be allowed them. The figures set forth in the brief do not convince us that it was not allowed. Moreover, respondent asserts in his brief that the credit was allowed and states the manner in which it was allowed, and appellants filed no reply brief. On the whole, appellants have failed to satisfy the rule that it is incumbent upon an

appellant to show error in the rendition of a judgment which he would have reversed. The point made, therefore, cannot be sustained.

[4] The principal question presented by appellants is that the consideration for one of the notes sued on had failed and that respondent was therefore not entitled to judgment upon it. Evidence is then stated which, while it is not altogether clear, tends to prove that the paper was given merely as a guaranty, or as security, for the performance of a certain act, and that the act had been performed. On the other hand, however, respondent refers to testimony which tends to prove that the note was given in consideration of "money advanced for payroll" and for the cost of a building which respondent constructed for the use of appellants. Here, then, appears but a conflict of evidence, and the finding of the trial court upon the subject must stand.

The judgment is modified by striking therefrom the words and figures, "Three thousand two hundred twenty-nine and 63/100 dollars (\$3,229.63)," and inserting in lieu thereof the words and figures, "Three thousand one hundred eighty-one and 70/100 dollars (\$3,181.70)," and as so modified it is affirmed.

We concur: FINLAYSON, P. J.;
CRAIG, J.

78 Cal. App. 142

Ex parte CIRRO. (Cr. 1306.)

(District Court of Appeal, First District Division 1, California. Jan. 4, 1926.)

Habeas corpus $\Rightarrow$ 30(2)—Defendant held entitled to discharge on habeas corpus, when held under information erroneously charging embezzlement of grapes instead of proceeds of sale.

Defendant held entitled to discharge on habeas corpus, where held on information charging embezzlement, as agent, of grapes, where embezzlement, if any, was of proceeds of sale of such grapes.

Application for a writ of habeas corpus by Cirro against the Sheriff of the City and County of San Francisco. Writ granted.

Emilio Lastreto and Alexander Mooslin, both of San Francisco, for petitioner.

R. M. J. Armstrong, Matthew Brady, Dist. Atty., and William W. Murphy, Deputy Dist. Atty., all of San Francisco, for respondent.

TYLER, P. J. Petitioner was accused by complaint filed in the police court of the city and county of San Francisco with having embezzled some 9 carloads of grapes. He was held to answer for this offense, and an

information was subsequently filed charging petitioner with embezzlement as agent of the grapes. He here seeks his discharge upon habeas corpus, upon the ground that the testimony taken upon his preliminary examination shows conclusively that the complaining witness, Anthony Barone, and petitioner were partners, and that the property alleged to have been embezzled was partnership property, for which reason petitioner is not guilty of any criminal offense. It is further claimed that the grapes were disposed of in conformity with the lawful exercise of his trust and under the express agreement of the parties.

The district attorney concedes that petitioner is correct in this latter contention, and that the embezzlement, if any, was of the proceeds of the sale, an offense with which he is not here charged. A reading of the evidence shows this to be so.

It results that the petition must be granted and the prisoner discharged.

It is so ordered.

We concur: KNIGHT, J.; CASHIN, J.

75 Cal. App. 698

GITTELSON et al. v. McKNIGHT et al.
(Civ. 5277.)

(District Court of Appeal, First District, Division 2, California. Dec. 22, 1925. Hearing Denied by Supreme Court Feb. 18, 1925.)

1. Specific performance ¶14—On death of wife intestate after appeal from decree for specific performance, agreement of husband to sell community property held enforceable regardless of whether wife signed original offer or first escrow instructions.

Where, pending appeal from decree for specific performance of contract for sale of real property, wife died intestate, husband could not urge on appeal that property belonged to community and that wife had not signed original offer or first escrow instructions, especially in view of stipulation that husband was owner of property and testimony showing him to be record owner; wife's interest having vested in him.

2. Vendor and purchaser ¶39—Fact that seller instructed escrow holder to affix insufficient revenue stamps held not to invalidate contract.

Fact that seller instructed escrow holder to affix insufficient amount of revenue stamps to deed does not render contract invalid, in view of fact that deed had not been recorded or delivered, and that stamps had to be affixed on recordation.

3. Specific performance ¶131—Fact that pleadings and judgment included certain personal property held not to render judgment of specific performance erroneous.

In suit for specific performance of contract to convey real property, fact that pleadings and

judgment included certain personal property which was not sufficiently described in contract did not render decree of specific performance erroneous, in view of fact that such property was inconsequential, and contract to convey real property and that to convey personalty might be separated.

4. Specific performance ¶131—Judgment granting specific performance held not erroneous for failing to provide for payment of consideration.

Judgment granting specific performance of contract to convey real property, which provided that agreement of parties should be specifically performed, was not erroneous as failing to provide for payment of consideration, although plaintiffs by stipulation were permitted to withdraw, pending trial, cash deposited in escrow, but such judgment will be modified to expressly protect vendors.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Suit by George Gittelson and others against John H. McKnight, individually and as administrator of the estate of Agnes W. McKnight, deceased, substituted for her, and another. Judgment for plaintiffs, and the named defendants appeal. Modified and affirmed.

See, also, 243 P. 892.

William J. O'Brien, of Los Angeles, F. J. McDougal, and Glen Behymer, of Los Angeles, and J. F. Reslenre and Robert Mack Light, both of San Francisco, for appellants.

Samuel A. Miller and John J. Wilson, both of Los Angeles (Gerald F. H. Delamer, of Los Angeles, of counsel), for respondents.

LANGDON, P. J. This is an appeal by some of the defendants from a judgment in favor of plaintiffs decreeing specific performance of an agreement for the purchase and sale of real property in Los Angeles, Cal. The record bears out the statement of facts appearing in respondents' brief, from which we quote:

The initial negotiations were carried on between the defendant John H. McKnight for the sellers and Max Gittelson, father of the plaintiffs George, Harry, and Samuel Gittelson, in behalf of the purchasers, which negotiations finally resulted in an offer in writing by said John H. McKnight and an acceptance by said Max Gittelson. The consideration was \$32,000 net to the sellers, \$10,000 to be paid in cash, the balance of the purchase price to be by note secured by mortgage on the property, due in 5 or 7 years at 8 per cent. interest.

On July 9, 1921, Max Gittelson, the agent, brought the purchasers, his sons, and John H. McKnight, the seller, together. Samuel Gittelson, one of the purchasers, accompanied John H. McKnight, the seller, to the office of the title company, where they reaffirmed the

terms of the contract and signed escrow instructions to the title company, which was to be the custodian of the purchase money, note, deed, and other documents. These instructions were dated July 9, 1921, and by their terms the Gittelsons were to deposit \$10,000 with the title company as a cash payment, a note for \$22,500, signed by the plaintiffs, secured by a trust deed on the property, due in 7 years from August 1, 1921, with interest at 8 per cent, per annum, payable quarterly. John H. McKnight was to deposit a deed executed by himself and Agnes W. McKnight, his wife, vesting title in the plaintiffs, purchasers in certain undivided interests. The title company was to deliver the \$10,000 and the note and trust deed securing the same to John H. McKnight and the deed to the purchasers, "provided, within 15 days," the title company could issue its certificate as called for, and, "in the event the conditions of this escrow have not been complied with at the expiration of the time provided for herein," the title company was "to complete the same at the earliest date possible hereafter," unless purchasers shall have made written demand on the company for the return of the money and instruments deposited by them. To these conditions John H. McKnight subscribed in the words "the conditions as above are hereby approved," and he instructed the title company to deliver the deed to the purchasers upon payment to the title company for his account of \$10,000 "within the time as above provided."

At the time of the signing of the escrow instructions, when Samuel Gittelson was about to deposit the \$10,000 called for, the escrow officer of the title company stated that the company did not care to have the entire \$10,000 deposited at that time, and suggested that Gittelson should then deposit \$500 and the balance of the \$10,000 and sufficient money to cover expenses when the title company had finished its preliminary examination and was ready to issue its certificate, and should so notify Gittelson. This arrangement was agreed to by all parties, and Gittelson deposited the said \$500.

Subsequently John H. McKnight deposited with the title company, in pursuance of the contract and instructions, a deed to the property, executed and acknowledged by himself and Agnes W. McKnight, conveying the property to the purchasers in certain undivided interests, as called for in the instructions. Also the Gittelsons deposited in the escrow a note for \$22,500, secured by a trust deed on the property, due in 7 years from August 1, 1921, with interest at 8 per cent, per annum, payable quarterly. Also Agnes W. McKnight, wife of John H. McKnight, deposited in the escrow a paper signed by her directing the title company to pay all money derived from the use of the deed she and her husband had deposited (particularly specifying that the deed conveyed the land to the Git-

telsons, naming them, and stating the undivided interests vested in each, as called for in the instructions) to John H. McKnight, and further specifically instructing the title company in these words:

"In the event that the conditions of this escrow have not been complied with at the expiration of the time provided for herein, you are instructed to complete the same at your earliest possible date thereafter unless I shall have made written demand upon you for the return of all instruments deposited by me."

The title company was not ready to issue its certificate called for within the 15 days provided in the contract and instructions, that is, was not ready so to do on July 24, 1921, but was ready 7 days thereafter, to wit, on August 1, 1921. In the meantime, neither the Gittelsons nor the McKnights had in writing, or otherwise, demanded the return of anything in escrow. On August 1, 1921, the title company wrote Samuel Gittelson that if had completed its preliminary examination, and was ready to receive the balance to be deposited, and stated that the amount of the balance was \$9,667; that is, \$9,500 balance upon cash payment and \$167 to cover expenses. This amount was promptly paid by the Gittelsons on August 2, 1921. The title company then had the whole \$10,000 cash payment to be made under the contract, \$167 for expenses, the note, and trust deed securing the same, and the deed from the McKnights. For some reason not explained by the record the title company, instead of delivering the \$10,000 note and trust deed to John H. McKnight and the deed to the Gittelsons, on said August 2, 1921, held both money and deed for 15 days, during which time no demands had been made by either the Gittelsons or the McKnights for the return of anything deposited.

On August 17, 1921, John H. McKnight caused his attorney to write a letter to the title company, instructing it to cancel all instructions given by him and to deliver the deed to William J. O'Brien, on whose letterhead the letter was written. This letter gave as the only reason for canceling his instructions and the return of the deed that the \$10,000 was not deposited with the company within the 15 days from July 9, 1921, and not until August 2d. The title company notified Samuel Gittelson that it had received said letter from said McKnight, copied the contents thereof in its letter to Gittelson, and refused to complete the transaction.

This action followed. The trial court decreed specific performance of the contract against John H. McKnight and Agnes McKnight, who have appealed. Pending the appeal Agnes McKnight died, and John H. McKnight, as the administrator of her estate, was substituted in her place and stood as a defendant and appellant in the action.

[1] The greatest ingenuity has been displayed by counsel in urging innumerable hy-

pertechanical objections to the foregoing transaction. Many of the points made do not warrant serious discussion. The objections which have a semblance of merit are based upon the fact that the original transaction was between Gittelson or his agent and John H. McKnight, and that Agnes W. McKnight does not appear to have signed the original offer, nor the first escrow instructions. There are numerous replies to be made to these objections, among which we might mention, first, that there was a stipulation in court by the attorneys that John H. McKnight was the owner of the property, and his testimony showed him to be the record owner. He, however, later took the position that the property was community property, and, conceding that it was, Agnes W. McKnight signed the deed conveying it to the Gittelsons, which was deposited with the title company, and she also signed a letter of instructions to said title company, hereinbefore mentioned, directing the title company to proceed with the transaction and to pay the proceeds to John H. McKnight. The appellants meet these facts by urging that the escrow agreement does not constitute the contract and must be supported by a valid contract preceding it. We are saved the necessity of meeting this argument by the fact that upon the record before us Agnes W. McKnight has since died intestate. Her interest in this property, if it was community property, has vested in John H. McKnight, and with the merging of her inchoate interest in the estate of John H. McKnight disappears the last vestige of ground for this appeal.

Counsel seeks to avoid this result by urging upon this court, at great length through several briefs, his views in criticism of the case of *Roberts v. Wehmeyer*, 191 Cal. 601, 218 P. 22. He asks this court to take a view contrary to that case, and to hold that the wife's interest in community property is something larger than was decided therein. So far as this court is concerned, *Roberts v. Wehmeyer*, supra, must settle the law upon this question in this state. Under that case the interest of Agnes W. McKnight in the community property was a mere expectancy. That expectancy is destroyed by her death, intestate, during the lifetime of her husband, and his title is now full and complete.

Nor is there any merit in the claim that John H. McKnight holds one-half of this property in a superior equitable position with reference to this action and may urge any claims which Agnes W. McKnight might have had against the enforcement of this judgment. A reading of *Roberts v. Wehmeyer*, supra, is conclusive upon the fact that the wife had no separate and vested estate in any part of this property. The husband received no new estate upon her death intestate. He always was the owner of the community property, subject only to the

wife's expectancy and her power or testamentary disposition. Both contingencies are now removed. The husband has the same estate he had before the wife's death, freed now from the possibility of being defeated in part. He has not a defense against this action for specific performance. The only reason he gave at the trial for not performing was that his wife did not want him to sell the property, and while she was ill, he wished to please her about the matter.

[2] It is idle to urge that the contract is invalid because the seller instructed the title company to affix only \$10 in revenue stamps instead of \$32.50 required. The purchaser has offered to furnish the balance of the stamps and the revenue law provides it may be done by either party. Furthermore, the deed in this case has never been recorded or even delivered to the grantee, and it is the recordation which is made unlawful without the stamps affixed.

[3] The point is also made that following the specific description of the real property in the pleadings and judgment appear the words "together with certain personal property contained therein as per inventory agreed upon by the parties herein." It is urged that there is no adequate description of the personal property at any place in the contract to enable a court to specifically perform the contract as to it. Respondents concede this, and assert that the personal property is inconsequential, and the provisions concerning the same may be treated as surplusage in the decree; that the contract to convey the real property and the contract to convey the personalty may be separated.

[4] The point is also made that the decree fails to provide for the payment over to the defendants of the consideration to be paid for the property. This is presented because it appears in the record that by stipulation between the parties the plaintiffs were permitted to withdraw, pending the trial, the \$10,000 cash which they had theretofore deposited with the title company, without prejudice to their rights. It is fair to assume that since the trial the money has again been deposited with the title company in escrow, and will be paid over to defendants upon delivery of the deed to plaintiffs. Furthermore, the judgment appealed from provides that the agreement of the parties be specifically performed, which, assuredly, means performed by both parties. However, the judgment of this court will protect the appellants in this matter. Accordingly, it is ordered:

That the judgment appealed from be and it hereby is modified by striking from the description of the property the following words: "Together with certain personal property contained therein as per inventory agreed upon by the parties herein," and by adding to the end of the last paragraph of said decree: "And that the plaintiffs pay to

the defendants \$32,500 for said property in the manner and form agreed upon, to wit, \$10,000 in cash and their promissory note for \$22,500, payable seven years from August 1, 1921, with interest at 8 per cent. per annum, payable quarterly, secured by deed of trust upon said property."

As so modified, the judgment is affirmed, the appellants to pay the costs upon appeal.

We concur: STURTEVANT, J.; NOURSE, J.

75 Cal. App. 697

George GITTELSON, Harry Gittelson, Samuel Gittelson, and Jennie Gittelson (Husband and Wife), Plaintiff and Respondents, v. John H. McKNIGHT and John H. McKnight, Administrator of the Estate of Agnes W. McKnight, Deceased, Substituted in the Place and Stead of Agnes W. McKnight, Defendants and Appellants. (Civ. 5277.)

(District Court of Appeal, First District, Division 2, California. Dec. 22, 1925.)

Motion to dismiss appeal by defendants from a judgment of the Superior Court of Los Angeles County, Walton J. Wood, Judge, in an action for specific performance. Motion denied.

See, also, 243 P. 889.

William J. O'Brien, of Los Angeles, F. J. McDougal, and Glen Behymer, of Los Angeles, and J. F. Resleure and Robert Mack Light, both of San Francisco, for appellants.

Samuel A. Miller and John J. Wilson, both of Los Angeles (Gerald F. H. Delamear, of Los Angeles, of counsel), for respondents.

LANGDON, J. In the above-entitled matter the motion to dismiss the appeal as to John H. McKnight, administrator of the estate of Agnes W. McKnight, deceased, is denied. Rubio Canon, etc., Ass'n v. Everett, 154 Cal. 29, 96 P. 811.

76 Cal. App. 165

SUN INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 5390.)

(District Court of Appeal, First District, Division 1, California. Jan. 7, 1926. Hearing Denied by Supreme Court March 3, 1926.)

1. Master and servant $\Leftrightarrow$ 375(2)—Injury to meat department manager, sustained while traveling on employer's time to arrange for purchase of meat, held within course of employment, though going home (Workmen's Compensation Act [St. 1917, p. 831]).

Injury to manager of store's meat department, sustained while traveling on employer's time to arrange for purchase of meat, held within course of employment, though he intended

to go home for the night before returning again to employer's place of business.

2. Master and servant $\Leftrightarrow$ 380 — Truck driver held not guilty of willful misconduct within Compensation Act (St. 1917, p. 831).

Truck driver, attempting to pass another automobile at 25 miles per hour on straight road, held not guilty of willful misconduct, relieving employer from liability for compensation for injuries.

3. Master and servant $\Leftrightarrow$ 405(6)—Finding of temporary total disability sustained (Workmen's Compensation Act [St. 1917, p. 831]).

Medical testimony, showing employee's injuries might cause disability for 6 months, held to warrant finding of temporary total disability.

Petition for certiorari by the Sun Indemnity Company against the Industrial Accident Commission of California and another, to review an award under the Workmen's Compensation Act (St. 1917, p. 831), made to W. R. Doolittle, claimant. Award affirmed.

Haswell & Martin, of San Francisco, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondents.

TYLER, P. J. Certiorari to review an award of the Industrial Accident Commission in allowing compensation for injuries to one W. R. Doolittle who, on the evening of February 18, 1925, was injured in an automobile accident.

Doolittle was employed by P. S. and S. J. Round, proprietors of a general store at Costa Mesa, Cal., of whom petitioner is the insurance carrier, to manage their meat department. His hours of labor were from 7 a. m. to 6 or 6:15 in the evening. Part of his duties consisted in the buying of meats, and in this connection he was vested with certain discretion. Ordinarily the meats were purchased from the Cudahy Company, but at times a small supply was procured from a market conducted by a Mr. Klamm at Santa Ana, a city close by. On the evening of February 18, 1925, Doolittle reported to his employer that the store was running short of pork and lamb. He was directed to take the firm's delivery truck home with him that night instead of going in his usual way, which was by stage, and purchase the necessary meat from Klamm, and bring it back next morning when he reported for duty. Doolittle had bought meat under similar circumstances on three former occasions.

Pursuant to these instructions, Doolittle left the shop for Santa Ana with the truck at about 5:45 o'clock in the evening; his declared intention being to notify Klamm before going to his own home, which was also situated in that city, to open his shop the next morning before the usual hour so

that he could get back to Costa Mesa early the next morning with the meat. While proceeding along the highway in the most direct route to his destination, Doolittle attempted to pass a car driven by three boys. He blew his horn, but the boys refused to give him a right of way. He made an attempt to pass, but the car crowded him, and he was forced to drop back. On reaching a straight stretch of the road Doolittle, driving at about 25 miles an hour, again attempted to pass the car driven by the boys, but was crowded into a ditch. He was thrown through the windshield, and suffered multiple lacerations of both hands, which injuries were of a serious nature. Under these circumstances the Commission found that Doolittle sustained his injuries in the course of his employment; that such injuries caused temporary total disability entitling him to compensation for a period of 14 weeks in the weekly sum of \$15.44, a total of \$216.16.

[1-3] It is petitioner's claim that the injuries did not occur in the course of the employment, that Doolittle was guilty of willful misconduct, and that the evidence does not sustain the findings as to the extent of disability. The first contention is based upon the claim that the facts bring the case within the so-called "going and coming" doctrine. The evidence does not support this contention. That Doolittle intended to go home there can be no question, but it is equally clear that his primary purpose was a business errand. He had been instructed to make the journey, not in his usual manner by stage, but with his employer's truck, and he had left his place of business before his regular quitting time in order to see Klamm, the proprietor of the meat shop, so that he could procure the meat he wanted at an early hour. His return to his home was an incidental factor in his mission. He was at the time of the accident, which occurred about 6 o'clock in the evening, traveling on his employer's time, for a definite purpose connected with his employment and to further his employer's interest. He was therefore acting within the scope of his employment. Nor is there any evidence in the record to support the claim that Doolittle was guilty of willful misconduct in the operation of his car, even conceding that this fact, if true, would relieve petitioner from liability.

Equally without merit is the claim that the evidence does not sustain the finding as to the extent of the disability. The medical testimony shows the injuries to have been of a serious nature that might cause temporary disability for at least 6 months, with a probability of such temporary disability becoming permanent.

The award is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

76 Cal. App. 140

DOLLEY et al. v. RAGON et al. (Civ. 4367.)

(District Court of Appeal, Second District, Division 1, California. Jan. 2, 1926.)

1. Courts ⇐102(1)—Judgment rendered by two justices of District Court of Appeal, third judge deeming himself disqualified, held valid (Amendment 1918 to Const. art. 6, § 4 [see St. 1919, p. xxxiii]).

Under Amendment 1918 to Const. art. 6, § 4 (see St. 1919, p. xxxiii), intended to enable District Court of Appeal to act as a court and transact business by concurrence of two of its justices, notwithstanding illness or absence or disqualification of third judge, a judgment on appeal, rendered by two district court justices, is valid, though third judge did not participate, deeming himself disqualified.

2. Courts ⇐102(1)—Constitutional authority to appoint judge in place of one disqualified or unable to act does not affect power of District Court of Appeal to transact business by action of two justices (Amendment 1918 to Const. art. 6, § 4 [see St. 1919 p. xxxiii]).

Constitutional provision, authorizing court to appoint a justice to act pro tempore in place of justice disqualified, or unable to act, does not affect power of court, under Amendment 1918 to Const. art. 6, § 4 (see St. 1919, p. xxxiii), to transact business through action of two of its judges.

Action by L. F. Dolley and others against Edward D. Ragon and others to terminate an oil lease. From the judgment, defendants appeal. On motion of E. D. Higginbotham and another to have defendants' appeal set down for hearing. Motions dismissed.

See, also, 228 P. 664, 67 Cal. App. 731, 228 P. 665, 68 Cal. App. 223.

Bicksler, Smith & Parke, of Los Angeles, for Higginbotham.

Earl J. McCully and Lorin Andrews, both of Los Angeles, for Pettit.

G. Randolph Miller and Frederick W. Smith, both of Whittier, for respondents.

CONREY, P. J. This case was before the court on appeal from the judgment, and was decided in April, 1924. *Dolley v. Ragon*, 228 P. 52, 66 Cal. App. 707. Signal Hill Oil & Gas Company, a corporation, was one of the appellants in the case. Now come E. D. Higginbotham and W. E. Pettit, claiming to be stockholders in said corporation, and severally present their motions to have the appeal set down for hearing. The theory of the moving parties appears to be that the former proceedings whereby the appeal was heard and determined in this court were void, and that the appeal is still pending. The motions are based upon the fact that Mr. Justice Curtis, deeming himself disqualified, did not act in the rendition of the opinion and judgment of the court. The minutes of

the court show that, at the call of the calendar on March 24, 1924, the cause was submitted for decision. At that session of the court the three justices thereof were present. On April 24, 1924, the judgment was affirmed; the opinion being written by Mr. Justice Houser and concurred in by the presiding justice. A memorandum was attached thereto, stating that Mr. Justice Curtis, deeming himself disqualified, did not participate in the opinion.

On May 14, 1924, a petition for rehearing in this cause was filed by appellants, appearing by Wm. J. Clark and P. V. Davis as their attorneys. By order of May 20, 1924, this petition was denied. The record further shows that, by order of June 23, 1924, a petition for rehearing of the cause was denied by the Supreme Court.

[1] Assuming, without deciding, that these motions are presented by parties entitled to act on behalf of the corporation in presenting such motions, we are of the opinion that the judgment on appeal as rendered was the act of a sufficient number of judges, and was and is a valid judgment of the court. It is true that under the provisions of article 6, § 4, of the Constitution of California, as adopted in the year 1904 (see St. 1905, p. xxxvi), the concurrence of three justices of the court was necessary to the rendition of a judgment. The Constitution at that time declared as follows:

"The presence of three justices shall be necessary for the transaction of any business by such court, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment."

But by the amendment of that section as adopted in the year 1918 (see St. 1919, p. xxxiii), there was substituted the following provision:

"The presence of two justices shall be necessary for the transaction of any business by such court except such as may be done at chambers, and the concurrence of two justices shall be necessary to pronounce a judgment."

[2] It appears to be absolutely clear that the amendment above quoted was intended to enable a District Court of Appeal to act as a court and transact its business by the concurrent action of two of its judges, notwithstanding the illness or absence or disqualification of the third judge. The further provision in the Constitution (both as originally adopted and as amended), authorizing the court to appoint a justice or judge to act pro tempore in the place of a justice disqualified or unable to act, does not in any way affect the power of the court to transact business through the action of two of its judges as above stated.

It thus appearing that the appeal in question has long since passed to final judgment,

the court is now without jurisdiction to act upon these motions.

For that reason the motions are dismissed.

I concur: HOUSER, J.

76 Cal. App. 168

PEOPLE v. HOLTZCLAW et al. (Cr. 1280.)

(District Court of Appeal, Second District, Division 2, California. Jan. 7, 1926. Hearing Denied by Supreme Court March 3, 1926.)

1. Criminal law $\S$ 642—Independently of statute, every court has inherent power to call interpreter for witness under proper circumstances (Code Civ. Proc. § 1884).

Independently of Code Civ. Proc. § 1884, every court has inherent power to call an interpreter for a witness under proper circumstances.

2. Criminal law $\S$ 642.

Court is under duty to call interpreter whenever circumstances calling for interpreter arise, in view of Code Civ. Proc. § 1884.

3. Courts $\S$ 56.

Accused held to have presented in sufficient form demand for interpreter within Code Civ. Proc. § 1884.

4. Courts $\S$ 56.

Whether an interpreter shall be called to render testimony of witness not understanding English language rests in discretion of trial court.

5. Courts $\S$ 56.

Determination of witness' understanding of English language, within Code Civ. Proc. § 1884, is to be solved upon examination of witness' entire testimony.

6. Criminal law $\S$ 642.

Refusal to call interpreter for Japanese witness held not abuse of discretion, in view of witness' understanding of English language as disclosed by record.

7. Robbery $\S$ 24(1).

Evidence held to support verdict finding accused guilty of robbery.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Voudria C. Holtzclaw and another were convicted of robbery, and they appeal. Affirmed.

C. B. Conlin and E. R. Simon, both of Los Angeles, for appellant Davis.

George E. Stoddard, of Los Angeles, for appellant Holtzclaw.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

WORKS, J. Defendants were convicted of the crime of robbery. They appeal from the judgment of conviction and from an order of

the trial court denying their motion for a new trial.

The prosecuting witness, and the sole witness as to the actual facts surrounding the robbery, was one Frank Ito, a Japanese. Over the objection of appellants the trial court required the examination of Ito by means of the English language, and not through an interpreter. It is contended that in this ruling the court abused its discretion. In order to make disposition of the point it will be necessary to quote somewhat voluminously from the record. After the oath had been administered to the witness and after a single question had been propounded to him on direct examination, one of the counsel for appellants asked and obtained leave to examine him in order to ascertain "if he understands what has taken place in the administration of this oath." The record then shows:

"Q. Do you know what the clerk in this court just did to you? A. Yes.

"Q. What did he do? A. To-day?

"Q. Yes, to-day. A. We have court to-day.

"Q. You understand thoroughly, of course, what the clerk just administered to you? A. No, I don't know."

At this point appellants objected "to this witness testifying." Thereupon the district attorney examined him thus:

"Do you know what it means to take an oath? Do you understand what it means to take an oath that you just took, to hold up your hand and swear that you will tell the truth? A. Yes, the date, the 30th of March. * * *

"Q. Do you know what it means to take an oath, to hold up your hand and swear you will tell the truth? A. Yes, the whole truth.

"Mr. Conlin: It has already been answered, your honor. The 30th of March is his answer.

"The Court: This matter goes to the credibility of the witness; it should not go to exclude the testimony of the witness. * * *

"Mr. Murray (a deputy District Attorney): We might need an interpreter in this case.

"The Court: All right; proceed.

"Mr. Murray: Do you know, Mr. Ito, that you are to tell the truth? A. To tell the truth.

"Q. Do you know it is a crime of perjury not to tell the truth? A. Yes, I tell the truth.

"Q. Do you know it is a crime not to tell the truth when you swear to God you will tell the truth? A. Sure, I will tell the truth.

"Q. Do you know that they will put you in jail if you don't tell the truth? A. I told all the truth.

"Q. But do you know that if you don't tell the truth they will put you in jail? A. Yes.

"Q. You know when you put your right hand up and swore you would tell the truth— A. Yes, I swore I would tell the truth.

"Q. Do you know what it means to hold your right hand up and swear you will tell the truth; do you know that is an oath? A. Yes, truth; I know.

"Q. Do you understand what I say to you all the time? A. Sometimes I can't understand very good English.

"Q. Would you like to have an interpreter?

A. I have an interpreter next door to my place. He talks pretty good English.

"Q. I know, but would you like to have an interpreter here in court to-day to interpret your language into English, Japanese into English, and English into Japanese? A. Yes, I think interpreter is best.

"Q. Do you understand everything that counsel and myself have been saying here? A. No, I don't know. This is the first time I am in court. I don't know much.

"Mr. Murray: I think maybe, your honor, it would be better to have an interpreter, although the witness speaks fairly good English.

"Mr. Conlin: Do you believe in a supreme being? A. Supreme man?

"Q. Do you believe in a supreme being? A. Do you mean a high court?

"Q. Yes, that is right.

"Mr. Murray: I submit that the witness doesn't understand what he is talking about.

"The Court: All right. Call an interpreter.

"Mr. Conlin: I will submit he don't, too.

"The Court: The clerk advises me that it will take some time to get an interpreter, possibly until 2 o'clock. Now, regarding the objection to this witness testifying, section 1879 of the Code of Civil Procedure provides that 'all persons, without exception, otherwise than as specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief.' The sections which contain the exceptions are those referring to persons of unsound mind and children under ten years of age, and so forth.

"Mr. Conlin: The first section the court read is the one I based my objection upon, those that apparently do not perceive and cannot make known their perception.

"The Court: The belief in a supreme being is not essential.

"Mr. Conlin: No, but the principal objection was that he did not perceive what was going on and could not make known his perception.

"The Court: However, those are matters which the jurors may take into consideration in weighing the evidence, and for that reason the court will let you proceed. Now, as to whether this man has organs of sense, it is apparent he has. Whether, perceiving, he can make known what his organs of sense disclose to him, the result of his perception, is a matter which we can determine after more careful investigation, after a little further proceeding. I am informed that this witness got ahead in the preliminary examination without an interpreter, and so I am willing to make an effort to proceed. If it appears later that it will be necessary to have an interpreter, why, we shall get one at 2 o'clock. You may proceed."

The examination of the witness upon the merits of the cause was then taken up and concluded.

[1, 2] It will be observed from the portion of the record which is above set forth that there was a strange intermixture of legal questions involved in the discussion between

the trial judge and counsel for appellants. Three separate points were by them entangled together. These were: First, was Ito competent as a witness under the terms of section 1879 of the Code of Civil Procedure? Second, did he comprehend the nature of the oath which the clerk administered to him? Third, did he understand and speak the English language? This last question is important under the provisions of section 1884 of the Code of Civil Procedure, which reads, in part:

"When a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him."

In every court there also rests the inherent power to call interpreters for witnesses under proper circumstances (*People v. Walker* [Cal. App.] 231 P. 572); and it is, of course, the duty of a court to call an interpreter whenever such circumstances arise.

[3] We advert to the state of the record concerning the three questions discussed by the court and counsel for appellants because there is some doubt whether appellants actually presented to the court the third question, the one upon which they now rely, although we have stated at the outset of this opinion that they did. We propose now to resolve that doubt. There is nothing in the record which lays a foundation for either of the two questions which we have first stated. There was not the slightest ground for the view that Ito was not competent as a witness under the provisions of section 1879 of the Code. There was nothing to indicate to the court that he was not in the full possession of his faculties. Likewise, there was nothing to show that he could not comprehend the nature of an oath, if it had been administered to him in his native tongue. His entire difficulty, plainly, was with the English language. Although three questions were intermingled in the discussion between the court and counsel for appellants, there is a fairly clear indication in the somewhat confused record that it finally appeared to all concerned that the only real point before the court was as to the necessity for an interpreter, the point embraced in the third question stated by us. The deputy district attorney evidently saw clearly that the calling of an interpreter would remove whatever difficulty was created by the peculiar answers to some of the questions put to Ito in English. It is true that the first objection of appellants' counsel was "to this witness testifying," but close upon the objection the deputy district attorney remarked: "We might need an interpreter in this case." Then, a little later, came this portion of the record:

"Q. Do you understand what I say to you all the time? A. Sometimes I can't understand very good English. Q. Would you like to have an interpreter? A. I have an interpreter next door to my place. He talks pretty good Eng-

lish. Q. I know, but would you like to have an interpreter here in court to-day? * * * A. Yes, I think interpreter is best. * * * "Mr. Murray: I think maybe * * * it would be better to have an interpreter. * * *"

Following this, and after the court's mention of section 1879, Mr. Conlin said:

"The first section the court read"—doubtless he meant the first sentence—"is the one I based my objection upon, those that apparently do not perceive and cannot make known their perception. * * * [T]he principal objection was that he did not perceive what was going on and could not make known his perception."

A few lines further on the court said:

"I am informed"—by what means does not appear—"that this witness got ahead in the preliminary examination without an interpreter, and so I am willing to make an effort to proceed."

Under all these circumstances we determine that appellants presented in sufficient form a demand for an interpreter and had an adverse ruling upon it.

[4] The question whether an interpreter shall be called for the purpose of rendering the testimony of a witness who does not understand the English language rests in the discretion of the trial court. *People v. Morine*, 138 Cal. 626, 72 P. 166. Was the discretion abused in the present instance? An answer to the question requires a further quotation from the record of Ito's testimony. We set forth his story of the commission of the crime with which appellants were charged, as it appears in his direct examination, omitting introductory matters and much testimony which bears but indirectly upon the main question. Ito was a restaurant keeper. He testified:

"Q. * * * [D]id you see either of these defendants on [the morning that the crime was committed]? A. Those two fellows I saw. One little short fellow has got a pistol.

"Q. Did you see the other defendant, too? * * * A. I know the short fellow.

"Q. Davis? A. He had the pistol.

"Q. How long have you known him? A. Oh, he came to my place last June or July, last year.

"Q. June or July last year? A. Yes; once in a while, not all the time.

"Q. How many times has he been in your place altogether since you have owned that place down there? A. Oh, about three or four times, I know.

"Q. You just knew him as a customer that came into your place three or four times? A. Three or four times; I can't say how many for sure, but I know three or four times.

"Q. The other defendant, Holtzclaw, did you ever see him before? A. I never saw him before.

"Q. The first time you ever saw him was on the morning of the 30th (the day the crime was committed)? A. Yes.

"Q. What time in the morning did you see them? A. A little after 4:30.

"Q. 4:30 a. m.? A. In the morning.

"Q. What time do you open up that restaurant down there? A. I open at 4:30.

"Q. How long had you been open when you saw these two defendants? A. I can't catch it quite.

"Q. How long had your restaurant been open when you saw these defendants? A. Just opened. * * *

"Q. Was it dark outside? A. Yes.

"Q. How many lights have you in your restaurant? A. Two in the front, two in the kitchen, and one in the room.

"Q. One where? A. Two on the lunch counter in the front, and two in the kitchen, but we haven't got no partition between the kitchen and the counter.

"Q. Are the kitchen and the counter all in one room? A. We have a serving table between the counter and kitchen. * * *

"Q. Just relate what occurred down there on the morning of the 30th when you saw these two defendants. A. The morning of the 30th—.

"Q. Talk slow and talk loud so the lady in the rear back here can understand you and hear you. A. March 30th, in the morning, 4:30, two fellows came in and ordered ham and eggs. At that time I was in the kitchen, and two fellows just came in, and I asked, 'What you going to have?'

"Q. Who did you ask that of? A. This fellow first.

"Q. Davis? A. Yes.

"Q. What did he say when you asked him what he was going to have? A. He said, 'Ham and eggs,' and the big fellow was on the second stool.

"Q. That is, Holtzclaw? A. On the other side (indicating). * * *

"Q. Was anybody else there present besides you and the two defendants? A. The two and me.

"Q. That is all? A. That is all in there. And the little fellow on this side.

"Q. Which fellow, Davis? A. Yes.

"Q. Call them by names. A. I don't know them by names.

"Q. The little fellow is named Davis, and the other fellow is named Holtzclaw. A. He asked me, 'I want a chance to wash hands,' and I go into the kitchen and he come behind me to wash his hands. We got water in the kitchen; we don't have any washstand in the front.

"Q. You have no place to wash hands in the front? A. No; in the kitchen.

"Q. Do you have a place in the kitchen where you can wash hands? A. Yes, and he came behind me, and the big fellow goes behind the counter. We got a register by the wall at the counter, and he pushed the register.

"Q. What did he do? A. He pushed the cash register.

"Q. Pushed in on the cash register? A. Yes.

"Q. Where were you at that time? A. I was by the stove in the kitchen.

"Q. Where was Davis? A. Davis was beside the stove.

"Q. How far from you? A. Two or three feet.

"Q. Then what happened? A. He pushed the register; I heard the bell ring, the noise.

"Q. You heard the bell ring? A. And I said, 'Here! Here! What you doing?' and Davis say, 'Keep quiet or I shoot you,' and put the pistol across me.

"Q. What did you see then? A. I said,

'What you doing?' He say, 'Keep quiet; keep quiet,' and he put the pistol on me and said, 'Lay down; lay down.'

"Q. Who said that? A. The little fellow, Davis, and 'Head down.'

"Q. 'Head down'? A. Yes.

"Q. What did you do? A. I cannot do much; I got no chance to do anything.

"Q. Did you lay down, or did you stand up? A. Yes, I just lay down like this.

"Q. Then what happened? A. They got out. We got no partition. I can see through to the register.

"Q. You can what? A. I could see clear through to the register at the front, and I saw him take out the money, and we have several cartons of Chesterfields and Camel cigarettes.

"Q. How much money did you have in the cash register, do you know? A. \$6.15.

"Q. All right. A. And he cleaned up the cigarettes and the money and he came in the kitchen.

"Q. Who came in? A. That big fellow.

"Q. What did he do? A. He came in the kitchen.

"Q. All right. Whereabouts were you on the floor with reference to the stove; were you close to the stove? A. Yes; I never moved.

"Q. You never moved? A. Because he has got a pistol; I can't move.

"Q. Then what? A. And the little fellow says, 'Come on.'

"Q. Who said that? A. The little fellow.

"Q. What did he say? A. He took me to the back room.

"Q. Did he still have the pistol in his hand? A. Yes.

"Q. Which way did he have it pointed, the pistol? A. The pistol in his right hand.

"Q. Which direction was he pointing it at? A. Mr. Davis.

"Q. Which way did he have the pistol pointed? A. Right on my nose.

"Q. What did he say? A. He said, 'Come on, get up,' and I sat up, and he asked the big fellow, 'How much money have you got?' The big fellow said, 'About \$5,' and the little fellow said, 'Oh, you got more than \$5. All Japanese have more money.'

"Q. Who did he say that to, you? A. Yes, to me he said, 'You got more than \$5,' and the little fellow said, 'You got more than \$5; all Japanese keep more than \$5 in their room. Where is your money?' And I say, 'I ain't got any,' and he looked in my pants, and I got a back pocket, a Mexican money half-dollar.

"Q. Half a dollar in Mexican money in your back pocket? A. Yes, sir; I had it for two months. And he said, 'Come on in the room.'

"Q. Which room was he referring to? A. In the back room. * * *

"Q. Where did you go? A. Go in the room and take up the mattress, take off the bedding and the mattress. I have got a little box under the bed that I put junk stuff in there.

"Q. Put what? A. Junk stuff.

"Q. Oh, junk stuff in the box. I see. A. And he turned the box over and the bedding.

"Q. What? A. Took off the bedding and say, 'Where is the money?'

"Q. Who said that? A. The little fellow.

"Q. Did he still have the gun in his hand? A. Yes. * * *

"Q. Where was your wife? A. My wife, when I said, 'Hey! Hey!' she heard it. * * *

I hollered when he pushed the cash register; I hollered, 'Here! Here! What are you doing?' * * *

"Q. Did you hear anything out in the living room when you yelled, 'Here! Here'? A. Yes.

"Q. What did you hear? A. I know my wife went out.

"Q. How do you know that? A. We got a spring door.

"Q. Did you hear that spring door? A. The screen door I heard.

"Q. When you went out there with those two fellows, was your wife in the living room? A. No; she had gone out the back.

"Q. She had already gone? A. She had already gone when we came into the room. * * * The little fellow * * * said, 'Where is your wife?' I said, 'My wife no stay here.' I said, 'My wife no stay here.' He said: 'Yes, she stay here. Maybe she went down to get a cop.' I said, 'No.' I said, 'No, she no sleep here.'

"Q. You told him, 'She no sleep here'? A. And he said, 'Oh, yes; maybe she go get a cop,' and they started to go out.

"Q. Who said that? A. The little fellow said, 'I don't want ham and eggs to-day.'

"Q. Said he didn't want ham and eggs? A. He said he didn't want ham and eggs, and I should stand there three minutes and not move, and they went out like this through the door.

"Q. With the pistol pointed at you? A. Yes; and as soon as he got out of the door, they go around to the east."

[5, 6] We recite this testimony for the purpose of showing that the prosecuting witness had such a comprehension of the English language that the trial court was justified in denying the request that an interpreter be called to aid in the rendition of his testimony. We have no doubt that the question as to his understanding of the language is to be solved upon an examination of his entire testimony, and not merely that part of it which had been developed when the request was made. There were some matters in the cross-examination of the witness which aid in a slight degree the contention now made by appellants, but they are unconvincing when placed beside the rather graphic story of the crime as related on the direct examination. Moreover, the discrepancies and inaccuracies shown in the cross-examination are largely explainable upon grounds other than the lack of understanding of the English language on Ito's part. The court did not abuse its discretion in refusing to call an interpreter.

[7] We have not scrupled to quote somewhat extensively from the direct examination of the prosecuting witness—apparently, indeed, a necessary course in meeting the point involved in the failure of the trial court to call an interpreter—for the added reason that it bears upon another point made by appellants. It is insisted "that the verdict was contrary to the law and the evidence," in that the testimony of the prosecuting witness, standing alone, as it did, upon the main features of the case, was so con-

fused and uncertain as to amount to nothing. We understand the contention to mean that, for the reasons stated, the evidence failed to support the verdict. This point falls to the ground upon a mere perusal of the portion of the direct examination of Ito which is above set forth.

Judgment and order affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

76 Cal. App. 114

PEOPLE v. McKEAN. (Cr. 1284.)

(District Court of Appeal, Second District, Division 2, California. Dec. 31, 1925.)

1. Criminal law $\S$ 1032(5)—Where information fails to charge and evidence to prove commission of any public offense, accused is entitled to reversal notwithstanding failure to file demurrer in court below.

Where information fails to charge and evidence to prove commission of any public offense, accused is entitled to reversal notwithstanding failure to file demurrer in court below.

2. Indictment and information $\S$ 154—Omission of essential element of offense in allegation or proof is not waived by failure to file demurrer, but may be raised at any time.

Absolute omission of essential element of offense in allegation or proof is defect of substance, and is not waived by failure to file demurrer, but may be raised at any time.

3. Abortion $\S$ 5—Information for offering services to assist accomplishment of miscarriage held defective in failing to charge services were offered by any notice, advertisement, or other like means; "or otherwise" (Pen. Code, $\S$ 317).

Under Pen. Code, $\S$ 317, making it a felony to offer services to assist accomplishment of miscarriage by any notice, advertisement, or otherwise, information failing to charge means by which alleged offer was made held defective; the words "or otherwise" as used in the statute meaning or other like means under application of ejusdem generis rule.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Otherwise.]

Craig, J., dissenting.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

Ralph L. McKean was convicted of offering services to the accomplishment of a miscarriage, and he appeals. Reversed.

C. W. Benshoof and Estudillo & Schwinn, all of Riverside, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. [1, 2] Defendant was charged with offering his services to assist in the accomplishment of a miscarriage. It was the theory of the prosecution that the

charge as laid stated all the essential elements of the offense denounced in the concluding clause of section 317 of the Penal Code. Whether the information does charge every essential ingredient of that offense is the principal question presented by this appeal. Defendant, who was found guilty as charged, appeals from the judgment of conviction and from an order denying his motion for a new trial.

Section 317 reads:

"Every person who willfully writes, composes or publishes any notice or advertisement of any medicine or means for producing or facilitating a miscarriage or abortion, or for the prevention of conception, or who offers his services *by any notice, advertisement, or otherwise*, to assist in the accomplishment of any such purpose, is guilty of a felony." (Italics ours.)

The charging part of the information is as follows:

"The said defendant on or about the 24th day of December, 1924, at the said county of Riverside, state of California, and before the filing of this information, did willfully, unlawfully and feloniously offer to Sanders Reynolds to produce and assist in the accomplishment of a miscarriage on Virginia Reynolds."

It will be noticed that the information is barren of any charge that appellant offered his services by any notice, advertisement, or other like means. The evidence also fails to show that defendant offered his services by any of those means. Giving to the evidence a construction most favorable to the prosecution, it discloses no more than a mere oral offer by defendant, made directly to Sanders Reynolds, the husband of Virginia Reynolds, whereby defendant proffered his services to produce a miscarriage of the wife.

Appellant contends, and, as we think, rightly contends, that the information does not state a public offense. The sufficiency of that pleading was not challenged in the court below by demurrer. Defendant, however, upon the conclusion of the people's evidence, moved the court to dismiss the case upon the ground that a public offense is not stated in the information. The motion was denied. If the information fails to charge, and if the evidence fails to prove, that defendant committed any public offense known to the laws of this state, then clearly appellant will be entitled to a reversal notwithstanding his failure to file a demurrer in the court below. Where there is an absolute omission of a fact which the statute makes an essential ingredient of the offense, the defect is one of substance and not merely one of form. In such case the defect is not merely the failure to allege a necessary fact with sufficient certainty; it is a failure to charge any public offense whatever. So radical a defect it not waived by neglecting to file a demurrer, but may be raised at any time. *People v. Smith*, 103 Cal. 563, 37 P. 516.

"* * * Neither the neglect to demur or move in arrest of judgment can be deemed a waiver of an objection based upon the ground that the indictment or information does not state a public offense. Such an objection might be raised at any point in the progress of a case, or upon appeal." 8 Cal. Jur. p. 500.

[3] Whether the information does omit the allegation of a fact necessary to constitute the offense defined in the concluding portion of section 317 depends upon the meaning to be ascribed to the words "or otherwise," in the provision that "every person who willfully * * * offers his services by any notice, advertisement, or otherwise, to assist in the accomplishment of any such purpose [i. e., in the production or facilitation of a miscarriage or abortion,] is guilty of a felony."

The section as a whole seems to be aimed against advertisements, i. e., advertisements of certain means for producing miscarriages, or abortions or for preventing conception. Thus the first part of the section declares that "Every person who willfully writes, composes, or publishes any notice or advertisement of any medicine or means for producing or facilitating a miscarriage or abortion, or for the prevention of conception, * * * is guilty of a felony." This part of the section speaks of "medicine" or "means" for producing or facilitating miscarriages or abortions or preventing conception. Just what is here meant by the word "means" is not clear. It is possible that it may include surgical instruments. This first part of the section is directed against the writing, composition, or publication of such notices or advertisements as are designed to bring home to the public a knowledge of certain "medicines" or "means," i. e., a knowledge of such agencies as may be used at any place and by any person—by the woman herself, for instance—to bring about an abortion or a miscarriage or to prevent conception. The concluding part of the section, that under which it was sought to charge appellant, deals, not with medicines, drugs, instruments, etc., but with "services," i. e., an agency which necessarily must be exercised upon the body of the woman by another viz., by the person offering his services. This part of the section makes it a crime for one to offer "his services" to assist in the accomplishment of any miscarriage or abortion. But a mere offer of services is not enough. More than that is required to bring the offerer within the terms of the offense denounced by the statute. He must offer his services by "notice, advertisement, or otherwise." Here, then, we have three classes of means for bringing to others a knowledge of the offer of services, one at least of which must be resorted to by the person offering his services in order to constitute the crime denounced by that part of section 317 under which it was sought to charge appellant. These are: (1) An advertisement; (2) a no-

tice; (3) other means. We say "other means," for the word "otherwise" signifies "other means."

The word "advertisement" has been defined as "a notice published in handbills or a newspaper." 2 C. J. 294. The word also includes notice by posting or display on signboards. *Id.* In *Carter v. State*, 81 Ark. 37, 98 S. W. 704, the court says:

"The many uses of the term 'advertise,' in its various forms, may be found in the Century Dictionary, from which this definition, the one most nearly reaching to the facts here, is taken: 'The act or practice of bringing anything, as one's wants or one's business, into public notice, as by paid announcement in periodicals, or by handbills, placards, etc., as to secure customers by advertising.'"

The idea underlying the word "advertisement" has reference not so much to the vehicle or instrumentality used for getting the notice before the public, as to the diffusion, or bringing home to the public, of the information or matter contained in the notice. *Cincinnati v. Fenner*, 11 Ohio S. & C. P. Dec. 281, 287.

The word "notice," in its broadest significance, doubtless includes any means whereby intelligence of knowledge is communicated. But according to the rule of interpretation "*nosctur a sociis*," the word should be construed in connection with its associated word "advertisement," thus giving to each a kindred meaning. This conclusion is further strengthened by the consideration that the first part of the section refers to such "notice or advertisement" as may be written, composed, or published—i. e., the first part of the section refers to written, printed, or pictorial matter only. The word "notice," as used in both clauses of section 317, doubtless was intended to include such notices as are sent through the mail; also circulars left upon doorsteps, etc.

We think that the term "or otherwise," in the provision, "Every person who willfully * * * offers his services by any notice, advertisement, or otherwise, * * * is guilty of a felony," should be construed as signifying other like means, i. e., means which are of the same general nature or class as advertisements, or which are of the same general nature or class as those notices which are akin to advertisements. This construction is warranted by the rule "*ejusdem generis*," which is stated in Cyc. as follows:

"By the rule of construction known as '*ejusdem generis*,' where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The particular words are presumed to describe certain species, and the general words to be used for the purpose of including other species of the same genus. The rule is based on the obvious reason that if the Legislature had intended the general words to be used in

their unrestricted sense they would have made no mention of the particular classes. The words 'other' or 'any other,' following an enumeration of particular classes, are therefore to be read as 'other such like,' and to include only others of like kind or character." 36 Cyc. pp. 1119, 1120.

See, also, *Pasadena University v. Los Angeles County*, 190 Cal. 790, 214 P. 868. In *Galveston County v. Gorham*, 49 Tex. 290, the Supreme Court of Texas, construing a statute of that state, says:

"The word otherwise, in that part of the sentence, 'by sample card, or otherwise,' should be understood, as doubtless intended, to mean 'by other like means.'"

In *Ex parte Williams*, 7 Cal. Unrep. 301, 87 P. 565, the District Court of Appeal for the Third Appellate District of this state had before it a habeas corpus proceeding, the petitioner wherein had been charged with carrying on a certain banking game, played by means of a slot machine, "for * * * representatives of value, to wit, cigars and tobacco," in alleged violation of section 330 of the Penal Code. That section makes it an offense to carry on any banking game, played with cards, dice, or any device, "for money, checks, credit, or other representative of value." In holding that cigars and tobacco are not "other representatives of value" within the meaning of the statute, Mr. Justice Buckles said:

"If the Legislature was intending to prohibit all gambling with banking devices or by banking games played with cards, dice, or any device, it seems to us there would have been no limitation as now to money, checks, or credits, but the statement would have been for anything of value or that represents value. * * * The rule seems to be well established in the interpretation of statutes and clauses like the one under consideration that where general words follow particular ones, the former are construed as applicable to persons or things of the same kind, class or nature."

In *Rhone v. Loomis*, 74 Minn. 200, 77 N. W. 31, the court had under consideration a statute which made it an offense to exclude any person, on account of his race, color, or previous condition of servitude, from "restaurants, barber shops, eating houses, or other places of public * * * refreshment." In holding that saloons, or places where intoxicating liquors are sold as beverages, are not "places of public refreshment" within the meaning of the act, the Minnesota Supreme Court says:

"We concede that the word 'refreshment' may include intoxicating liquors, and that the words 'places of refreshment' may be used in such a connection as to include a place where such liquors are sold as a beverage. But here is a case where the Legislature has specifically enumerated, in a somewhat descending order according to rank or importance, every kind of place of refreshment which was presently in mind to which they intended the act to apply,

but have omitted, apparently purposely, to enumerate places where intoxicating liquors are sold as a beverage. * * * We are of opinion that upon these facts is not permissible, under any proper application of the doctrine of ejusdem generis, or what is commonly called 'Lord Tenterden's rule,' to extend the meaning of the general words, 'or other public place of refreshment,' so as to include places where intoxicating drinks are sold. This rule, generally stated, is that where a statute or document specifically enumerates several classes of persons or things, and immediately following, and classed with such enumeration, the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like,' so that persons or things therein comprised may be read as ejusdem generis 'with,' and not of a quality superior to, or different from, those specifically enumerated. (Citing authorities.) The reason of this rule is that 'if the Legislature had meant the general words to apply, without restriction, it would have used only one compendious word.'

In *State v. Dennison*, 60 Neb. 157, 82 N. W. 383, the statute provided: "If any person * * * shall open, or establish, as owner, or otherwise, any lottery, or scheme of chance, in this state," etc. In construing the term "or otherwise," following the word "owner," it was held that it should be restricted to the meaning of "owner," or some one in similar or like capacity.

The rule ejusdem generis is particularly applicable to penal statutes. In *Matter of La Societe Francaise*, 123 Cal. 531, 56 P. 460, our Supreme Court says that "there is little, if any, controversy as to the maxim in its application to penal statutes." The Supreme Court of Missouri, speaking of the application of the doctrine in criminal cases, says that "as applied to penal statutes especially, it is only a humane doctrine, and accentuates the wisdom of the fathers when they objected to being punished for offenses which had not been declared to be offenses by the law." *Ex parte Neet*, 157 Mo. 527, 57 S. W. 1025, 80 Am. St. Rep. 639. See, also, *Ex parte Roquemore*, 60 Tex. Cr. R. 282, 131 S. W. 1101, 32 L. R. A. (N. S.) 1186, where the court quotes from *Ex parte Muckenfuss*, 52 Tex. Cr. R. 467, 107 S. W. 1131, as follows:

"It has been held also, that this rule [ejusdem generis] is especially applicable in the interpretation of statutes defining crimes and regulating their punishment."

In this state the rule is given express statutory recognition, it being declared in section 3534 of the Civil Code that, "Particular expressions qualify those which are general."

It is true that the maxim, "ejusdem generis" is only a rule of construction, to be applied as an aid "in ascertaining the legislative intent," and that it does not control where it clearly appears from the statute as a whole that no such limitation was intended. But we venture to assert that no authority can

be found where the general words "or otherwise," when following particular and specific words, have been construed as having their unrestricted sense where such a construction would cause the preceding particular words as well as the general words to become meaningless surplusage. And yet that is precisely the result which must inevitably follow if the words, "or otherwise," as used in section 317, be given their full, unrestricted meaning. That is to say, if the words "or otherwise" be not construed as meaning "other such like means," then the whole phrase "by any notice, advertisement, or otherwise" becomes mere barren verbiage, sterile of effect. This is so for the reason that every offer of one's services necessarily implies the giving of notice of some sort to the person to whom the offer is made. To "'offer' to do a thing," says the court in *Morrison v. Springer*, 15 Iowa, 346, "is to bring to or before—to present for acceptance or rejection—to exhibit something that may be taken or received or not." See, also, *People v. Ah Fook*, 62 Cal. 494. Since the words "or otherwise," if used in their unrestricted sense, would embrace that notice of one's offer of his services which necessarily is included in the mere making of the offer, it seems clear that had it been the intention of the Legislature to employ those general words without restriction it would have said no more than that it shall be an offense for one to offer his services to produce a miscarriage or an abortion, omitting entirely the provision to the effect that such offer, to be criminal, must be made by "notice, advertisement, or otherwise." Unless, therefore, the general term "or otherwise" be construed as ejusdem generis with the preceding particular and specific words, then the whole phrase "by any notice, advertisement, or otherwise" may as well be stricken from the statute as an impotent inutility.

While we are satisfied that the term "or otherwise," as used in this code section, is equivalent to the term "or other such like means," we do not find it necessary to decide, and we expressly refrain from deciding, the precise content of the words "or otherwise," i. e., the precise kind of notice which would satisfy their requirement. Suffice it to say that, for the reasons above stated, these words must be held to mean that the offer of services must be made through or by means of notice of some kind other than such as necessarily is involved in the mere act of making the offer. But here the information makes no attempt to charge that the offer of appellant's services was made by means of any notice of any kind whatsoever, save only such as necessarily is implied in the mere act of offering one's services.

The judgment and the order denying a new trial are reversed.

I concur: WORKS, J.

CRAIG, J. I dissent. No rule is better established as an aid to statutory interpretation and construction than that known as *ejusdem generis*. On the other hand, its limitations and exceptions are equally well recognized. To my mind, the instant case as charged and proved is unquestionably within the inhibition of section 317 of the Penal Code. The defendant personally and verbally solicited the opportunity to produce a miscarriage, and this the statute makes a criminal offense by the use of the words "or otherwise," following the provision "who offers his services by any notice, advertisement."

A number of considerations, singly and each one supporting and corroborating the others, compel this conclusion. Because it is necessary for me to dissent from the opinion of my associates, I shall set forth these reasons at greater length than would otherwise be expedient. It will be observed that the sole reason for ruling that the defendant herein should not be held guilty is the asserted application of the *ejusdem generis* rule to the words "or otherwise," as used in this section of the Penal Code. Before accepting as final and as entitled to unquestioned obedience the authority of this rule, let us measure the scope of its application.

In the first place, it has no standing as against a positive provision of legislative enactment. Its only office is to aid the courts in determining the intent of the Legislature, as expressed in any law which may be the subject of examination. *Lewis' Sutherland*, Stat. Constr. § 437; *Willis v. Mabon*, 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 626. If the meaning of the statute is clear, this rule has no right to receive the slightest consideration; but even when the statute is uncertain, other and more trustworthy aids are first applied, and will prevail when found to be in conflict with the rule *ejusdem generis*. *State v. Woodman*, 26 Mont. 348, 67 P. 1118.

I will now enumerate some considerations which constrain me to dissent, and then discuss each in some detail: (1) The language of the enactment, read in its ordinary sense, is so clear as to leave no room for construction. (2) When the purpose of the statute is considered its object would be only half achieved if a close and restricted construction be placed upon its language; but courts have no right to permit a blind devotion to the maxim *ejusdem generis* to interfere with the full accomplishment of the manifest purpose of the Legislature. (3) If the particular words exhaust the genus, there is nothing *ejusdem generis* left, and in such case we must give the general words a meaning outside of the class indicated by the particular words, or we must say that they are meaningless. In that case the rule would defeat its own purpose, and it will not be applied. (4) Courts will always refuse to limit or impede the operation and enforcement of stat-

utes obviously intended to carry out public policy by the use of this rule, which is one of strict construction, but will recognize and remedy a known evil. (5) Where no reason exists for not giving effect to the general provision, and it is equally adapted to carry out the purpose of the law as is the special enumeration, the general term will not be discarded, but will be fully accepted and applied. (6) Not every enumeration of persons or things, followed by a more general term, constitutes a proper case for the application of this maxim. Where the preceding enumeration is not of individual things, the rule cannot be used. (7) Even if the rule *ejusdem generis* be applied, section 317 of the Penal Code would still penalize the defendant's offer to commit an abortion.

1. Of course, the entire object in interpreting any law is to discover the meaning intended to be conveyed and promulgated by the Legislature. No rule of statutory interpretation is controlling except in so far as it accomplishes this purpose. The intent of the statute is the law. Therefore, we should first analyze the section to determine whether or not its intent is clearly expressed. It may be that there is little or no occasion to take into consideration the rule *ejusdem generis*, or any other rule for the interpretation of ambiguous statutes. A mere reading of the provision is sufficient to satisfy me that its object is to prevent the destruction of gestation against nature, as well as to make illegal the prevention of conception. This purpose it attempts to accomplish in conjunction with section 274 of the same Code.

It is noteworthy that in the first part of section 317 the prohibition extends only as against notices and advertisements, whereas in the latter part, here under consideration, the words "or otherwise" are added, which comparison makes more emphatic the fact that the words "or otherwise" were deliberately placed there and intended to refer to offers of services distinct from and in addition to those conveyed by notices or advertisements.

There is no better recognized rule than that words are usually to be taken and interpreted in their ordinary meaning. Civ. Code, §§ 1324, 1644. The words "or otherwise" commonly mean "or in any other way." "Otherwise" is defined by the *Standard Dictionary* as meaning "in a different manner, in another way, differently, in other respects"; by Webster, "in a different manner, in other respects"; by the *Century Dictionary*, "In a different manner or way, differently, in other respects." These definitions are quoted with approval in *Thompson v. City of Highland Park*, 187 Ill. 265, 58 N. E. 328, and in other cases. If we accept these authorities, the statute is clear, and there is no ambiguity; it not only penalizes the act of any person who uses notices or advertisements in doing that which the statute inhib-

its, but makes it an offense to do the same thing "differently," "in any other way," and through the use of "any other means." In order to reject this construction we must resort to a rule of strict construction, and raise an issue where none before existed. Without reference to that rule, the statute is not even ambiguous. Under such circumstances, there is no warrant for giving it any consideration or weight. The mere fact that a general term is used after an enumeration of particulars does not necessarily even create an ambiguity so as to require construction.

In this case the Legislature has itself precluded the courts from applying the rule *ejusdem generis*, because it has eliminated the reason advanced for its application in proper cases, to wit, that it will not be presumed that the Legislature intended to make the special words previously employed meaningless by the use of a broader term comprehending such narrower words. It has eliminated this argument from consideration by employing the word "advertisement" after the word "notice," thus rendering "notice" unnecessary, because it is included in the word "advertisement." This it has done in the identical enumeration in which the words "or otherwise" are used. In the face of this demonstration of legislative intent the claim that the Legislature will not be presumed to have intended to render the special term meaningless by the use of a broader term is made entirely impossible. No presumption can stand against direct and positive evidence. Without doubt the purpose of the Legislature in enacting this statute was to prevent the production of miscarriages and abortion; to this end it penalized the making of offers to assist in the commission of such wrongful acts. It seems quite apparent that in drafting this provision the means ordinarily used by persons who make a business of such practices was first in the legislative mind, and so the employment of notices and advertisements as a means of making the objectionable offers was prohibited. The narrower of these terms is first employed. A notice is a form of advertising; it is defined to be information, by whatever means communicated. *U. S. v. Foote*, 25 Fed. Cas. 1140, No. 15,128. To advertise is "to notify," to "inform," to "give intelligence to" (*Ency. Dict.*); before writing was developed, advertising was exclusively by criers and signboards (*Ency. Amer. vol. 1*); advertising may be by oral proclamation (*Cincinnati v. Fenner*, 11 Ohio S. & C. P. Dec. 281, 8 Ohio N. P. 342); advertising has been called the medium or vehicle of persuasion. While advertising was originally by publication, the complete content of the word now involves exploitation, and thus while a notice involves nothing more than the giving of information, an advertisement conveys such information in a manner or by means to the end of persuading to do something, usually to buy.

Cal. Rep. 240-243 P.—58

Having broadened the scope of the inhibition from notices to advertisements, the draughtsman of the law, apparently to make certain that no means of making obnoxious offers might be devised by which a culprit might escape through technical judicial construction, sought a still broader term, and employed the words "or otherwise."

At this point attention is again called to the fact that the basis for the rule *ejusdem generis* is as above stated. It is said in *Rhone v. Loomis*, 74 Minn. 200, 77 N. W. 31, that the enumeration of the inhibited means, ascending progressively and widening in its scope, is proof conclusive of the legislative intent that the last term be allowed its broad and comprehensive meaning. In the statute there under consideration the converse was true. In that case the fact that "the Legislature has specifically enumerated, in a somewhat descending order according to rank or importance, every kind of place of refreshment which was presently in mind to which they intended the act to apply," was given great and perhaps deciding weight in producing the decision that in that instance the rule *ejusdem generis* should be applied.

Again, by the same process of reasoning as that adopted in *Matter of La Societe Francaise*, etc., 123 Cal. 525, 56 P. 458, 787, we may say that there appears no reason why the Legislature should prohibit the solicitation of employment to produce miscarriages or abortions when that solicitation is done through notices or advertisements, but would allow such solicitation by means of personal offers. The mere statement of the proposition is sufficient to convince that the vice of the latter form of offers to engage in such evil practices is both as vicious and as dangerous to the public welfare as the former.

2. In *State v. Woodman*, 26 Mont. 348, 67 P. 1118, the Supreme Court of Montana held, in construing a statute which prohibited games of chance, etc., "for money, checks, credits, or any representative of value, or for any property or thing whatever," that the rule *ejusdem generis* had no application; and that cigars were included under the term "or for any property or thing whatever." Referring to the rule, the court said:

"It is, however, but a rule of construction to be used as an aid in ascertaining the legislative intent, and not for the purpose of controlling the intention of a statute or of confining its operation to narrower limits than the Legislature intended. *Id.* sec. 279. It must be used in connection with other rules of equal importance, such as that the meaning of a statute is to be gathered from the language employed in it, and that every word of it must be taken in its ordinary signification, unless it was clearly the intention of the Legislature, as gathered from the context, to restrict its meaning."

Another case in which the rule was held inapplicable, because to hold otherwise would fail to carry out the purpose of the statute,

is *American Ice Co. v. Fitzhugh*, 128 Md. 382, 97 A. 999, Ann. Cas. 1917D, 33, in which it was held that horse power was within the term "or other power," under a statute in which the enumeration was of "cars, trucks, wagons or other vehicles, and rollers and engines, propelled by steam, gas, gasoline, electric, mechanical, or other power."

In *State v. Broderick*, 7 Mo. App. 19, the words construed were, "If any carrier or other bailee shall embezzle," etc. It was held that the words "or other bailee" were not to be interpreted according to the *ejusdem generis* rule; that "it is by no means a rule of universal application, and its use is to carry out, not to defeat, the legislative intent."

An act for securing estates given to charitable uses specified that "all lands, tenements, hereditaments and other estates, * * * shall be free from the payment of rates." It was held that money at interest was included in the term "other estates," and that the rule here contended for had no application. *Atwater v. Inhabitants of Woodbridge*, 6 Conn. 223, 16 Am. Dec. 46.

Among other cases holding to the same general effect are: *McReynolds v. People*, 230 Ill. 623, 82 N. E. 945; *Morton v. Skinner*, 48 Ind. 123; *Brown's Case*, 112 Mass. 409, 17 Am. Rep. 114; *Pein v. Miznerr*, 41 Ind. App. 255, 83 N. E. 784. It will serve no good purpose to cite further authority on this point, although numerous decisions are to be found in the reports of nearly all the states upholding the proposition that the rule *ejusdem generis* will be disregarded where to give it effect would be to interfere with the carrying out of the object intended to be attained by the Legislature in enacting the statute in question.

3. If notices and advertisements be construed as belonging only to the class of publication consisting of fixed representations to the eye, they completely exhaust the genus. Offers by way of notices and advertisements cover substantially every kind and form of an offer that can be made by printing, writing, billboards, electric signs, etc.; hence, we must either give the general term "or otherwise" a meaning outside of this class, or discard it as surplusage. In such cases the maxim *ejusdem generis* must yield to the more important one, that every part of a statute, and every word in it, must be upheld and given an appropriate effect. *Misch v. Russell*, 136 Ill. 22, 26 N. E. 523, 12 L. R. A. 125; *Nat. Bank of Commerce v. Ripley*, 161 Mo. 126, 61 S. W. 587; *Wills v. Mabon*, 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 626.

In *American Ice Co. v. Fitzhugh*, 128 Md. 382, 97 A. 999, Ann. Cas. 1917D, 33, heretofore mentioned, the Maryland court said:

"Following the doctrine of *noscitur a sociis* and the rule *ejusdem generis*, the appellant argues that the words of the statute 'or other

power' in sub-section forty-one should be read as 'other such like,' and as including other power of the kind and character of the several kinds enumerated. The doctrine relied upon is, however, only applied as an aid in ascertaining the legislative intent and is not controlling where it appears that no such limitation was intended. It is said in 36 Cyc. 1121-22: 'Nor does the doctrine apply where the specific words of a statute signify subjects greatly different from one another, nor where the specific words embrace all objects of their class, so that the general words must bear a different meaning from the specific words or be meaningless.' In the case of *National Bank of Commerce v. Ripley*, 161 Mo. 126, 61 S. W. 587, the Supreme Court said: 'It is a rule of construction that a statute should be construed so as to give effect to all its words, if it can be done. * * * It is a corollary to the first proposition above stated, that the statute must be construed to give effect to all its words. The rule itself must not be so construed as to defeat that purpose. Whilst it is aimed to preserve a meaning for the particular words, it is not intended to render meaningless the general words. Therefore, where the particular words exhaust the class, the general words must be construed as embracing something outside of that class. If the particular words exhaust the genus there is nothing *ejusdem generis* left, and in such case we must give the general words a meaning outside of the class indicated by the particular words or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose.' Applying the well-recognized exception to the doctrine relied on to the provisions of the act in question the kinds of power specifically mentioned in subsection forty-one of section 32 of said act would seem to embrace all kinds of power other than animal power, and if we are to give the words 'or other power' any meaning at all there is no reason why they should not include horse power or mule power." (The opinion is reinforced by numerous citations of, and quotations from, other authorities.)

To the same effect is *State v. Grosvenor*, 149 Tenn. 158, 258 S. W. 140.

4. The following cases uphold the principle that statutes intended to carry out public policy and to remedy known evils are not to be nullified or limited by this rule: *Riggs v. State*, 7 Lea (75 Tenn.) 475; *Kentucky v. Dennison*, 24 How. 66, 16 L. Ed. 717; *Rawson v. State*, 19 Conn. 292; *Black on Stat. Inter. p. 215*.

5. Where the general provision is equally adapted to carry out the purpose of the law with the special enumeration and no apparent reason exists for not giving effect to the general provision, it will be fully applied. *Matter of La Societe Francaise, etc.*, 123 Cal. 525, 56 P. 458, 787. This was a proceeding to change the name of *La Societe Francaise* to "French Savings Bank," under a provision permitting such change of name by "any religious, benevolent, literary, scientific, or other corporation." The court held that the general expression "or other corporation"

was not limited to include other corporations ejusdem generis with those specifically enumerated. The only reason for not applying the rule to this case is contained in the closing paragraph of the opinion, as follows:

"But in this case the necessity or desirability of a change of name is as likely to occur in the case of a private corporation organized for profit as any other, and there is no reason suggested why a change of name should not be permitted to such corporations as well as to those specifically named."

And so we have here a forcible illustration of the fact that in many of the cases where this maxim has been involved it is recognized that where the purpose of the statute is clear courts will be largely guided in construing a questioned provision by consideration of whether there is any reason why it should not be applied to the case before the court, as well as to instances specially enumerated in the statute. If no such reason exists, and the purpose of the statute is clear, cases coming within the general term of the law have usually been held to be within its provisions, although not ejusdem generis with the things or persons particularly named.

6. Where the preceding enumeration is not of individual things, the rule has no application. For the sake of argument only it has been assumed that the enumeration under discussion is one to which the rule might be applied, but notices and advertisements are generic and not special terms. The forms in which notices and advertisements may exist are almost limitless in number. Any kind of notification to another is notice; any means of exploitation through the conveyance of information is advertising. One case will be sufficient to illustrate the force and application of the proposition above stated, and to show that for this reason alone the rule ejusdem generis cannot be applied to the instant case. In *Higler v. People*, 44 Mich. 299, 6 N. W. 664, 38 Am. Rep. 267, it was held in construing a statute relating to cheating by means of "any false token or writing, or by any other false pretense," that the terms "false token" and "false writing" are generic, and not specific. Even more clearly, the words "notice" and "advertisement" are not special, but general.

7. One of the most common means of advertising is by broadcasting over the radio. Another is by lectures, running the entire range from those delivered by the erudite author and traveler who educates the wondering listeners in frigid climes concerning the beauties and the balmy climatic perfection of a certain land by the Sunset Sea, to the soapbox variety who upholds to a waiting world the hidden power of some magic lotion which he declares, if given the opportunity, will grow hair on even a marble dome. In this day, when the word "advertise" is perhaps as well known as any in the English language, and when the maxim, "It pays to

advertise," is accepted everywhere and almost universally applied, and it is equally well known that the more complete the concealment of its identity as an advertisement, the more perfect the skill of the advertiser—who will say that the verbal announcement of one's ability, equipment or experience in any occupation or project is not to be classed with advertising? Does not a woman who goes from house to house explaining to housewives the advantage of some new device for cleaning the kitchen sink advertise? Does not one who stands in the doorway, or on a busy street corner, and exhibits his wares, telling all who listen just why each article is the most perfect of its kind ever offered to the public, advertise? What more effective means of advertising could be devised than that of going from one to another, proclaiming one's skill, and offering to demonstrate it forthwith? This is exactly what witnesses said this defendant did; and so, even if the rule ejusdem generis, or the broader maxim, *noscitur a sociis*, be held applicable, the result is the same as though the services of these maxims in assisting in the construction of this statute be rejected as entirely unnecessary. The means employed by the defendant in offering to perform an abortion is of the same class as a notice or an advertisement. This must be true, since the only claim that a distinction exists between the form of the offer made by the defendant and an advertisement is that the former was verbal in character, and it is contended that the latter consists of printing or similar representation to the eye. But, as we have seen, advertising may be done orally. So, although the solicitation of the defendant be not regarded or classed as advertising, it was undoubtedly ejusdem generis with advertising.

The foregoing are the principal reasons why the term "or otherwise" used in section 317 of the Penal Code should be construed to include all other means of offering to assist in the performance of miscarriages and abortions than by notices and advertisements.

It has been said that the rule ejusdem generis has no special application to penal statutes. This may have been true under the common law, and may still be a correct statement in those states where the principle of that law still prevails which requires all statutes to be strictly construed in the interests of the defendant. But wherever, as is the case in California, that provision of the law has been expressly canceled, the same rules of construction govern in penal as in civil cases, and we must accept as controlling in this matter section 4 of the Penal Code, which provides that all of the provisions of the Penal Code are to be construed according to the fair import of its terms, with a view to effect its objects and to promote justice, and that the rule of the common law above referred to has no application.

Aside from this the cases are plentiful where courts have disregarded the maxim *ejusdem generis* in criminal cases, and have given the broader final term of an enumeration its full meaning. The following, in addition to others elsewhere herein cited, are a few such cases: *State v. Grosvenor*, 149 Tenn. 158, 258 S. W. 140; *State v. Broderick*, 7 Mo. App. 19; *Higler v. People*, 44 Mich. 299, 6 N. W. 664, 38 Am. Rep. 267; *Wonner v. Carterville*, 142 Mo. App. 120, 125 S. W. 861; *McReynolds v. People*, 230 Ill. 623, 82 N. E. 945; *Queen v. Edmundson*, 2 El. & El. 77, 121 Eng. Rep. (Repr.) 30; *State v. Woodman*, 26 Mont. 348, 67 P. 1118; *State v. Williams*, 2 Strob. (S. C.) 474; *Rawson v. State*, 19 Conn. 291.

It is said that no cases are to be found where the words "or otherwise" following an enumeration of special terms have not been so limited by the rule *ejusdem generis* as to prevent the preceding particular words from being rendered surplusage.

A few instances of this character will be mentioned. It is not often that such direct authority is to be found, as exists upon the construction of this term. In *State v. West*, 106 La. 274, 30 So. 848, the statute provided that:

"Whoever shall be found guilty of attempting to rob, from the person of another, money or other property by cutting or tearing the clothes, thrusting the hand into the pockets, or otherwise, though he do not succeed in such attempted robbery, shall, on conviction," be punished, etc.

It was held that the scope of the provision was enlarged by the use of the words "or otherwise," and that:

"The intent of the word 'otherwise' as used evidently was to include all similar acts to those denounced, resorted to in the attempt to 'rob.' The statute includes attempts other than those expressly mentioned by the use of the word, by expressly providing that attempts in a different manner and in another way than in that specifically denounced, shall be subject to punishment."

In *Rawson v. State*, 19 Conn. 292, the Supreme Court of Connecticut had before it a provision of a statute regulating the sale of wines and spirituous liquors, an excerpt from which reads:

"If any person or persons, except taverners, by agent or otherwise, shall keep any house," etc.

In the opinion it is said:

"No man can read this statute without learning from its entire perusal, that the controlling purpose of the Legislature was, to suppress tippling houses, under whatever pretense or name established; and thus to prevent the facilities to intemperate and ruinous dram drinking. To reject the word otherwise, from the law, and thus to legalize the evil which it was the object of the statute to prevent, if perpetrated in person, and not by agent, would be not only absurd, but it would involve a judicial

repeal of an important part of the law itself. This word was not incautiously introduced into the statute; it was necessary to give full expression of the intent to the Legislature."

In *Fontenot v. Fontenot*, 157 La. 511, 102 So. 590, was involved an antenuptial contract which the court was required to construe in the settlement of community interests among the heirs of the contracting parties. It was provided in the contract, among other things:

"The parties to this act mutually agree that the property hereinbefore described and appraised shall be excluded from the community that shall exist between them as well as all property that shall be received by either of them hereafter, either by succession, donation or otherwise. Also the appearers declared that they nor their property shall not (sic) be in any way responsible for the debts due by either prior to their intended union. That the acquêts or gains shall be disposed of at the dissolution of their union as provided for in the Civil Code of Louisiana."

It was said of this provision:

"The meaning intended to be conveyed by the word 'otherwise,' in the foregoing quotation, was that property which should be acquired by either spouse with his or her separate funds, or in any other manner, under such circumstances, as would make the property acquired separate, under the law, should be deemed the separate property of the spouse acquiring it, as would property received by 'succession' or 'donation,' which words precede 'otherwise.'"

Attention need merely be called to the fact that by this construction the word "otherwise" was given a meaning of such scope as to render the words "succession" and "donation" unnecessary and surplusage.

Again, we have the case of *Nagle v. Brown*, 37 Ohio St. 7, which involved a statute providing that "the obstructing or incumbering by fences, buildings, structures or otherwise, any of the public highways, or streets, or alleys of any city or village shall be deemed nuisances," and any person injured thereby was afforded the right to collect damages. Nagle felled a large tree across the highway, which he permitted to remain for some time, and as a consequence Brown and wife were injured when driving. Suit was instituted under the statute mentioned, and it was said on appeal:

"The obstruction of the highway mentioned in the original petition was clearly a nuisance within the meaning of this act, and the only question made is, was the plaintiff in error 'guilty of the same.'"

Here, also, by giving the words "or otherwise" a liberal construction, the statute would have the same scope had the preceding particular words been omitted.

Robbertson v. State, 3 Tex. App. 502, held that a penal statute making it an offense to remove out of the state any personal property on which a person had given any written

lien, or to sell such property, or to "otherwise dispose" thereof, with intent to defraud, included "any other method of placing the property beyond the reach of the holder of the lien with such intent. The preceding enumeration is here, again included in the terms "otherwise dispose."

Cramer v. United States (C. C. A.) 276 F. 78, is another case where the term "or otherwise" was construed in line with the foregoing decisions, and it was said that mere occupancy by the Indians of alternate sections of land was a disposition thereof under a statute providing that "when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands designated as aforesaid, shall be selected * * * in lieu thereof, under the direction of the Secretary of the Interior."

In Whelen's Appeal, 70 Pa. 429, a statutory phrase "money, stocks or otherwise," was held to have been enlarged in scope by these words so as to include everything of value, whether real estate, evidence of debt, or any kind of personal property. The things previously enumerated therefore became unnecessary, and surplusage.

A New Mexico statute provided that it was the duty of the governor to fill a vacancy occurring by reason of death, resignation, "or otherwise," and that the appointee "shall hold the office until his successor is elected and qualifies." It was held that the words "or otherwise" should not be construed ejusdem generis, but rather as extending the scope of the statute to include vacancies other than such as were created by death or resignation. Territory ex rel. Curran v. Gutierrez, 12 N. M. 254, 78 P. 139. It is apparent that the result of this construction of the words "or otherwise" is to render the particular words preceding them unnecessary.

Two California cases, construing the same section relating to public lands, are to the same effect. These are Hambleton v. Duhain, 71 Cal. 136, 11 P. 865, and Daniels v. Gualala Mill Co., 77 Cal. 300, 19 P. 519. The statute considered in these cases provided that "where indemnity school selections have been made and certified to the state, and said selections shall fail by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed. * * *" It was held that the term "or are otherwise defective" should be given an unrestricted interpretation, so that it would include "any and all defects" in indemnity school selections which might have been made and certified to the state; hence it embraced a failure "by reason of the land * * * not being included within such final survey of a Mexican

grant." Consequently the latter term becomes surplusage.

The foregoing precedents in which the exact term required to be construed in the instant case has been interpreted in the ordinary sense of the words which compose it, and allowed such meaning unrestricted by the maxim ejusdem generis, seem to be decisive without regard to any other considerations. It will be noted that the majority of them are cases in which a penal statute was construed.

Appellant has urged a number of other reasons as grounds for reversal, but it is not necessary to refer to them otherwise than to say that to my mind they are not well taken.

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